



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 952 OF 2016

ARAB SUGAL ADOW.....CLAIMANT

-VERSUS-

THE CABINET SECRETARY MINISTRY

OF DEFENCE.....1ST RESPONDENT

THE CHIEF OF DEFENCE FORCES.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 24th May, 2016 seeking the following reliefs:

a) A declaration that his dismissal from the Defence forces was unfair, unlawful, null and void.

b) An Order that the Respondents to pays him: -

i. Loss of earning at

Kshs. 63,067 x 12 x 4 years Kshs. 3,027,216/-

ii. One-month salary in lieu of notice Kshs. 63,067/-

TOTAL Kshs. 3,090,283/-

c) A declaration that the Claimant's pensions and gratuity has been withheld and/or suspended unfairly and unlawfully.

d) An Order that the Claimant is entitled to pensions and gratuity and the same must be paid to the Claimant.

e) Compensatory damages for unfair and unlawful dismissal including damages for loss of promotion and future earnings.

f) Damages for mental disorder and illness suffered by the Claimant as a result of the illegal detention, torture and dismissal.

g) A declaration that the Claimant is entitled to payment of his terminal dues.

h) Interest on the above from 27th February, 2014 till full settlement.

i) The costs of this suit.

j) Any other relief the Honourable Court may deem fit to grant.

2. The facts of the case according to the claimant are that he was employed by the Kenya Defence Forces on 24th April, 1984 and underwent Military Training at the Armed Forces Training College. He thereafter served the Forces and the Country diligently in various parts of the Republic of Kenya and rose ranks within the Forces to a Sergeant Serving Military Intelligence Battalion. According to him he served the

Defence Forces for a period of 29 years and 11 months during which his conduct was above board and never faced any disciplinary proceedings.

3. On 27th February, 2014 he was dismissed from the Defence Forces for allegation that he obtained money from a private citizen promising assistance in the military recruitment process. However, the claimant averred that the money he obtained was a loan and by the time of the dismissal he had repaid a substantial part of the loan. He further contended that the dismissal was unfair, un-procedural and unlawful, because it was informed by internal wrangles and disagreements between himself and his colleagues within the Military Intelligence. Finally, he contended that he was arrested and illegally detained and subsequently summarily dismissed from service without benefits.

4. The Respondents filed defence on 26th July, 2016 denying the alleged unfair and unlawful dismissal. They contended that the dismissal was justified and it was done after a fair procedure. They contended that the Claimant obtained money, Kshs 100,000, from one Mr. Joseph Kagwi promising to assist him secure a military job for his daughter. They further contended that the Claimant was accorded an opportunity to defend himself before his Officer Commanding and the Commanding Officer in accordance with Sections 156 (b) (iii) and 156 (3) of the Kenya Defence Forces Act.

5. The Respondents further contended that in accordance with the provisions of the terms and conditions of service, the Claimant is not entitled to terminal benefits because he was dismissed from service for indiscipline. They therefore urged the Court to dismiss the Claim with costs.

6. The suit was heard on 22nd July, 2019 when both parties tendered evidence and thereafter filed written submissions.

Claimant's Case

7. The Claimant testified as Cw1 and basically reiterated his averments in the Memorandum of claim and his written witness statement dated 23rd May, 2016. He also produced 6 documents filed with his Claim on 24th May, 2016 as exhibits to support his claim. In brief he testified that on 4th February, 2014 he was detained in custody at Laikipia Airbase following a report from Mr. Kagwi that he had borrowed Kshs. 100,000 in December, 2011 and had failed to refund the amount.

8. He further stated that on 6th February, 2014 at 6.00 am he was taken to the Commanding Officer for hearing but the complainant Mr. Kagwi was not called for the hearing, which he termed as unfair or his statement served on him. He testified that borrowed the money borrowed from Mr. Kagwi's wife and that she had not filed any complaint against him. He further stated that he sought to be taken through investigations or in the alternative he be retired with full benefits. He denied ever admitting the charges. However, he confirmed that on 3rd March 2014 he was informed of his dismissal.

9. Upon cross examination he confirmed that his run out date was on 5th May, 2014, which was to be his retirement date unless time was added. He contended that the dismissal was done with intention to deny him his terminal benefits. He further testified that out of the Kshs 100,000 he had borrowed from Mrs Kagwi he had refunded a total of Kshs. 51,000 by Mpeas. He insisted that the Commanding Officer did not hear his case but only indicated that his services were terminated. He further confirmed that he was aware of the process of redress and that he wrote his redress in March, 2014. He further stated that after the dismissal he was issued with a certificate of good conduct.

10. On re-examination CW1 stated that there was no recruitment in the year 2011 and that the charges against him were not true. He insisted that the amount of Kshs. 100,000/- was a loan which he was unable to pay back.

