



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 668 OF 2014**

**ADAM ISILU MUTINDA.....CLAIMANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 22.4.2014 seeking compensatory damages, general exemplary damages and aggravated damages for breach of the Claimant's fundamental rights and freedoms as enshrined in section 70, 71 (1), 72(3) & (5), 74(1), 77(2) and 79(1) of the retired constitution of Kenya. It is the Claimant's case that he was arrested, tortured, forced to give incriminating evidence, charged, tried and sentenced to serve 12 years' imprisonment for alleged the crime of mutiny which sentence was later reduced to 3 years.

2. The Respondent filed his response on 20th June 2014 contending that the decisions by the Court Martial was not set aside by an appellate court and that the suit is time barred. He further denied the alleged violation of the claimants rights and averred that the court lacks jurisdiction to determine the suit. He then prayed for the suit to be dismissed with costs. The objection to the suit on ground of limitation period was, however, argued as a preliminary point on 17.2.2015 before Nduma J who dismissed it by his ruling delivered on 23.4.2015 where he held that violation of Human Rights and Fundamental Freedoms cannot be shielded from judicial adjudication, merely by passage of time.

3. The suit was heard on 5.3.2018 where the Claimant testified as Cw1 but the respondent called no witnesses despite several adjournments. After the hearing both parties filed written submissions.

**Claimant's evidence**

4. The Claimant testified that he was arrested for allegedly participating in the attempted coup of 1.8.1982. He was taken to Lang'ata Barracks and later to Kamiti Prison. While in the custody, he was tortured, wounded, stripped naked and paraded before the families of the Army officers, forced to lie on hot tarmac while naked, whipped with wire cords, denied food, slept on a lice infested mattress and denied proper medical care.

5. After serving his prison term, he was denied access to his residence in the military barracks and as such he lost all his personal belongings such as his photographs, certificates and his flying logbook such that as a flight officer he could not pursue a career as a pilot. He contended that he was arrested when he was 20 years old and he expected to retire at 55 years with a pension. He therefore prayed for the reliefs sought in his claim including compensation for violation of his human Rights during his arrest, trial and imprisonment and also for denial of his career progression. He confirmed that he was now 57 years old.

6. During cross examination, he conceded that he had trained for piloting for 6 months and was yet to become a pilot. He also conceded that he did not have documentary evidence to prove that he was tortured or that he had lost his items. He contended that some of his colleagues who had suffered a similar fate, had successfully sued the Respondent and that those who remained in the military have now scaled up.

7. He admitted that the Medical Report produced was made on 6th September 2006, 21 years after the alleged torture, but contended that he ought to have been examined before he was handed over to the prisons. He maintained that he was denied proper medical care and contended that he only received very scanty medication. He further denied being involved in any coup and relied on his certificate of Discharge to prove that he was detained for mutiny. He could not recall what was his pay was at the time of dismissal.

8. In re-examination, he admitted that he was not given any documents to show that he had been detained at Lang'ata Barracks and that he was never issued with a medical discharge form. He contended that no documents were adduced by the defence to show that he was given his belongings after the arrest and stated that personal belongings left in the Barracks, were to be kept until an officer returns. He contended that he suffered fractures of the clavicle bone and his eye sight affected as a result of the said torture and maintained that as an officer he was required to undergo medical examination before termination of his service. He concluded by contending that he was only given two tablets of Panadol for the fractured clavicle bone.

#### **Claimant's submissions**

9. The claimant submitted that under section 84 (2) of the retired constitution, the court has original jurisdiction to here and determine any question of violation of a right under the bill of rights and to make the necessary orders and directions for enforcing the provisions of section 70 to 83 of the said constitution. He further submitted that under section 49 (1) and (3) of the Employment Act subject to the factors provided under subsection (4) of thereof, the court has jurisdiction to award remedies for wrongful dismissal and unfair termination of employment. He also submitted that under Article 23 (3) of the current Constitution, the court has jurisdiction to grant appropriate reliefs in proceedings brought under Article 22 thereof, for violation of constitutional rights and fundamental freedoms.

