



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC JR NO. 38 OF 2020**

**(FORMERLY HIGH COURT JUDICIAL REVIEW NO. R1142 OF 2020)**

**IN THE MATTER OF AN APPLCIATION FOR JUDICIAL REVIEW ORDERS OF  
MANDAMUS UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26 OF THE  
LAWS OF KENYA, ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, ARTICLE 47  
OF THE CONSTITUTION AND SECTIONS 2, 7, 11 OF THE FAIR ADMINISTRATIVE  
ACTION ACT, 2015**

**BETWEEN**

**LT. COLONEL (RTD) BENJAMIN MUEMA.....APPLICANT**

**VERSUS**

**THE NATIONAL TREASURY AND PLANNING.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY,**

**THE NATIONAL TREASURY ANDPLANNING.....2<sup>ND</sup> RESPONDENT**

**THE DEFENCE COUNCIL OF THE KENYA DEFENCE FORCES.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Notice of motion by the Exparte Applicant dated 3<sup>rd</sup> December, 2020 was filed pursuant to leave granted by the Court.

2. The Exparte Applicant Lt. Colonel (**RTD**) Benjamin Muema prays for an order in the following terms:-

1. **THAT** a declaration be issued that the *ex parte* Applicant is entitled to pension calculated based on his retirement date, 15<sup>th</sup> May, 2007 and his qualifications, salary and additional pay for a qualified Pilot Category 'A' and a qualified Flight Instructor.

2. **THAT** an order of *Mandamus* be issued to compel the Respondents to adjust the *ex parte* Applicant's pension to accord with the *ex parte* Applicant's retirement date, 15<sup>th</sup> May, 2007 as decreed in *HCCC No. 2230 of 2001; Lt. Col. Benjamin Muema –vs- Attorney General & Others*.

3. **THAT** an order of *Mandamus* be issued to compel the Respondents to adjust the *ex parte* Applicant's pension to accord with the Applicant's qualification, salary and additional pay for a qualified Pilot Category 'A' and a qualified Flight Instructor.

4. **THAT** an order of *Mandamus* be issued to compel the 1<sup>st</sup> Respondent to immediately pay to the *ex parte* Applicant the arrears in pension arising out of the failure by the Respondents to take into account the *ex parte* Applicant's retirement date, 15<sup>th</sup> May, 2007 and the omission of the additional pay for a qualified Pilot Category 'A' and a qualified Flight Instructor in calculating the *ex parte*

Applicant's current pension.

5. **THAT** an order of *Mandamus* be issued to compel the 1<sup>st</sup> Respondent to regularize and henceforth pay to the *ex parte* Applicant the monthly pension adjusted to accord with the *ex parte* Applicant's retirement date, 15<sup>th</sup> May, 2007 and the additional pay for a qualified Pilot Category "A" and a qualified Flight Instructor.

6. **THAT** this Honourable Court be pleased to grant any further or such orders as it may deem fit to grant in the interests of justice.

7. **THAT** the costs of the Application be provided for.

3. The application is premised on matters set out in the statutory statement dated 23<sup>rd</sup> November, 2021 and verifying Affidavit of the *Exparte* applicant of the even date.

4. The gravamen of the application is that the *Exparte* Applicant was unlawfully removed from the Kenya Defence Forces on or about April, 1993.

5. That on 27<sup>th</sup> December, 2001, he filed **HCCC No. 2230 of 2001 – Lt. Colonel Benjamin Muema –vs- Attorney General and Others** challenging the unlawful removal.

6. That on 2<sup>nd</sup> June, 2000, the High Court per J.B. Ojwang J. as he then was delivered judgment awarding the *Exparte* Applicant compensation for unlawful removal and loss of employment from April 1993 to the *Exparte* Applicant's 50<sup>th</sup> Birthday, which was the *exparte* Applicant's due retirement date.

7. That accordingly, and as per the National identify card of the *Exparte* Applicant, his 50<sup>th</sup> birthday falls on 15<sup>th</sup> May, 2007.

8. That in 2010, the Attorney General appealed against the said judgment and orders of the High Court in **Civil Appeal No. 315 of 2010 – Attorney General and 2 Others-vs- Lt. Colonel Benjamin Muema**.

9. That on 30<sup>th</sup> August, 2019, the Court of Appeal delivered judgment in which it reduced the award by the High Court but it did not interfere with the finding of the High Court on the retirement of the *Exparte* Applicant.

10. That on 1<sup>st</sup> July, 2020, the High Court made final decree taking into account the judgment and orders of the Court of Appeal, which decree confirms that the retirement date of the *Exparte* Applicant is 15<sup>th</sup> May, 2007.

