



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 60 OF 2017

BETWEEN

1. WILFREDA MARY ACHIENG' ODENDO

2. JAMES ONYANGO ODENDO [Both suing as the Administrators of the estate of the late

PATRICK ODENDO OYUNDI].....PETITIONERS

VERSUS

1. THE KENYA DEFENCE FORCES

2. THE ATTORNEY- GENERAL.....RESPONDENTS

Rika J

Court Assistant: Emmanuel Kiprono

J. Ogada & Company Advocates for the Petitioners

The Attorney-General for the Respondent

JUDGMENT

1. This Petition was filed by the Administrators to the estate of Patrick Odendo Oyundi, a soldier in the Kenya Armed Forces as of 1st August 1982, when an attempt was made by a section of the Armed Forces, to overthrow the Moi Regime.

2. Oyundi was among the soldiers who were arrested in the aftermath, confined in various cells and prisons for about 1½ years, before release, without being charged with any offence.

3. He died on 27th June 1993.1

4. His Wife and Son, were appointed Administrators to his estate, and filed this Petition on 14th July 2017. Unfortunately, his Wife died on 11th April 2018. It was left to his Son James, to prosecute the Petition.

5. In a summary, the Petitioners state: the late Oyundi was recruited into the Army on or about 30th April 1966; he rose to the position of Lieutenant- Colonel; he was based at Nakuru; shortly after the attempted coup of 1st August 1982, he was arrested and confined without trial; he was tortured, branded with red-hot metal, heated straight from the fire; he was made to stand in a room full of freezing water; he was denied toilet facilities; and had to do without drinking water and food for long. While incarcerated in this inhuman and degrading environment, the Kenya Armed Forces dismissed/discharged him with loss of all terminal benefits. The Respondents acted arbitrarily in contravention of the Armed Forces Act [repealed], the Standing Orders, the existing Constitution and Employment Law.

6. He suffered mental breakdown, and by the time he was freed, had developed mental illness.

7. He was the sole breadwinner of his Family, comprising Wife Wilfreda, Children Christine, James, George and Lilian. The Family's livelihood was disrupted. The Children's education could not be sustained. His death resulted from the lengthy incarceration and torture in the hands of the Government.

8. The Petitioners seek orders: -

- a. Declaration that the late Oyundi's right to personal liberty as provided under the repealed and current Constitution of Kenya was violated.
- b. Declaration that his detention without trial for extended period, torture, inhuman and degrading treatment, violated his constitutional rights and fundamental freedoms as enshrined in domestic and international laws.
- c. Declaration that the deceased is entitled to damages for redress in respect of each of his right that was violated.
- d. Declaration that dismissal of Oyundi from service was unlawful and in contravention of his constitutional rights and denied him the right to natural justice and fairness and in contravention of employment law and practice.
- e. Payment of the full retirement benefits to his estate.
- f. Payment of terminal benefits and/or severance pay or benefits from the date he was enlisted until the date of retirement.
- g. Payment of his full pension and allowances he would have been entitled to.
- h. Payment of general damages for torture, pain and suffering.
- i. Payment of full salary, privileges and benefits due to him, commensurate with his rank or higher rank as he would have been entitled to from the date of his discharge.
- j. Reinstatement of rank within the military and award of full honours.
- k. General damages to all the beneficiaries of the estate for pain and loss.
- l. Costs.

9. The Respondents filed their Replying Affidavit on 28th August 2017. They hold that there was inordinate delay of over 30 years, in presentation of the Petition. They deny that Oyundi was ever a member of the Kenya Defence Forces. Members are recognized by their service number, rank and units served. They deny allegations of arrest, unlawful detention and torture. It is denied that Oyundi died from torture and unlawful detention. There is a paucity of evidence arising from effluxion of time, and destruction of documentary evidence. The Respondents submit that the Petitioners seek mainly enforcement of employment rights, without regard to Section 90 of the Employment Act and Section 5 of the Public Authorities Limitation Act. The Petitioners invoke the Constitution to avoid statutory provisions. If Oyundi was dismissed from service, it was because of his role in the failed coup. He acted in contravention of the Armed Forces Act and the Standing Orders. It was within the Employer's prerogative to dismiss the Employee.

10. The Court directed on 12th December 2020, in the presence of the Parties' Advocates, that the Petition is heard in open Court on 25th March 2021. Hearing did not take place as directed. On 8th April 2021, there was a change on the mode of hearing, in light of spiking Covid-19 afflictions. It was directed in a virtual session, that the Petition is considered by way of Written Submissions and Affidavits on record. It was directed that Witten Submissions are filed within 21 days apiece, from 8th April 2021. At the time of preparation of this Judgment, there are no Submissions filed in the physical file. The Court therefore relies on the Affidavits, Petition and Documents on record, in making this determination.

