



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1642 OF 2014**

*(Formerly HCCC No. 339 of 2012)*

**Before Hon. Lady Justice Maureen Onyango**

**CHARLES MIRONGA NYAMWARO.....CLAIMANT**

**VERSUS**

**MAJOR JAMES LEAKONO.....1<sup>ST</sup> RESPONDENT**

**MINISTRY OF STATE FOR DEFENCE.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The claim herein was instituted vide the Plaint dated 9<sup>th</sup> July, 2012 and filed in Court on 10<sup>th</sup> July, 2012. The claimant was employed by the 2<sup>nd</sup> Respondent in the month of April, 1980 as a Private Soldier and rose through the ranks to the position of Sergeant.

The Claimant avers that he performed his duties diligently and to the Respondent's satisfaction until on or about 24<sup>th</sup> January, 2009 when the 1<sup>st</sup> Respondent alleged that 200 Litres of fuel belonging to the Commander Reserve (Isiolo) had been stolen and hidden behind the Petroleum Oils and Lubricant stores which the claimant alleges is under 24 hour surveillance.

The Claimant states that the 1<sup>st</sup> Respondent suspected him but that upon investigations confirmed that the Claimant had the correct quantity of fuel as indicated in voucher No. 42. He further averred that following this incident on 24<sup>th</sup> January, 2009 he was wrongfully and unlawfully arrested and confined for 4 days before being charged with an attempt to steal fuel and thereafter summarily demoted and discharged in the month of August, 2009 on the basis that his services were no longer required.

The Claimant averred that he was not accorded a fair chance to defend himself on the allegations levelled against him when he appeared before the Commanding Officer, Lt. COL. Lokia (18914) and that his request to have the matter referred to the Court martial was declined.

Aggrieved by the decision to demote him and terminate his services, the Claimant filed the instant suit seeking the following reliefs:

a) Kenya Shillings Two Million Eight Hundred and Eighty Five Thousand One Hundred and One Only (Kshs.2,885,101) comprising of the following:

i. 57 months he would have worked till retirement at the rank of a sergeant at Kshs.44,972 totalling to Kshs.2,563,404.

ii. Lumpsum payment at the rank of a sergeant Kshs.1,623,304.80

Was paid lumpsum at the rank of corporal Kshs.1,305,667

Difference Kshs.317,636

iii. Monthly pension at the rank of sergeant totalling to Kshs.20,291

Monthly pension at the rank of a corporal totalling to Kshs.16,320

b) General damages

c) Any other relief as this Court may deem just and expedient to grant.

The Respondents filed their Statement of Defence on 7<sup>th</sup> August, 2012. In the defence they aver that the Claimant was discharged from service following an attempt to steal and conceal theft of 200 Litres of fuel.

The Respondents maintained that the Claimant's discharge was lawful and procedural as his actions amounted to gross misconduct. They further aver that there was no malice on as alleged by the Claimant.

The Respondents urged this Court to dismiss the Claim as it is devoid of merit.

### **Evidence**

This matter was heard on 11<sup>th</sup> February 2019, 29<sup>th</sup> May 2019, 8<sup>th</sup> July 2019 and 9<sup>th</sup> October 2019 with the Claimant testifying on his behalf and the Respondent calling three (3) witnesses to testify on its behalf.

### **Claimant's Case.**

In his evidence in chief the Claimant adopted his witness statement dated 9<sup>th</sup> July 2012 in which reiterated the averments in his Plaint. He further relied on the list of documents filed on the same date as exhibits in this matter.

On cross examination the claimant testified that there were cases of theft of fuel but maintained that he was a transparent officer and that he was not involved in the theft. He further stated that he was not given an opportunity to defend himself and maintained made no defence to the charges of theft levelled against him.

The claimant stated that he was demoted from sergeant to corporal at the time of his discharge and that he had been paid all his dues based on the rank of corporal. He however maintained that his dues were underpaid.

On re-examination the claimant stated that he was never demoted at any point during the subsistence of his service and that the decision was made by Lt. COL Lokia. He further maintained that he should have been discharged at the rank of sergeant.

The claimant stated that he was carrying 1600 Litres of fuel that he was allowed to carry as reflected in Exhibit No. 2. He further maintained that the investigations in this matter were to be conducted by the Military Police which was not done.

