



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC PETITION NO. 20 OF 2016.

(Before Hon. Justice Mathews N. Nduma)

MAURICE OTIENO ODUOR.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. The petition was filed on 12th July 2016 by the petitioner Maurice Otieno Oduor seeking the following reliefs:

(i) THAT this Honourable Court declares that the Petitioner's freedom from discrimination and equality as enshrined in *Article 27 of the Constitution* and the right to dignity as provided under *Article 28* has been infringed and/or violated by the Respondent.

(ii) THAT this Honourable court declares that the petitioner has been subjected to psychological torture, unfairly punished and treated in a cruel and inhuman manner, further his rights to fair Labour practice, legitimate expectation to fair administrative action, and right to fair hearing has been infringed upon in violation of *Article 29, 41, 47 and 50 of the constitution of Kenya 2010*.

(iii) THAT an order of certiorari do issue quashing the letter dated 17th July 2014 [Ref KA/14401/PERS/RECS] discharging/dismissing the petitioner from service and/or any other decision made in that regard.

(iv) THAT an order of reasonable compensation be made to the Petitioner for violation of his rights and fundamental freedoms. The compensation to be paid by the Respondent for an amount to be determined by this Honourable Court.

(v) THAT the Honourable Court declares that the petitioner is entitled to his full salary for the remaining term of service and service benefits and service gratuity for the entire period worked [33 years] and he be issued with a certificate of service.

(vi) THAT this Honourable Court makes such other or further orders as it shall deem fit and just to grant.

(vii) THAT the costs of this Petition be borne by the Respondent.

2. The petition is based on the following summarized facts:-

3. The petitioner was recruited to the Kenya Army in the year 1980. He served the Army for 33 years and 58 days. He was on 6th June 2014 charged with three offences before his Commanding Officer to wit:-

Charge 1.

4. An act to the prejudice of good order and service discipline contrary to Section 121 of the KDF Act 2012. In that the accused at Syndicate estate Gilgil on 24th May 2014 at about 1000 hours was found with four (4) gas cylinders in his private residence which he stole from the QM stores 66 Art. BW an act he knew or ought to have known constitutes an offence.

Charge 2.

5. An act to the prejudice of good order and service discipline contrary to Section 121 of the KDF Act 2012- in that the accused at Syndicate estate Gilgil on 24th May 2014 about 1000 hours was found with stolen military Kit and stores at his private residence, an act he knew or ought to have known constitutes an offence.

Charge 3.

6. Disobedience to standing orders contrary to Section 77(1) of the KDF Act 2012 in that the accused was found keeping assorted military uniform in his private residence contrary to the KA Letter ref no. KA/2058/pers dated 16th January 2014 an act he knew or ought to have known constitutes an offence.

7. The petitioner states that even though the petitioner submitted himself before his commanding officer for summary trial his rights to a fair hearing were violated in that Section 153 of the KDF Act provides:

“A person shall not have a charge dealt with summarily for an offence under this Act, other than an offence under Sections 72, 73 or 74(1) (A) unless the trial began within three years after commission of the subject to subsection (2) and (3)”

8. That the petitioner was summarily tried for offence Under *Sections 77(1) and (2) of KDF Act 2012* which were not one of the offences to be dealt with in a summary manner as provided under *Sections 153 of the KDF Act 2012*.

9. That therefore the prosecution was wholly illegal and ought to be vitiated and set aside.

10. That the petitioner Appealed against the dismissal to the Army Commander through the Brigade Commander, Artillery Brigade and vide a letter dated 28th January 2015 but did not get a reply declining to review the decision to dismiss him from service.

11. That the petitioner's right under *Article 27 of the constitution of Kenya 2010* to be treated equally before the law and equal protection and equal benefit of the law was disregarded. This action of disregard amounted to discrimination.

12. That the trial was an illegitimate kangaroo process unknown to the law which culminated to the summary dismissal and denial of terminal benefits earned over a period of 33 years of service. This robbed the petitioner of dignity under *Article 28 of the constitution of Kenya 2010*.

13. The petitioner as a result of the summary dismissal and denial of pension has been subjected to psychological torture, unfairly punished and treated in a cruel, inhuman and degrading manner contrary to *Article 29 of the constitution 2010*.

14. That the dismissal be declared unlawful, unfair labour practice and therefore a nullity and the reliefs sought by the petitioner be granted.

Response

15. The respondent was granted leave to file replying affidavit to the petition by the court and proceeded to file the same on 2nd October 2018.

16. Major D.A Apondi deposed to the replying affidavit in which he states that he was a state officer in charge of records at the Kenya Defence Headquarters in Nairobi.

17. The particulars of employment of the petitioner are admitted and not in dispute.

18. The particulars of the charges and summary trial of the petitioner before he commanding officer on 6th June 2014 are not placed in any dispute. The respondent confirms that the charges were under *section 77(1) and 121 of the KDF Act 2012*.

19. The respondent denies that the petitioner appealed against the decision of the commanding officer to dismiss him as alleged or at all.

20. The respondent states that the offences committed by the petitioner are grave and amount to serious misconduct and posed a risk to the security of the nation which the petitioner swore to uphold. That the punishment meted on the petitioner was just and legal in the circumstances.

21. That the process followed was lawful and fair and did not violate the constitutional provisions cited or at all nor did it violate *Section 153 of the KDF Act, 2012* or any other applicable statute or regulation.