The Court Finds: -

11. There have been many Petitions filed by the former Kenya Armed Forces Servicemen, who were implicated in the insurrection of 1st August 1982. Some have succeeded, others have failed. The historical background is the same. The basic facts and legal issues argued before the various Courts are the same.

12. Chief among the chain of these cases is *Nairobi H.C.C.C No. 403 of 2006 [Peter M. Kariuki v. the Attorney-General]* and the subsequent Appeal at the Kenya Court of Appeal, *Peter M. Kariuki v. the Attorney-General [2014] e-KLR*. The Claimant, and eventual Appellant, Kariuki, was Commander of the Kenya Airforce at the time of the insurrection.

13. He was arrested like the Soldiers below his rank, confined at Kamiti Maximim Prison in Nairobi, before transfer to Naivasha Maximum Security Prison. He was held in solitary confinement for 147 days. He was court-martialled for failing to prevent a mutiny, convicted and sentenced to serve a term of 4 years.

14. He filed a Claim at the High Court 23 years after he was convicted by the Court Martial, on 21st July 2006 alleging violation of his constitutional rights and freedoms. The High Court granted Kariuki Kshs. 7 million in damages, having agreed that his constitutional rights

and freedoms were violated. The High Court however declined to restore Kariuki his rank, benefits and honours, holding that Kariuki did not appeal against the conviction by the Court Martial to the High Court, and would be deemed to have been satisfied with the conviction and sentence.

15. On Appeal, Kariuki's award of damages was enhanced to Kshs. 15 million. The Court Appeal also quashed his conviction by the Court Martial. His rank, benefits, honours and decorations were restored.

16. The favourable outcome offered to the Commander, appears to have triggered many other Claims and Petitions by Soldiers who were similarly treated after the insurrection of 1st August 1982. Not all however were successful.

17. In *Nairobi H.C. Petition NO. 517 of 2013 Wellington Nzioka Kioko v Attorney-General [Judgment delivered on 18th November 2015]*, the Petitioner was a Soldier implicated in the insurrection of 1st August 1982. He was arrested and kept in custody for 8 months at Kamiti Maximum Prison and Kahawa Garrison. He sued for damages for violation of constitutional rights and for payment of withheld salaries, terminal benefits and pension. The High Court declined the Petition, finding that there was inordinate delay in filing the Petition, and that the Petitioner had not established violation of his constitutional rights.

18. On Appeal, the Court of Appeal, in *Wellington Nzioka Kioko v. the Attorney- General [2018] e-KLR*, agreed with the High Court that there was inordinate delay of 30 years, which was not explained, and concluded that dismissal of the Petition was proper. The Court of Appeal held also that there was paucity of evidence. There was no evidence of arrest or even torture, the Court of Appeal of Kenya held. It was held that employment reliefs could only be entertained in the E&LRC.

19. While the Courts therefore granted and enhanced reliefs to Commander Kariuki, Kioko a Soldier lower in rank to Kariuki, found no relief. Delay in coming to Court was for 23 and 30 years, in Kariuki and Kioko cases, respectively.

20. In Petition 572 of 2013 before the High Court at Nairobi, reported as *Danish Gumbe Osire v Cabinet Secretary Ministry of Defence & Another [2017] e-KLR*, the Petitioner, an ex-serviceman, complained of torture, inhuman and degrading treatment and unlawful incarceration following the insurrection of 1st August 1982. He was in custody for 86 days at Kamiti Maximum Prison. He sought damages among other reliefs from the Court, for these violations. Relying on the Court of Appeal decision in *Kariuki*, the Petitioner urged the High Court to award him Kshs. 15 million as general damages for violations made against him by the State. He was awarded Kshs. 10 million.

21. In *Joel Bernard Lekukuton & 4 others v. the Attorney-General [2017] e-KLR*, the Petitioners were similarly former Kenya Armed Forces Soldiers, caught up in allegations of participating in the insurrection. The Petition was brought 30 years after the coup attempt. The Petitioners explained that the atmosphere was not conducive to petitioning against the violations. The Court held that there is no time limit in filing Claims alleging violation of rights and freedoms under the Constitution. The Court agreed that there was a repressive political climate, observing also that the Petition was filed after the Constitution of 2010, and that Kenyans had submitted to the concept of transitional justice. The Petitioners were held for periods over 6 months. The High Court granted each Petitioner Kshs. 2.5 million.

22. In *Peter Tonny Wambua & 17 Others v the Attorney-General [2017] e-KLR*, the High Court restated that there is no time limit in bringing Petitions for violation constitutional rights and freedoms but that a Petitioner must explain delay in bringing the Petition. It was accepted by the Court that the political environment was not right, the purported insurrectionists having been ostracized and denied counsel until the Moi regime was removed from power. The Petitioners were detained, for periods between 25 and 200 days. They were paid general damages ranging from Kshs. 650,000 to Kshs. 6.1 million.

