



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT BUNGOMA

ELR COURT PETITION NO. 4 OF 2021

IN THE MATTER OF

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

(1),21(1),23(1),24(1),25(a) & (c),26 (1),27,28,47(1)&(2),48,50 165 (3)

(b),232(1) (c),239,241 (1),5&(7)

IN THE MATTER OF

THE VIOLATION AND CONTRAVENTION OF THE FUNDAMENTAL RIGHTS

AND FREEDOMS GUARANTEES UNDER ARTICLES 10(1) (A-C) AND 2 (B),25(A)

&(C),27,28,29 (F),47 (1) &(2),48,50 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE

CONTRAVENTION OF SECTON 4 (1) & (2) OF THE FAIR

ADMINSTRATIVE ACTION ACT 2015

IN THE MATTER OF

THE EMPLOYMENT ACT, 2007 LAWS OF KENYA

THE MATTER OF

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS, PRACTICE AND PROCEDURE RULES, 2013)

IN THE MATTER OF

THE CHALLENGE OF THE UNLAWFUL DISMISSAL OF

THE PETITIONER FROM THE EMPLOYMENT

OF THE RESPONDENTS

BETWEEN

MOSES ETYANG.....PETITIONER /APPLICANT

VERSUS

CHIEF OF KENYA DEFENCE FORCES1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

RULING

1. The Petitioner filed a Constitutional Petition dated 20th September, 2021 seeking declaration that the Respondent did not follow due process in dismissing him.
2. The Petitioner was discharged from service on the 6th January, 2016 on ground that his service is no longer required (exhibit “ME2a”) of the Petitioner annexed to the supporting affidavit.
3. The Petitioner further filed Notice of Motion dated 20th December, 2021 and supported by supporting affidavit of the Petitioner. The Ruling is on this Application.
4. Orders sought under the Notice of Motion Application:-
 - (a) Conservatory order to issue to the respondents directing the Respondents by itself, its servants and or any other officer acting under its authority that the impugned decision by the Kenya Defence Force to terminate the Petitioner be rescinded pending the hearing and determination of this application and the petition.
 - (b) That conservatory orders be issued to Respondents compelling it to pay the Petitioner monthly salary of Kshs. 20,328.00 per month pending hearing and determination of this application and the petition.
 - (c) In the alternative conservatory orders do issue to the Respondents , by itself, its agent /servant and any other officer working under its authority compelling the Respondents to pay the Petitioner full remuneration and benefits and interest from date of impugned termination of employment being 6th October, 2015 pending hearing and determination of petition.
 - (d) That conservatory order to issue to the Respondents to provide for the Petitioner future medical support of Kshs. 40,000/- on a monthly basis pending hearing of Petition.
 - (e) That conservatory orders do issue for payment of damages:- and compensation from violation of the Petitioner’s fundamental rights and freedoms pending hearing of the Application and Petition.
5. The Application is supported by grounds in the application and supporting affidavit of the Applicant/Petitioner, Moses Etyang, dated 20th September 2021. The grounds *inter alia* are that the Applicant was enlisted into the Kenya Defence Forces on the 1st September, 2008 and upon completion of his training he was recruited on the 27th day of March 2019. That he was posted to the 15 Kenya Rifles and later to 17 Kenya Rifles where he was deployed to the infantry. That in the year 2013 -2014 the Petitioner /Applicant served in Amison mission III in Afmadow Somalia. That sometimes in March 2014 while in patrol he was involved in a road accident and he sustained soft tissue injuries in his left frontal & Occipital region. That he did not get medical services as the Major in charge of camp Shangata indicated he remains in camp as injuries not severe enough. That he returned to work and started having severe headaches and sleep hallucinations but the doctor at Camp said nothing would be done.
6. That he also started having back pains and could not walk properly while at camp. After the mission completion in 2015 the Applicant returned to Nyalii Barracks and the boss in charge Late Sergeant Tigo advised Major Ali who was the doctor to check him as he was having challenges performing duties which he was performing well before accident. He was having memory loss and impaired judgement and could not perform duties which he attributed to the accident in Somalia mission.
7. That the 1st Respondent did not investigate the root cause of non- performance which according to the Applicant was the accident in Somalia. He was discharged from service. He sought medical help and was diagnosed with mental illness. That the Medical Board assessed him and directed him to continue on medication adding him some other drugs. The Medical Board later approved compensation to the Petitioner/Applicant on finding he had schizophrenia which could not have enabled him to continue in service.
8. That the Petitioner/Applicant later received two letters dated 23.7.2019 & 30.7.2019 approving his disability compensation at Kshs. 350,000 paid through KCB Voi Branch and has not heard from Respondents thereafter and continues treatment.
9. The court certified this application brought under certificate as urgent and ordered inter-parties hearing on the 18th October, 2021.
10. The parties appeared in court on the 18th October 2021 and the Respondents sought time to file response. The Applicant agreed and on the said date of 9th November 2021 the Respondent had not filed response. I gave directions for the Respondents to respond simultaneously with submissions with leave to Applicant to file supplementary submissions. I directed that the application would be dispensed by way of written submissions.
11. The Respondent filed Replying affidavit in response to the application by way of Replying Affidavit of Major Dickson Nzalia (130355) sworn on the 22nd November 2021. The deponent stated he is employed and deployed as Staff Officer Records, Defence Headquarters and conversant with the case.

