



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1516 OF 2013

EX SSGT GREGORY GITIJE MBERIA

CLAIMANT

V

HON. ATTORNEY GENERAL

1ST RESPONDENT

SERVICE COMMANDER, KENYA ARMY

2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF DEFENCE

3RD RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF DEFENCE

4TH RESPONDENT

PUBLIC SERVICE COMMISSION

5th RESPONDENT

JUDGMENT

1. Ex SSGT Gregory Gitije Mberia (Claimant) was enlisted into the Kenya Army in 1981 and by 2006, he had risen to the rank of Senior Sergeant.
2. The Claimant at the material time served as Pay Clerk under a Paymaster called Captain Too.
3. Sometime in 2004 while on pass (leave), the Claimant was summoned back to work.
4. On reporting back, on 12 June 2004 the Claimant's Commanding Officer ordered him to take over the office of Paymaster because the substantive office holder, Captain Too had disappeared.
5. The Claimant was instructed to prepare a financial report on the state of Kabete barracks.
6. Since the substantive office holder had disappeared, there was no handover to the Claimant as required.
7. In the role of Paymaster, the Claimant performed his duties and established that the books did not balance.
8. In 2006, the Claimant was arrested and arraigned before a Court Martial charged with offences of committing an *act to the prejudice of good order and service, stealing public property and committing a civil offence* (fraudulent false accounting).
9. On 4 August 2006, upon conclusion of the Court Martial, the Claimant was convicted of the 4 charges he was facing.
10. As a consequence, the Claimant was sentenced to prison and also dismissed from the Armed Forces but upon Appeal, the High Court set aside the conviction and sentence on 20 September 2007 (Criminal Appeal No. 7 of 2006).
11. On 1 November 2007, the Claimant appealed to the Army Commander seeking that his dismissal be substituted with normal discharge but in a reply dated 27 February 2008, the 2nd Respondent stated that the appeal lacked foundation as there was no law providing for substitution of a dismissal with normal discharge (the Claimant made further appeals which were declined).
12. The Claimant also addressed letters to other institutions such as the office of the Ombudsman, seeking their intervention.

13. On 19 September 2013, the Claimant instituted the instant proceedings against the Respondents alleging malicious prosecution. He contended that the Court Martial charges were actuated by negligence, malice and without reasonable cause, and that because the High Court set aside the conviction by the Court Martial, his dismissal was wrongful and unfair, and therefore he should have been discharged honourably with full benefits.

14. The Claimant also alleged discrimination for which he sought damages.

15. The Respondents through the 1st Respondent filed a *Memorandum of Response* on 16 October 2013, and on 29 October 2013, the Claimant filed a *Reply to the Memorandum of Response*.

16. On 21 October 2015, the Claimant filed an *Amended Statement of Claim*.

17. The parties filed witness statements and documents.

18. On 25 April 2018, the Deputy Registrar scheduled the Cause for hearing on 14 June 2018 but on 13 June 2018, the Respondents filed an application seeking to amend the Memorandum of Response.

19. When the Cause came up for hearing on the scheduled date, and in consideration of its age, the Court directed that any amendments be presented orally in the course of hearing.

20. The Cause was heard on 14 June 2018, 23 July 2018 and 20 November 2018. The Claimant and a Staff Records Officer with the 2nd Respondent testified.

21. The Claimant filed his submissions on 4 December 2018 while the Respondents filed their submissions on 21 January 2019.

22. The Court has considered the pleadings, evidence and submissions and come to the view that only 4 substantive issues arise for determination. These are limitation, whether prosecution of the Claimant was malicious, whether the Claimant established discrimination and the effect of the High Court order quashing and setting aside the conviction and sentence of the Court Martial. **Limitation**

23. The Respondents contended in the Memorandum of Response that the cause(s) advanced by the Claimant were statute time barred, and reference was made to section 3(1) & (2) of the Public Authorities Limitation Act and section 90 of the Employment Act, 2007.

24. The Respondents also drew the attention of the Court to *Nthiga Njiru & Ors v Kangaita Tea Factory & Ors* (2018) eKLR and *Peter Ngari Kagume & Ors v the Hon Attorney General* (2016) eKLR.

Employment Act, 2007

25. In terms of section 3(2)(a) of the Employment Act, 2007 does not apply to the Armed Forces. The limitation proviso thereof does not apply in the present case.

26. Further, section 90 of the Employment Act, 2007 relates to civil action arising out of the Act or actions based on *contracts of service in general* and in the view of the Court, service members/officers of the Kenya Defence Forces do not serve on *contracts of service*.

Public Authorities Limitation Act

27. The Claimant has anchored his cause on the decision of the High Court rendered on 4 August 2006. He moved the Court 19 September 2013, some 7 years after the decision of the High Court.