10. He urged the court to award him reasonable compensation for violation of his constitutional rights and fundamental freedoms plus further Kshs.1,000,000 being general, exemplary and aggravated damages taking into account the circumstances of his case and the case law arising from former Kenya Air Force officers who brought similar cases. He relies on the case of **Samuel Chege Gitau & 283 Others vs. Attorney General [2016] eKLR** and **Peter M. Kariuki vs. Attorney General [2014] eKLR**.

#### **Respondent's submissions**

11. The respondent submitted that the claim herein is time barred by dint of section 90 of the Employment Act because it was filed more three years from the time when the cause of action arose. To fortify the said contention, the respondent relied on **Kenya Scientific Research International & Allied Workers Union vs TNS Research International Limited** (citation not given).

12. In addition, the respondent objected to the suit on grounds that the court lacks jurisdiction to determine the suit because the alleged violation of fundamental rights and freedoms did not arise out of employment relationship. He relied on **United States International University (USIU) vs Attorney General [2013] e KLR** where the court held that this court has jurisdiction to interpret the constitution and enforce fundamental rights and freedoms only in matters arising from employment and labour relations.

13. As regards the alleged violation of the claimant's fundamental rights and freedoms, the respondent submitted that no evidence including medical report was adduced to support the alleged torture and physical injuries. He further submitted that the claimant was tried and prosecuted before a Court martial by dint of the Kenya Armed Forces Act because he was a soldier and contended that all the rules and regulation were followed during the process. He therefore denied that the claimant was not denied his right to liberty, life and hearing under section 70,71,72 and 77 of the retired constitution and prayed for the suit to be dismissed with costs.

#### **Analysis and determination**

14. There is no dispute that on 1.8.1982, there was an attempted coup in Kenya and the Claimant was arrested, charged, sentenced and imprisoned for allegedly committing the crime of mutiny. The issues for determination therefore are:

- a. Whether the suit meets the competency threshold.
- b. Whether the Claimant's fundamental rights and freedoms were violated.
- c. Whether the Claimant is entitled to the reliefs sought.

#### **(a) Whether the suit meets the competency threshold.**

15. Competency of a suit is determined by jurisdiction, procedure and form of the pleading. The respondent has submitted that the court lacks jurisdiction because the dispute herein does not relate to an employment relationship. This court appreciates that enlisting of soldiers to the Kenya Defence Forces does not *per se* amount to a contract of employment in the strict sense contemplated by the Employment Act. It cannot however be completely lost that the soldier is engaged to offer services in return for some emoluments. I therefore hold that this court is the one best suited to determine any dispute that arise between the soldiers and their enlisting department of the state because the relationship is akin to that of employer – employee at common law. It is also clear from the precedents cited by the claimant that in the recent past this court has dealt with similar cases filed by officers of the Kenya Defence Forces and the National Police Service whose relations are not subject to the Employment Act.

16. As regards the issue of procedure, rule 7 (1) of the Employment and Labour Relations Court (Procedure ) Rules, 2016 provides that a suit for interpretation of the constitution be instituted by a Petition under the Constitution of Kenya (Protection of Rights and Fundamental freedoms and Enforcement of the constitution) Practice and Procedure Rules, 2012. However, this suit was filed in 2014 before the enactment of the said 2016 Rules of procedure for this court. I therefore find that the claimant was free to approach the court by a Memorandum of Claim since rules of procedure in place then were for the defunct tribunal, which lacked jurisdiction to interpret the constitution.

17. As regards the issue of form, the court held as follows in **Anarita Karimi Njeru –v-Republic [1979] eKLR**:

**“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”**

18. In this case, the claimant has pleaded the section of the retired constitution which he alleges to have been breached by the respondent. He has also pleaded the particulars of how the alleged breach was committed and the grounds upon which the suit is premised. Based on the said pleadings, the respondent was able to understand the complaint made and indeed pleaded his defence to each allegations made. I therefore find and hold that suit meets the competency threshold in both jurisdiction, procedure and form.

**(b)Whether the Claimant’s fundamental rights and freedoms were violated.**

19. The claimant’s evidence herein was not rebutted by the defence. He produced a Certificate of Discharge to prove that he was previously employed by the Kenya Air Forces. He testified how on 1st August 1982, he and other officers and several servicemen were rounded up for investigation following a botched coup in Kenya. That what followed thereafter was torture and all manner of inhuman treatment which forced him to make a confession which led him to be arraigned before a court martial and sentenced to imprisonment. The Respondent did not adduce any evidence to controvert the Claimant’s allegations of violation of his fundamental rights and freedoms as enshrined under section 72, 74 and 77 of the retired constitution. Consequently, I return that the Claimant has proved on a balance of probability that his rights and fundamental freedoms under the said provisions were violated.