### **Respondent's Case**

RW1, MAJOR YIAPAN adopted his witness statement dated 8<sup>th</sup> February 2013 as his evidence in chief. In the statement he states that on 24<sup>th</sup> January 2009 at around 9.30 am while at the officer's mess with Major Leakono and other colleagues, Major Leakono signed form 7110 authorising withdrawal of 1,600 litres of fuel to the School of Artillery. RW1 was requested by Major Leakono to go with Sergeant Onderi, the petroleum oils and lubricants officer, to confirm that there were 8 drums of diesel in the truck parked at the entrance of the mess. He counted 9 drums and asked Sergeant Onderi about the discrepancy, who explained that the 9<sup>th</sup> drum contained petrol and that Major Leakono was aware about it.

He states that when he reported to Major Leakono about it, he said he was not aware and called the main gate to stop the vehicle with the fuel from leaving the compound. Major Yiapan then called Sergeant Onderi to report to the officer's mess but he delayed causing RW1 to call him again. When Sergeant Onderi finally arrived at the mess, he was unable to explain to Major Leakono why he had released the petrol without 7110 form.

That when the claimant came back the mess there were only 8 drums in the truck. When asked where the 9<sup>th</sup> drum was he denied any knowledge of the same. Upon searching the stores and soundings, the 9<sup>th</sup> drum of 200 litres of diesel was found hidden in the bushes.

The military police were called to take over the matter and while waiting for them to arrive, the claimant confessed that the 200 litres of diesel was to cover a deficit he had at the Scholl of Artillery stores which Sergeant Onderi was helping to bail him out of. RW1 further stated that the military police conducted investigations on the alleged loss of fuel which involved 2 officers, Retired Sergeant Onderi and the Claimant.

RW1 testified that he participated in the recording of statements for the military police and that a trial was conducted where he appeared as a witness.

RW1 further testified that following conclusion of the trial it was decided that the Claimant be demoted from the rank of Sergeant to Corporal and further that he be discharged on grounds that his services were no longer required.

On cross examination RW1 confirmed that the Claimant's dues were paid to him based on the rank of corporal. He further confirmed that

Major Lokia carried out investigations in the matter, heard the case and subsequently awarded punishment under his authority as Army Commander.

On re-examination RW1 stated that the drums approved were 8 but what was loaded was 9 drums.

RW2, MAJOR EMMANUEL MAKOKHA WANDERA, Staff Officer II Records of the 2<sup>nd</sup> Respondent's headquarters testified that the claimant was charged with theft. That due process was followed and he was found guilty. He was sentenced to a severe reprimand on the 1<sup>st</sup> charge and demotion from Sergeant to Corporal on the 2<sup>nd</sup> charge. That the appropriate superior authority recommended that the claimant be discharged from service under "SERVICE NO LONGER REQUIRED" (SNLR) subject to Arm Commander's approval.

He testified that there were investigation as demonstrated by documents filed in court at exhibit 5 of the respondent's bundle, the investigation report at exhibit 6 and action taken by military police at exhibit 7.

RW2 explained that SNLR is not a dismissal but means the officer is not fit to work under the law. He testified that the discharge gave the claimant's current rank (then) so that he could get employment elsewhere.

He testified that the claimant was paid his terminal benefits together with computed mileage for transport upon discharge.

On cross examination RW2 stated that the Claimant pleaded guilty to the charges as is evident in Exhibit 3 of the Defense bundle. He further stated that the Claimant was paid all his terminal dues at the time of separation which was based on the rank of corporal in accordance with Part II of the Orders.

He further testified that the termination of the services of the claimant was procedural and that due process was followed. He confirmed that the Claimant was issued with a testimonial on exit that indicated his last position as corporal.

RW3, COL. JAMES LEAKONO adopted his witness statement dated 8<sup>th</sup> February 2013 as his evidence in chief in which he reiterated the circumstances leading to the Claimant's demotion and exit from the military as pleaded in the Defense.

He further testified that the Claimant admitted having the extra drum of fuel with the authority of Sergeant Onderi for purposes of offsetting the deficit in his account. RW3 further testified that the extra drum was found hidden in the bush and taken as evidence. He further testified that the Claimant was accorded a fair hearing.

He further testified that the commander upheld the award and that the Claimant was discharged from service at the rank of corporal. He maintained that the Claimant was discharged and not dismissed and that the same was in accordance with Section 82(4) of the Armed Forces Act.

On cross examination RW3 confirmed that the attempted theft by the Claimant was investigated by the Military police and that due process was followed.