11. The two judgments and Decree of the High Court are attached to the Application for ease of reference.

12. The applicant states that the pay officer 1 of the Kenya Defence Forces Lt. Colonel Sammy Kipng'etich admitted that the applicant's recognizable services in the Kenya Defence Service is up to 15<sup>th</sup> May, 2007, the applicant's 50<sup>th</sup> Birthday and retirement date.

13. That the officer calculated wrongly the monthly salary of the applicant at Kshs 55,219 because while the officer acknowledged and admitted the day of retirement to be 15<sup>th</sup> May, 2007, he deliberately omitted the applicant's pay for the qualification as a qualified flight instructor which qualifications the applicant had attained prior to the unlawful removal from the Kenya Defence Forces and before the retirement date of 13<sup>th</sup> May, 2007,

14. The applicant relied on a testimonial marked "BM7" on Discharge issued by the Commandant, Defence Staff College confirming the qualifications and which document was also produced as evidence in HCC No. 2230 of 2001 by one Major Joseph Kosene.

15. That Kenya Defence Forces admitted that the applicant was entitled to Flight Instructor Additional pay with effect from 1<sup>st</sup> November, 1982 as well as to Pilot Flying Allowance Category 'A' effective 10<sup>th</sup> October, 1984 per annexure "BM8" a copy of the said qualification record.

16. That accordingly, the respondent admits that the applicant is entitled to additional pay as follows:-

**(i) Qualified Flight Instructor Additional pay of Kshs 15,000 per month; and**

**(ii) Pilot category 'A' Additional pay of Kshs 30,000 per month.**

17. The applicant produced, the report on the Review of pay Allowances and terms and Conditions of Service for the personnel of the Armed Forces dated February, 2003, in support of the above position.

18. That therefore in terms of the Armed Forces (**Pensions and Gratuities**) (**Officer and Servicemen**) Regulations 1980, read together with Section 310(2) of the Kenya Defence Forces Act, 2012 are the current applicable regulations on computation of pensions pay for each completed month of reasonable service. That the (Pension and Gratuities Officer and servicemen Regulations 2017 were annulled by the National Assembly which Regulations had sought to remove the 1980 Armed Forces (**Pensions and Gratuities Officer and Servicemen**) Regulations, 1980.

19. That additional pay borne out of the aforesaid qualifications is a component of the applicant's Pensionable pay and thus ought to be considered in the computation of pension.
20. That with effect from 1993, the applicant has been receiving monthly pension of Kshs 7,206 which amounts do not take into account either the retirement date of 15<sup>th</sup> May, 2007 or the aforesaid additional pay.
21. That the Kenya Defence Forces have refused and or neglected to re-compute the pension entitlement of the applicant despite demand. That this refusal is in bad faith under Section 7(2) (h) of Fair Administrative Action Act, 2015 and is unjustifiable and unlawful therefore.
22. That the 1<sup>st</sup> respondent has a duty to compute the pension correctly under Section 244 of Kenya Defence Forces Act, 2012.
23. That Regulation 4, of the regulations of 1980, read together with Section 310 (2) of the Kenya Defence Forces Act, provides that Pensions, gratuities and other allowances may be granted by the Defence Council with concurrence of the National Treasury.
24. That Article 47 of the Constitution read with Section 4 of Fair Administrative Actions Act, entitle the applicant to expeditious, efficient, lawful and reasonable computation and payment of pension and the respondents are in breach of the said right.
25. Wherefore, the Applicant prays for the reliefs sought

### **Replying Affidavit**

26. The respondents filed a replying affidavit of Henry Muriithi Mugiira, advocate in conduct of the suit for the respondent deposing that the application that seeks orders of mandamus to re-adjust the Applicant's pension based on his retirement date and additional salary based on qualification for Pilot category 'A' and Instructor is misconceived as it is based on serious misinterpretation of the orders of the High Court and the Court of Appeal.
27. That the High Court per Justice J.B. Ojwang pronounced itself thus:-

***"... (6) I award general damages against the defendants jointly and severally for the loss in career advancement to which the plaintiff was subjected by their acts in contravention of the protective statute law, in a figure equivalent to his net income from his employment as a Lieutenant – Colonel for the whole period running from the beginning of April, 1993 to his 50<sup>th</sup> birthday, with appropriate adjustments made to reflect high status to which he would have moved, in the normal course of military practice. This figure is to take into account any compensations such as may have already been paid to the plaintiff; and the up-to-date figure of monies payable under this head is to be formulated by the parties and appropriate orders made by the Deputy Registrar, any further dispute on amounts is to be resolved through application before a Judge in Chambers, in the Civil Division of the High Court...."***