20. Section 72 (1) of the retired Constitution of Kenya accorded individuals the right to liberty unless there was reasonable suspicion that one had committed, or was about to commit, a criminal offence under the law which were indeed the circumstances of this case. However, the same section states that one was supposed to be informed of the reason for the arrest and presented before Court as soon as reasonably practicable. In this case, the uncontroverted evidence is that the claimant was not arraigned in court immediately but for a long time he was taken through an ordeal of torture that forced him to sign a confession to the offence after which he was swiftly taken to a court martial and sentenced.

21. The certificate of Imprisonment produced by the claimant indicated that he was convicted on 24.9.1982, meaning that it took almost two months of torture before presenting the claimant to court. I therefore find that the claimant’s rights to liberty under section 72 (1) of the retired constitution was violated by the prolonged detention before being charged in court.

22. I also find that his fundamental freedom from torture, inhuman or degrading punishment or other treatment under section 74 (1) of the retired constitution was also violated. The Claimant testified that he was denied food, water and medical attention, stripped of his clothes and paraded naked and forced to lie on hot tarmac at the barracks, forced to sleep in a cold room and sometimes on lice infested mattresses and even subjected to solitary confinement, beaten and fractured his clavicle bone while in maximum prison and denied treatment. Such inhuman treatment was contrary to section 74(1) of the Constitution and it has not been denied by the Respondent by evidence.

23. Finally, the claimant’s right to fair hearing under section 77 (1) of the Repealed Constitution was also violated. The section provided that, if a person was charged with a criminal offence, they were to be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. It was the Claimant’s case that he was not afforded the right to counsel or the right of being heard on his defence. Instead he was only brought to a Court Martial for sentencing immediately he signed a confession. No evidence was adduced by the respondent to controvert that assertion and as such I find and hold that the claimant’s right to fair hearing under section 77(1) of the said Constitution was violated.

**(d) Remedies**

24. The Claimant has sought a declaration that his rights under the Armed Forces Act, the Kenya Defence Forces Act and the Repealed Constitution have been violated. He further prays for compensation by way of damages. Section 12 (3) of the ELRC Act permits this court to grant both reliefs. In view of the findings made herein above I make declaration that the claimant’s fundamental rights and freedoms under section 72, 74(1) and 77 of the retired constitution of Kenya were violated by the Kenya Army and Prison Officers of the Government of Kenya from 1.8.1982 till 2. 9.1985. I further make declaration that the claimant is entitled to payment of compensation of damages for the violation of his fundamental rights and individual freedoms under the said retired constitution of Kenya.

25. Considering the gravity and the multiplicity of the violations, the cited precedents and inflation factors from the date of the violations, I award the claimant Kshs.10,000,000. The said compensation may not be adequate for the ordeal suffered by the claimant and the lost opportunities in military career but it is reasonably sufficient. I therefore will not award him any further damages.

26. As regards the alleged violation of his rights under the Armed Forces Act and the Kenya Defence Forces Act, I eschew from making any findings thereon since the Claimant never substantiated the alleged violation and the specific sections of the Acts that were violated and how his rights under those Acts were violated.

**Conclusion and disposition**

27. I have found that suit herein meets the competence threshold for a constitutional reference as enunciated by in **Anarita Karimi Njeru –v-Republic [1979] eKLR**. I have further found that the claimant’s fundamental Rights and Freedoms guaranteed by section 72(1), 74(1) and 77(1) of the retired constitution of Kenya were violated from 1.8.1982 to 2.9.1985 and awarded the claimant Kshs.10,00,000 as

compensation for the said violations. Consequently, I enter judgement for the claimant in the sum of Kshs.10,000,000 plus costs and interest at court rates from the date hereof.

**Dated, Signed and Delivered in Open Court at Nairobi this 12th day of July 2019.**

**ONESMUS MAKAU**

**JUDGE**