### **Submissions by the Claimant**

The Claimant in his submissions maintained that the termination of his employment was illegal and irregular as the allegations of theft of 200 litres of fuel was not investigated by the Military Police as required and instead was conducted by Major Leakono and Lieutenant Yiapan.

The Claimant further submitted that the termination was unlawful as the Respondent failed to comply with the mandatory provisions of Section 41 and 45 of the Employment Act. The Claimant relied on the cases of **Gilbert Mariera Makori v Equity Bank Limited (2016) eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where the Courts held that failure to comply with the mandatory requirements of Section 41 of the Employment Act, 2007 would render a termination unlawful and unfair.

The Claimant urged the Court to find that his termination was unfair and award him 12 months' compensation totalling to Kshs.539,664 as damages for unfair termination.

The Claimant maintained that even if this Court was to find his termination lawful, he would still be entitled to payment of his benefits for the remainder of his term and at the rank of Sergeant as pleaded in his Pleint. He therefore urged this Court to allow his Pleint in terms of the reliefs sought therein.

### **Respondent's Submissions**

On its part the Respondent submitted that the Claimant's discharge from the Kenya Defence Forces was fair, legal and procedural. It is further the Respondents submission that the Claimant was tried through summary process in compliance with the provisions of Section 78(1) (a) and 80 of the Armed Forces Act, 1968.

The Respondent further submitted that the Claimant affirmed that he would accept the verdict of the summary trial process and he did not state that he wished to be tried by a Court Martial and therefore he is bound by the outcome of the final. The Respondent relied on the Court of Appeal decision in the case of **Republic v Chief of General Staff & Another (2017) eKLR** where it was held that:

*"It is therefore our finding as did the learned judge that the appellant voluntarily submitted himself to the summary proceedings he*

was subjected to, and, second, that the commanding officer who conducted those proceedings was the appellant's own commanding officer.”

The Respondent further submitted that the sentence of reduction in rank from sergeant to corporal was lawful by dint of Section 82(4)(a)(ii) of the Armed Forces Act.

It is further the Respondent's submission that the recommendation for discharge from service is similarly provided for under Section 176(g) of the Armed Forces Act. For emphasis the Respondents relied on the case of **Gift Kambu Marandu v Kenya Defence Forces & Another (2017) eKLR**.

The Respondent further submitted that the Claimant is not entitled to the reliefs sought in his Complaint having been legally and procedurally discharged from service.

In conclusion the Respondents urged this Court to dismiss the Complaint in its entirety with costs to the Respondent.

### **Analysis and Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited, the issues for determination are: -

1. Whether the Plaintiff's discharge from the Kenya Defence Forces was procedurally and substantively valid.
2. Whether the Plaintiff is entitled to the reliefs sought.

Both the Claimant and the Respondent filed lengthy submissions on the first issue with the Claimant maintaining that his termination was unlawful and unfair as the Respondent failed to comply with the Provisions of Section 41 and 45 of Employment Act, 2007. The claimant urged this Court to award him 12 months' compensation for unfair termination as general damages.

The Respondent on the other hand maintained that the Claimant's discharge was procedural and lawful maintaining that the same was undertaken in accordance with the provisions of Sections 78(1)(a) and 80 of the Armed Forces Act, 1968.

It is worthy to note that despite raising the issue of his termination in his written submissions the Claimant did not raise the same in his

Complaint in which he only prayed for Kshs.2,885,100, general damages, interest on (a) and (b) and any other relief as this Honorable Court may deem just and expedient to grant,

It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

*“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”*

*“...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”*

Further, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another v IEBC & 2 others (2017) eKLR** found and held as follows in respect to the essence of pleadings in an election petition: -

*“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”*

The Claimant having not raised any issue on the process of his discharge in his pleadings, he cannot raise the same in his submissions. Further, the Employment Act, 2007 does not apply to the Claimant being a former member of the Armed forces by dint of Section 3(2) of the Employment Act which provides as follows:-

**(2) This Act shall not apply to—**

- a. the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap. 199);
- b. the Kenya Police, the Kenya Prisons Service or the Administration Police Force;
- c. the National Youth Service; and
- d. an employer and the employer's dependants where the dependants are the only employees in a family undertaking.