28. In the view of the Court therefore, the primary statutory framework for determination of the question of limitation is not the *Public Authorities Limitation Act* but rather the *Limitation of Actions Act*.

29. In terms of section 4(4) the Limitation of Actions Act, the Claimant had 12 years within which to institute legal proceedings and he was well within the prescribed time.

Malicious prosecution

30. Although alleging malicious prosecution, the Claimant did not satisfy the test required to show malicious prosecution. The elements of showing malicious prosecution are well known.

31. The Claimant was expected to demonstrate that the prosecution was instituted by Respondents (there is no dispute as to this); that the prosecution terminated in the plaintiffs' favour (there is also no dispute as to this); that the prosecution was instituted without reasonable and probable cause that it was actuated by malice. (See *Kagane & Ors v Attorney General* (1960) EA 643).

32. The Claimant admitted that he served as a Paymaster at some point when some entries in cashbooks/accountable documents were made. Previously he had served as a Pay Clerk in the same department.

33. In the view of the Court, it cannot be said that there was no reasonable cause for the prosecution.

34. On the question of malice, the Claimant did not satisfy the Court that any officer of the Respondents were actuated by malice.

Discrimination

35. The Claimant did not lead any evidence to demonstrate discrimination or clearly set out the grounds and particulars of discrimination.

Impact of the judgment of the High Court on the Claimant's dismissal

36. The *Amended Statement of Claim*, in the view of the Court was verbose to the core but the fulcrum upon which the cause rotates is the legal effect of the setting aside/quashing of the conviction and sentence of the Court Martial by the High Court on Appeal.

37. Unlike ordinary employment where an employer is expected to give notice of termination of employment and conduct a hearing, separation for servicemen under the Armed Forces Act can be on account of a Court Martial process or after colour service completion.

38. Some of the sanctions or penalties provided for in section 103 of the Armed Forces Act (Kenya Defence Forces Act) after a trial by a Court Martial for servicemen were *death, imprisonment, dismissal, reduction or forfeiture in rank, imprisonment, fine and severe reprimand among other penalties*.

39. It appears to the Court from an examination of the Armed Forces Act that apart from *completion of colour service*, the other involuntary principal route through which a serviceman or officer may be removed from service is through a Court Martial process. The Court Martial in such instant serves the role which can be equated to disciplinary tribunal.

40. In the view of the Court therefore, the determination of the gravamen of the Claimant's case herein turns on the legal impact of the High Court judgment on appeal from the decision of the Court Martial.

41. The Claimant was taken through a legal process in terms of the law governing the Armed Forces at the material time. The Claimant was convicted and sentenced. Part of the sentence was dismissal from service.

42. The Claimant challenged the conviction and sentence by the Court Martial. The High Court set aside and quashed the conviction and sentence.

43. Considering that dismissal from service was part of the sentence/sanction meted out by the Court Martial sitting as a disciplinary tribunal, and that the High Court not only set aside the conviction but the sentences on all charges, it is only logical that the dismissal of the Claimant automatically stood set aside as they became null and void in law. It was as if the conviction and sentence never were *ipso facto*.

44. The proposition by the Respondents therefore that they could not reinstate the Claimant unless on an express court order is therefore not a valid legal proposition.

Appropriate remedies

45. The Claimant sought several declarations, damages and orders.

46. It is not every day that practitioners and the Courts are confronted with litigation relating to servicemen and what should be appropriate remedies where a finding is reached that the separation was not lawful.

47. It is not surprising therefore that most of the remedies sought are the typical unfair termination of employment remedies.

48. The Court may not take refuge in the remedies set out in the Employment Act, 2007 for obvious reasons, least of which include the fact that servicemen are not on *contracts of service*, and that the Armed Forces Act (read Kenya Defence Forces Act) is a near complete Code on terms and conditions of service for servicemen and officers.

49. In the considered view of the Court, and in consideration of the time lapse since the dismissal of the Claimant and the provisions on separation set out in the Armed Forces Act (read Kenya Defence Forces Act), in lieu of the reliefs sought, the most appropriate remedy and which remedy would vindicate his rights and entitlements is one which would convert the dismissal into normal discharge with payment of full benefits from 4 August 2006.

Orders

50. The Court finds and holds that the conviction and sentence of dismissal of the Claimant having been set aside and quashed by the High Court, the said dismissal became a nullity.

51. The Court converts the said dismissal for purposes of benefits into honourable discharge with full benefits from 4 August 2006.

52. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 8th day of February 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Burugu instructed by Obura Mbeche & Co. Advocates

For 1st & 5th Respondents Mr. Munene, State Counsel, Office of the Attorney General

For 2nd – 4th Respondents Mr. Wanyoike instructed by

Court Assistant Lindsey