The Court Finds: -

23. The late Patrick Oyundi is alleged to have been among the Soldiers whose careers ended tragically, in the aftermath of the attempted coup of 1982.

24. He died on 27th June 1993, leaving it upon his Wife and Son, the Administrators of his estate, to petition the Court on constitutional violations, which took place about 10 years before his death, and about 24 years before the filing of the Petition on 14th July 2017.

25. The Affidavit filed by his Wife sworn on 13th July 2017, does not give any reason for the delay. It does not even allude to unconducive political atmosphere, which has been endorsed by the Courts in some of the decisions above, as being a reasonable explanation for delay.

26. There is no evidence brought on behalf of the Oyundi, to at the very least, show he suffered illness as a consequence of torture and unlawful detention. The Affidavit filed by his Wife only contains her identity card; certificate of Oyundi's death; gazette notice, notifying the public that grant of letters of administration had been applied for; and, certificate of confirmation of grant. These documents are only useful in establishing that the Wife and the Son, had authority to pursue the Petition. No effort is shown, in establishing the Petition.

27. The proceedings in some of the High Court Petitions above, which resulted in award of damages, show that proper evidence, including medical evidence was availed to the respective Courts. The Petition herein is not supported by any document relating to the main issues in dispute- torture, incarceration, and the consequential mental illness of Oyundi. There is not a document filed, showing that he was indeed a Soldier, in the service of Kenya Armed Services. Did not any document issue on appointment or discharge? Was Oyundi not given a service number on recruitment? His Administrators needed to avail to the Court evidence of his employment, particularly in light of Respondent's denial that such employment existed.

28. The Petition as it stands, cannot be granted. The Affidavit filed by Oyundi's Wife is insufficient to establish that the Oyundi was a Soldier serving in the Kenya Army; that he was detained without trial; that he became ill as a result of this detention and torture; that he suffered mental disability as a result of torture and detention; that he was unlawfully discharged from service; and that he eventually lost his life due to these violations. There was no evidence of pension, terminal dues, gratuity and severance payable to Oyundi. The Replying

Affidavit filed by Major Daniel Muu Kiama, Staff Officer at the KDF Head Office, raises fundamental issues of evidence, gaps, which the Administrators of the estate of Oyundi, Petitioners herein, did not attempt to fill. The Court cannot grant the prayers based solely on bare statements contained in the Petition.

29. The Court is of the view that the Courts should as much as possible, treat the former Soldiers of the defunct Kenya Armed Forces equally. There is no convincing reason why for instance there should be a wide divergence on the range of damages, or different application of the law on delay in filing of the Petitions. There is no reason why Commander Kariuki's enhanced grant of Kshs. 15 million in damages, should not apply to ex-Soldiers of lower ranks, who were similarly implicated in the coup and went through similar constitutional violations. Justice must be served evenly.

30. The Claimants/Petitioners coming before the Court under the banner of 1st August 1982 coup attempt violations, must however, give evidence in support of their Claims/ Petitions, adequate to allow the Courts serve justice evenly. Oyundi's successors, have not availed such evidence.

31. The Attorney- General could, in the respectful view of this Court, assist the Judiciary and the Country, in addressing this issue of transitional justice, through a collective negotiation and settlement of constitutional grievances, which have largely been established by the Judiciary to have taken place. The Court is aware of a big number of these ex-Soldiers implicated in the insurrection, who have come to Court and withdrawn their Petitions, encountered with challenges of collecting evidence after decades of inaction, and faced with the arduous task of placing evidence before the Court. Some of them are old and ailing, hardly in a position to recollect the events of 1st August 1982. Some see pursuit of restitution, as a hopeless cause, and prefer not to institute any action. Others such as the Petitioner have passed on in dishonour, leaving behind indigent families. The Attorney-General being the Respondent, is aware of such matters-withdrawn or dismissed for lack of proper evidence required by the Courts to grant appropriate remedies. Dismissal or withdrawal of cases relating to August 1st 1982 insurrection, does not aid in correction of historical injustice. It is not healthy to award some of the implicated soldiers individually, while there appears to have been a collective historical injustice. Let the Attorney- General establish a mechanism outside the Judiciary, through which the much maligned ex- Soldiers and their families, can find transitional justice and restitution. A judicial process does not always guarantee correction of historical injustice, and as can be read in the decisions discussed by the Court above, does not always have consistent or satisfactory result.

32. In the end, and not without sympathy to the Petitioners, the Court adopts the decision in **Wellington Nzioka Kioko v. the Attorney-General** cited above, and orders that the Petition is dismissed for paucity of evidence.

IT IS ORDERED: -

a. The Petition is declined.

b. No order on the costs.

Dated, signed and released to the Parties under the Ministry of Health and Judiciary Covid-19 Guidelines, at Nairobi, this 23rd July 2021.

James Rika

Judge