The Respondent's Case

11. The Respondents called **Major Agnetta Damaris Apondi**, as their witness and testified as Rw1. She is the Officer in charge of records at DOD and in her testimony, she basically adopted her Replying Affidavit sworn on 19/7/2019 as her evidence in chief. She also produced the documents marked "DAA 1- 4 as exhibits. In brief, she testified that the claimant was served with a copy of Abstract of evidence together with charges against him on 5.2.2014 under section 121 of the Kenya Defence Forces (KDF) Act. The charge was for obtaining money, kshs. 100,000 from Mr. Joseph Muturi Kagwi purporting to assist him in recruitment exercise.

12. Rw1 further contended that the claimant appeared before his officer Commanding on 6.2.2014 and confirmed that he had been given sufficient time to prepare for his defence. She further testified that the claimant admitted the charge and he was convicted on his own admission. She maintained that the dismissal of the claimant was after fair disciplinary process under section 156(b)(ii) and 156(3) of the KDF Act. She denied that the claimant's rights were violated. She contended that the offence committed was grave and as such the claimant is not entitled to terminal benefits. Finally, she contended that the Claimant failed to follow the laid down procedure of writing a redress to the Service Commander and instead filed the instant Claim.

13. Upon cross examination, RW1 admitted that she had no evidence to support the assertion that there was a recruitment exercise in the year 2011. However, she maintained that the Claimant was charged with obtaining the money in March 2011 after he promised to assist in the recruitment exercise. She further confirmed that the statement recorded by the Claimant was also not availed to this Court.

14. RW1 further confirmed that the notice dated 6th February, 2014 under Section 151 of the Defence Forces Act did not indicate the name of the investigator. She further confirmed the complainant (Kagwi) did not appear during the hearing for purposes of cross examination by the Claimant. She also confirmed that the proceedings before the Commanding Officer were not dated and also failed to indicate the findings and award. She confirmed that the statement by Mr. Kagwi admitted that some money had been refunded by the Claimant.

Claimants submissions

15. The Claimant that his dismissal was unlawful, unfair, irregular and in blatant disregard to the legal parameters as set down in the Constitution of Kenya, the rules of natural justice, and in particular Section 147 (1) of the Kenya Defence Forces Act. To buttress this argument, he relied on **Sarah Wanyaga Muchiri Vs Henry Kathii & Another (2014) eKLR**, **Engen Petroleum Limited Vs Commissioner for Conciliation Mediation and Arbitration and Others (2007) ZALAC 5**.

16. He further submitted that he was tried without proper investigations being conducted contrary to the provisions of Section 150 of the Kenya Defence Forces Act and the hearing was not conducted in a proper manner as the complainant was not present at the hearing for cross examination. He therefore contended that the verdict arrived at was unfair because due process was not followed. For emphasis the Claimant relied on **Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (K) (2017) eKLR**.

17. He further submitted that his termination did not pass the fairness test since there was no proof of any recruitment in 2011 and as such there was no valid reason to terminate his services. For emphasis the Claimant relied on **Walter Anuro Vs Teachers Service Commission (2013) eKLR**.

18. Finally, the Claimant submitted that he is entitled to the reliefs as sought in his Claim and urged this Honourable Court to allow the same as pleaded. For emphasis he relied on **Henry Kamau Ngare Vs Teachers Service Commission & Another (2016) eKLR** and **Ezekiel Nyangoya Okemwa Vs Kenya Marine & Fisheries Research (2016) eKLR**.

Respondent's Submissions

21. The Respondents submitted that she lawfully and fairly dismissed the Claimant as provided under Section 121 of the Kenya Defence Forces Act, 2012 on allegation that he obtained money, (Kshs. 100,000/-) from a civilian Mr. Joseph Kagwi purporting to assist him in the recruitment process. They further submitted that the Claimant's dismissal was procedural and in accordance with Section 147 and 156 of the Kenya Defence Forces Act, Part V of the Kenya Defence Forces Rules of Procedure, 2017 and Articles 47 and 50 of the Constitution of Kenya, 2010. To buttress this argument, they relied on **Republic Vs Chief of General Staff & Another (2017) eKLR** and **Peter Masai Mailanga Vs Republic (2019) eKLR**.

22. On the issue of reliefs sought by the Claimant in his Memorandum of Claim, the Respondents submitted that he is not entitled to the claim for loss earning and one-month salary in lieu of notice because the provisions of the Employment Act do not apply to members of the Kenya Defence Forces. To fortify this argument, the Respondents relied on the provisions of Section 3, 4 and 253 (5) (a) of the Kenya Defence Forces Act and the case of **Gift Kambu Marandu Vs Kenya Defence Forces Council & Another (2017) eKLR**.