12. In summary the Respondents deny the claim in the Application . states that the Applicant was discharged on 6th January 2016 as his service was no longer required under Section 255 (i) (g) of the Kenya Defence Forces Act. That the Applicant was charged with service offences and appeared before his Commanding Officer on 11th August 2015 and upon being tried he was awarded and recommended for discharge subject to approval by the Service Commander. That the Service Commander approved the recommendation of the Applicant on the 21st September 2015 as required by the law. The Applicant is not entitled to the prayers sought in the application. That the Petitioner has not demonstrated a *prima facie* case with a probability of success noting he was discharged more than 6 years ago. That the Applicant is guilty of inordinate delay.

DETERMINATION

13. The Applicant has already been discharged from service of the 1st Respondent. There is no active employee relationship.

14. I have read the written submissions of the Applicant. They, in my opinion, do not address the question of grant of conservatory orders but are on the merit of the Petition. The court has also read the written submissions of the Respondent on conservatory orders and refers to one of the authorities cited to define my jurisdiction at this stage being Progress Welfare Association Of Malindi & 3 Others -Vs- County Government Of Kilifi & 4 others (2020) Eklr Supra where the court states as follows:-

“The guiding principals upon which Kenya courts make finding on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are now fully settled. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it to determine whether the Applicant has made out a prima facie case to warrant grant of conservatory orders”. The court adopts this holding to apply in determination of the Application. The next question is what is the purpose of conservatory orders?.

15. The High Court in *Center for Rights Education and Awareness (Creaw) & Another -vs- Speaker of the National Assembly & 2 Others* (2017) eKLR defined the purpose of conservatory orders which I cite and adopt with approval to state “ *the purpose of granting conservatory orders is to prevent violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending petition.*”

16. What is there is to conserve in the instant case? The orders sought seek that the decision to terminate the Applicant/Petitioner be rescinded pending hearing of the petition and other orders sought. That he be paid some monies like salary , medical support pending hearing of the petition. The court finds the nature of orders sought by the Applicant amounts to reinstatement of the Applicant to the employment of the 1st Respondent which is an order that is final in nature and can only be granted under Section 49 of the Employment Act after hearing the petition on merit.

17. The conservatory orders sought are not available to be granted as they amount to reinstatement of the Applicant to service. It is for this reason the Application by way of Notice of Motion dated 20th September, 2021 is dismissed for lack of merit with costs in the cause.

RULING DATED DELIVERED, THIS 20TH DAY OF DECEMBER, 2021 AT BUNGOMA

J. W. KELI

JUDGE

In the presence of

Court Assistant: Brenda

Petitioner/Applicant – Fwaya holding brief for Ndalila

Respondent : Absent