**Whether the Claimant is entitled to the reliefs sought**

The Claimant seeks the following reliefs in his Plaint:

- a) 57 months he would have worked until retirement at the rank of a sergeant totalling to Kshs.2,563,404

I find that the Claimant is not entitled to this relief as awarding the same would amount to unjust enrichment by the Claimant. Further, the prayer is speculative as it relates to future earnings. In the case of **D. K Njagi Marete v Teachers Service Commission – Industrial Cause No 379 Of 2009** Rika J. held:

*“What remedies are available to the Claimant “This Court has*

*advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”*

- b) Lump sum pension and monthly pension arrears

At paragraphs 12, 13 and 14 of the plaint, the claimant pleads as follows –

*12. That the Plaintiff was aggrieved by the verdict of the LT COL LOKIA (18914 ) COMDT SO ARTTY and requested for the matter to be referred to the court martial however the said request was declined.*

*13. The LT COL LOKIA ( 18914 ) COMDT SO ARTTY's verdict was referred to the Army Commander who reviewed the same on his own initiative and recommended that the plaintiff be relieved of his services at the rank of a sergeant.*

*14. The recommendation by the Army Commander was violated by the said LT COL LOKIA ( 18914 ) COMDT SO ARTTY by altering the certificate of service and relieving the Plaintiff's services at the rank of a corporal at the age of 47 years (August 2009 ) whereas he was supposed to retire at the age of 52 years (May 2014) and his benefits were pegged on that rank.”*

The claimant's averment that he requested to be tried by Courts Martial but the request declined is not true. At page 3 of the respondent's bundle, the claimant did not opt for trial by Court Martial. In response to the Question: Will you accept my award or do you elect to be tried by Court Martial? The claimant responded: Yes, I accept.

However, at the same document, that is page 3 of the respondent's bundle, the sentence for the second charge is as follows:

- demoted BDR
- To be discharged from the AF (Armed Forces) under SNLR subject to Army Commander's Approval.

The claimant was thus demoted and discharged under SNLR for the same charge.

Section 81(4), (5), (6), (7) and (8) of the Armed Forces Act (repealed) provides as follows –

**(4) Where the appropriate superior authority deals with a charge summarily and records a finding of guilty, the punishments which he may award are, subject to the limitations hereinafter provided, those set out in the following scale-**

- (a) forfeiture of up to twelve months seniority of rank and the prescribed manner;
- (b) a fine not exceeding one month's pay;
- (c) severe reprimand;
- (d) reprimand;
- (e) admonition;

(f) where the offence has occasioned any expense, loss or damage, stoppages.

(5) Where the commanding officer or the appropriate superior authority deals with a charge summarily and considers that the accused is guilty, then, if he intends to award a punishment of forfeiture of seniority of rank, a fine or stoppages-

(a) a finding shall not be recorded until the accused has been afforded the opportunity of choosing to be tried by court martial; and

(b) if the accused chooses to be tried by court martial, a finding shall not be recorded but the prescribed steps shall be taken with a view to the charge being tried by court martial.

(6) Except where expressly provided by this Act, not more than one punishment shall be awarded under this section for one offence.

(7) Stoppages may be awarded either in addition to or without any other punishment.

(8) A severe reprimand or a reprimand may be awarded in addition to forfeiture of seniority of rank or a fine.

Section 178 provides for the right of discharge upon reduction of rank as follows –

**178. Right to discharge on reduction to ranks**

**A warrant officer who is reduced to the rank of private or corresponding rank may thereupon claim to be discharged, except during a state of war, insurrection, hostilities or public emergency or at a time when he is on active service.**

In the present case, the claimant did not apply for the discharge under Section 178. The discharge was a consequence of the charges against him and came as part of the punishment.

Under Section 81(6), the meting out of both the demotion and the discharge was unlawful.

In view of the fact that the claimant left service immediately after the verdict, I will set aside the demotion so that the punishment for the 2<sup>nd</sup> charge will be a discharge from the service. This is in line with Section 176 which provides for discharge for among other grounds, conviction of a civil offence and SNLR.

For the foregoing reason, the claimant is entitled to a recalculation of his terminal dues based on his last salary as a Sergeant. In view of the fact that the respondents did not confirm or deny the calculations, I will order that the claimant be paid both lump sum and monthly pension as claimed in the sum of **Kshs.317,636** for lump sum and the difference of Kshs.3,970 per month for the difference in monthly pension or as recalculated based on his last salary as Sergeant. The difference between the two should be tabulated and paid to him up to the date of the adjustment of the monthly pension.

The prayer for general damages is rejected.

In view of the fact that the claimant's discharge was in accordance with the law save for the punishment as set out above, there shall be no orders for costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**