28. That the Court of Appeal reversed the decision of the High Court and nullified the directive by the High Court that the Deputy Registrar do assess the damages for loss of employment and instead awarded the applicant damages for loss of career advancement and loss of employment in the sum of Kshs 5,000,000.
29. That the decision by the Court of Appeal fully substituted the gratuity issued by the High Court and therefore the Court of Appeal's decision is the current point of reference for any execution.
30. That the issues raised by the applicant herein having been settled by the Court of Appeal are res-judicata and any further recourse would have to be appeal against the decision by the Court of Appeal.
31. The parties filed written submissions and the issue for determination is
- (a) Whether the issue raised by the exparte applicant is res judicata.***
- (b) Whether the exparte applicant is entitled to the reliefs sought if answer to (i) above is in the negative.***
32. It is the Exparte applicant's case that the Court of Appeal in its judgment, delivered on 30<sup>th</sup> August, 2019, did not interfere with the High Court's finding on the exparte Applicant's retirement date and therefore his pension ought to be re-worked on the basis of that date confirmed by the High Court and admitted by the respondents to be 15<sup>th</sup> May, 2007.
33. The cause of action in HCC No. 2230 of 2001 was wrongful removal by the respondents as a commissioned officer vide a coerced resignation from service in March, 1993 followed by criminal charges laid against the plaintiff in Criminal case No. 106 of 1997, which prosecution was terminated vide a ***nolle prosequi*** entered by the Attorney General on 9<sup>th</sup> May, 2001.
34. The High Court ordered *inter alia* that:-
- (i) The plaintiff's removal from his employment in the Armed Forces was unlawful, null and void.***
- (ii) The Court found that the arrest and prosecution of the plaintiff was wrongful, and malicious and awards the plaintiff general***

**damages for false imprisonment in the sum of Kshs 400,000; further General damages for malicious prosecution in the sum of Kshs 400,000 and general damages for unlawful detention at the sum of Kshs 600,000.**

35. In addition the Court directed that damages be assessed as reflected earlier in this judgment for the loss of career advancement to which the plaintiff was subjected by the respondent.

36. The computation was to be based on a figure equivalent to his net income from his employment as a Lieutenant Colonel for the whole period running from the beginning of April, 1993 to his 50<sup>th</sup> birthday.

37. The Court of Appeal in **Civil Appeal No. 315 of 2010** considered the appeal by the respondents. The Court of Appeal in its judgment rendered itself thus:-

**“..We therefore set aside the order directing the Deputy Registrar to assess damages for loss of employment, assuming that mandate and proceed to assess an appropriate award in deciding on an appropriate award.”**

38. The Court of Appeal went on to state:-

**“We also bear in mind the undisputed position on the record that the respondent received some payments from his employer and was also said to be on some form of pension. All in all, and doing the best we can, we find an award of Kshs. 5,000,000/= would in the circumstances be adequate compensation for the respondent's loss of his employment. It will carry interest at court rates from the date of Judgment in the lower Court.**

39. The Appeal fails and we make the following orders:-

**1. Kshs 400,000/= general damages for false arrest and illegal confinement.**

**2. Kshs 400,000/= general damages for malicious prosecution.**

**3. Kshs 600,000/= general damages for unlawful detention and loss of use of the respondent's motor vehicles.**

**4. Kshs 5,000,000/= as compensation for loss of employment.**

**5. The amounts awarded under items 1, 2, 3 and 4 above to carry interest at Court rates from the date of Judgment until payment in full.**

40. It is apparently clear that the Court of Appeal confirmed the judgment of the High Court on the merits and liability respondents bore in favour of the plaintiff except with respect to general damages payable for loss of employment. The Court of Appeal having considered all factors including the undisputed position on the record that the respondent received some payments from his employer and also said to be on some form of pension awarded the plaintiff a Global sum of Kshs 5,000,000 in compensation.

41. The *ex parte* Applicant did not appeal the decision of the Court of Appeal to the Supreme Court. Therefore, it is this Court's considered finding that any claim by the *ex parte* applicant arising from his employment and termination by Kenya Defence Forces is **res-judicata** and cannot be re-opened again before this Court.

42. Accordingly, the suit is misconceived and an abuse of the process of the Court and is struck out as being **res-judicata**.

43. Since the suit arises from an apparent mis-interpretation of the judgment of the Court of Appeal aforesaid, each party to bear their own costs of this application.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 24TH DAY OF MARCH, 2022.**

**Mathews N. Nduma**

**Judge**

**Appearances**

S.M. Kilonzo for Exparte Applicant

The Hon. Attorney General

B.K. Torore: Special State Counsel.

Ekale – Court Assistant