



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 4 OF 2019

**IN THE MATTER OF: ARTICLES 21, 22, 23(3), 27, 28, 35, 41, 47, 48 AND 50(2) OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FREEDOMS UNDER
ARTICLES 10, 21, 22, 23(3), 27, 28, 35, 41, 47, 48 AND 50(2) OF THE CONSTITUTION OF
KENYA, 2010**

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF: THE EMPLOYMENT ACT

BETWEEN

MAJOR (Rtd) JOSEPH K CHEPKWONY

PETITIONER

v

KENYA DEFENCE FORCES

1st RESPONDENT

HON ATTORNEY GENERAL

2nd RESPONDENT

JUDGMENT

1. Major (Rtd) Joseph Kiptanui Chepkwony (the Petitioner) was enlisted into the Kenya Armed Forces in October 1971.
2. Sometime in 1995, the Petitioner applied for voluntary early retirement from the Kenya Defence Forces (the Respondent) and the application was approved on 10 May 1995. The effective date of retirement was 10 October 1995.
3. On 14 February 2019, the Petitioner filed a Petition seeking orders

(i) **THAT** this Honourable Court be pleased to issue an order directing the Respondent to review the calculation of his retirement benefits to reflect the new SRC salary formula which came into

force on 1 January 1996 and be paid the difference of what he would have been paid had the formula been applied in his case.

(ii) **THAT** this Honourable Court be pleased to issue an order directing the Respondent to pay the Petitioner salary for the extra two and a half months, he was on standby duties without pay.

(iii) **THAT** this Honourable Court be pleased to declare that the Respondents violated the rights to fair labour practices namely reasonable working conditions including payment of salary for work done and the employee welfare such as issuing of work protective with accordance to the job description as provided under the Employment Act, 2007.

(iv) A declaration that the Respondent has violated the Petitioner's right to equal benefit of law under Article 27 of the Constitution and the right to fair administrative action under Article 47 of the Constitution.

(v) General damages for breach of the Petitioner's constitutional rights.

(vi) **THAT** the Respondent to pay costs of the Petition.

(vii) Any other or further relief that this Honourable Court considers appropriate and just to grant.

4. The Respondent caused to be filed a Replying Affidavit sworn by its Staff Officer Records, Major Damaris Apondi Agnetta on 16 August 2019.

5. On 16 November 2020, the Court directed the parties to file and exchange submissions within agreed timelines.

6. The Petitioner's submissions were not on record by the agreed timeline off 4 December 2020. However, he filed a supplementary affidavit on 15 January 2021.

7. The affidavit was filed without leave, and it is expunged from the record.

8. The Respondent filed its submissions on 2 February 2021.

9. The Court has considered the Petition and the affidavits on record and come to the conclusion that the Petition should be dismissed for the following reasons.

10. First, the Employment Act, 2007, which the Petitioner has cited as having been violated was not in operation in 1995 when the Petitioner resigned. The Petitioner did not demonstrate that the Act had a retrospective application with respect to the alleged violations.

11. Two, by dint of section 3(2)(a) of the Employment Act, 2007, the Act does not apply to members of the Kenya Defence Forces.

12. Three, the Petitioner did not file/produce any evidence that the Salaries and Remuneration Commission had put in place a retirement benefit calculation formula which affected his pension and which the Respondent had disregarded.

13. Fourth, at the time of the Petitioner's resignation in 1995, the Salaries and Remuneration Commission had not been established. There was even no inkling at that time that it would be established.

14. Consequently, the allegations that promise had been made to the Petitioner to hold his clearance by the Garrison Pay Master until further directions by the Salaries and Remuneration Commission cannot be true.

15. Five, the assertion by the Petitioner that he was kept in the barracks illegally from 10 October 1995 to

January 1996 is not supported by the Petitioner's own documents. There are records showing that by 13 October 1995, the Petitioner had surrendered official issues.

16. Six, by failing to file and serve his submissions, the Petitioner can be deemed to have failed to prosecute the Petition.

17. Lastly, the Petition did not raise any constitutional issues warranting approaching the Court in the manner done. The Constitution was invoked in vain.

Conclusion and Orders

18. From the foregoing, the Court finds no merit in the Petition. It is dismissed with costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 10th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner P. Sang & Co. Advocates

For Respondent Mr. Yator, Office of the Hon. Attorney General

Court Assistant Chrispo Aura