22. That the procedure followed by KDF is robust, progressive and is fair in every respect as the record of the proceedings attached to the replying affidavit depicts. That the petitioner was asked to plead to the charges. That the petitioner pleaded guilty to counts 2 and 3 as charged and asked for forgiveness. That the petitioner pleaded not guilty to count 1 as charged. That two witnesses were called who testified before the Commanding Officer in the presence of the petitioner. The petitioner was given opportunity to cross examine the witnesses. That it was proved that the petitioner was guilty of count one, also in that he had stolen three(3) gas cylinders, the property of KDF and that the same were recovered in his private residence pursuant to a lawful raid conducted by KDF in his house.

23. That the petition be dismissed for lack of merit.

Determination

24. The issues for determination are as follows:-

(i) Did the summary trial violate *Section 153 of the KDF Act, 2012*?

(ii) Did the respondent violate Articles 27, 28, 29, 41, 47 and 50 of the constitution of Kenya 2010 in respect of the petitioner?

(iii) Is the petitioner entitled to the reliefs sought?

Issue i

25. A plain reading of *Section 153 of the KDF Act, 2012*, as set out in the judgment shows that persons charged under *Sections 77(1) and 121 of KDF Act, 2012* may upon submitting themselves to the process before the commanding officer, be summarily tried.

26. The petitioner and his advocate in their submissions misconstrued the provisions of *Section 153 of the KDF Act*. The provision simply means that:

(i) Persons may be summarily tried if charged with offences under *Sections 72, 73, or 74(1) (A)* even after expiry of three years from the date the offence was committed.

(ii) In respect of charges pursuant to other provisions not mentioned under *Section 153, including Sections 77(1) and 121* under which the petitioner was charged, shall be tried within three years from the date the offence was committed.

27. In the case of the petitioner, the offences were committed on 24th May 2014, the day the raid to the petitioner's private residence was conducted and he was found in possession of stolen property from the military namely, four (4) gas cylinders, military kit and stores and assorted military uniform.

28. The record of proceedings shows clearly that the claimant was given the option to be tried summarily or elect to be tried by court martial and he elected to be tried summarily.

29. The court finds that the respondent did not violate *Section 153 of the KDF Act 2012* in any manner.

Issue ii

30. With regard to the submissions by the petitioner that his constitutional rights under *Article, 27, 29, 41, 47 and 50* were violated, there is no evidence adduced by the petitioner to demonstrate that any of the alleged violations occurred. The petitioner freely and voluntarily submitted himself to a summary trial before his commanding officer and as provided under the *KDF Act*. The petitioner opted not to be represented by someone else during the trial and the summary trial proceeded.

31. The proceedings depict an open and fair process that involved the petitioner pleading guilty to counts 1 and 2 as charged and offered mitigation. The petitioner pleaded not guilty to count 1 being theft of four (4) gas cylinders. Testimony was adduced by two witnesses who were then subjected to cross examination by the petitioner. The commanding officer then reached a verdict of guilty as charged on all the three counts and recommended dismissal of the petitioner.

32. It is the court's considered decision that the petitioner has failed to prove on a balance of probabilities as provided under *Sections 107 and 108 of the evidence Act, Cap 80 laws of Kenya*, that his constitutional rights were violated by the respondent as alleged or at all.

33. To the contrary the respondent provided lucid and credible evidence that rebutted sufficiently the testimony on affidavit adduced by the petitioner. The petition does not succeed on the merits to this extent.

Issue iii

34. Having found that the petition lacked merit regarding alleged statutory and constitutional provisions, the court is concerned, and has expressed itself in the past while dealing with similar matters to do with public servants who are summarily dismissed being denied pension, as in the case of the petitioner. Pension earned and accumulated by the employee over a period of 33 years and 58 days, a period in which the petitioner provided unblemished service to the nation. The petitioner has urged the court to find that the respondent violated his right to dignity contrary to *Article 28 of the constitution* by dismissing him after serving the nation diligently for a period of 33 years and 58 days without a penny.

35. I have grappled with the matter in several cases and I am of the considered opinion and finding that a statutory provision or subsidiary legislation dealing with terminal benefits and pensions which purport to retroactively dispossess an employee pension funds that have been earned and accrued overtime, retrospectively on the basis of an offence committed years later and which is completely unrelated to the issue of pension does not meet the threshold of validity provided under *Article 24 of the constitution of Kenya 2010*.

36. I therefore find that denial of accumulated pension, retrogressively, is contrary to the principles of legality and subjects the petitioner and his family to poverty and indignity and therefore is in violation of *Article 28 of the constitution of Kenya 2010*.

37. Accordingly I uphold prayer 1 as set out in the petition and declare:-

(a) That the denial of terminal benefits/ pension accumulated by the petitioner over a period of 33 years and 58 days retrogressively

is a violation of the petitioner's right to dignity under *Article 28 of the constitution of Kenya 2010*.

(b) The court declare that the petitioner is entitled to payment of the pension dues accumulated over a period of 33 years and 58 days.

(c) The respondent is directed to initiate and complete relevant processes to allow the payment of pension to the petitioner in terms of the KDF pension provisions.

(d) Each party to bear the costs of the petition.

Judgment Dated, Signed and delivered this 14th day of March, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Olel for Petitioner

Mr. Felix Kioko, State Counsel for the Respondent

Chrispo: Court clerk