23. The Respondents further submitted that the Claimant is also not entitled to pension and gratuity by dint of Section 244 (2) of the Kenya Defence Forces Act and Regulation 6 of the Kenya Defence Forces (Pension and Gratuities) (Officers and Servicemen) Regulations, 2017 because he was dismissed from service for misconduct. For emphasis they relied on the case of **Gift Kambu Marandu Vs Kenya Defence Forces Council & Another (2017) eKLR**.

24. In addition to the foregoing, the Respondents urged that this Honourable Court lacks the jurisdiction to entertain the Claim for Pension, gratuity and an award for mental illness disability since that mandate is vested in other fora under the Kenya defence Forces (Pension and Gratuities) (Officers and Service Members) Regulations, 2017. In the respondents' view, the Claimant's illness was attributed to his sudden stop in the use of miraa and cannot therefore be attributed in any way to his duties.

25. The Respondents further contended that the Claim as drawn is defective because the Claimant disowned the signature in his Verifying Affidavit. For emphasis the Respondents relied on the provisions of Rule 6 of the Employment and Labour Relations Court Procedure Rules 2016 and **Miriam Wanja Muchiri Vs Emmah Wangechi Macharia & Another (2016) eKLR** and **Kitur & Another Vs Standard Chartered Bank & 2 Others (2002) eKLR**. It was further submitted that the same can be cured by Article 159 (2) (d) of the Constitution of Kenya, 2010.

26. The Respondents further contended that the Claimant failed to exhaust the internal mechanisms of appeal or review as provided under Section 158 (1) of the Kenya Defence Forces Act and paragraph 19 of Part VII of the General Administration in Chapter 1 on Discipline General in the terms and conditions of service which provides that: -

"...If a service member is dissatisfied with the decision of the service commander, he/she may make a complaint in writing to the chief of the Defence Forces through the chain of command."

27. To buttress this argument, the Respondent cited the case of **Non-Governmental Organizations Co-ordination Board Vs EG & 5 Others (2019) eKLR**.

28. In conclusion the Respondents urged this Honourable Court to dismiss the instant Claim with costs.

Issues for determination

29. There is no dispute from the pleadings, evidence and submissions that the claimant was employed by the Kenya Defence forces from 24.4.1984 to 6.2.2014 when he was summarily dismissed. The issues for determination are: -

(a) Whether the dismissal was for valid reason.

(b) Whether the procedure followed was fair.

(c) Whether the claimant is entitled to the reliefs sought herein.

Whether the dismissal was for a valid reason.

30. The reason cited for the dismissal of claimant was that he obtained money, being Kshs. 100,000 from a civilian, Mr. Kagwi, purporting that he would assist him in the military recruitment process. The Claimant denies the alleged misconduct and contended that the kshs 100,000 he received was a loan from Mrs Kagwi and that he had refunded kshs.51000 before the dismissal. I have carefully considered the evidence and the submissions presented to the court and I am satisfied that the claimant admitted the offence of obtaining kshs 100000 for the civilian as charged. I therefore return that the reason for his dismissal from service was valid and it justified the decision by the respondents.

Whether a fair procedure was followed

31. The claimant contended that he was not accorded a fair hearing before the dismissal especially because the complainant never attended the hearing for cross examination, he was never served with the complainant's written statement, there was no investigations done, he was not represented at the hearing and he was not heard at all. The respondents have however produced a bundle of records of the whole disciplinary process which I have carefully considered and found that indeed, the claimant was served with the copy of the Abstract of evidence and charge, he appeared before his officer commanding and he was heard without any complaint, and finally, he appeared before his Commanding Officer for sentencing upon his own admission of the offence charged. The said hearing was in consonance with the provisions of section 150, 156 and 157 of the KDF Act. Accordingly, I return that the procedure followed before dismissing the claimant from service was fair and his rights under Article 47 and 50 of the Constitution were not violated.

Whether the reliefs sought should be granted.

32. In view of the foregoing finding that the claimant was dismissed for a valid reason and after following a fair procedure, I decline to make declaration that the dismissal was unfair, unlawful, null and void.

33. I further decline to award the claim for loss of earning for 4 years, one month salary in lieu of notice and compensation for unfair dismissal including loss of promotion and future earnings because there is no basis laid to justify the same.

34. Likewise, I decline to make any order for the claim for pension and gratuity, and also damages for mental disorder suffered as a result of alleged illegal detention, torture and dismissal, because the court has no jurisdiction to determine those issues under **Kenya defence Forces (Pension and Gratuities) (Officers and Service Members) Regulations, 2017**. I therefore leave the same for determination by the relevant Boards under the KDF Regulations.

35. Finally, I decline to make declaration that the claimant is entitled to payment of terminal dues because the claim lacks particulars. In the end I find that the claimant has not proved his claim on a balance of probability and the same is dismissed.

Each party to bear own costs.

Dated, and delivered at Nairobi this 7th day of February, 2020.

ONESMUS N. MAKAU

JUDGE