



**REPUBLIC OF KENYA**

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

**PETITION 153 OF 2018**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES 2 (1), 3 (1), 10 (1) AND (2), 19,20 (1),21 (1),23(1),24 (1),25 (a) & (c),26 (1),27,28,29 (a),47 (1) & (2),48 ,165 (3) (b),232 (1) (c) AND (f), 238(2) (b), 239,241 (1), (5) & 7**

**IN THE MATTER OF: VIOLATION AND CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS GUARANTEES UNDER ARTICLES 10 (1) (a) – (c) and 2 (B), 25 (a) & (c),26 (1), 27,28,29 (a), 47 (1) & (2). 48 OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF: SECTIONS 12, 156 (4) ,251 (2) OF THE KENYA DEFENCE FORCES ACT NO. 25 of 2015.**

**IN THE MATTER OF: CONTRAVENTION OF SECTION 4 (1) & (2) OF THE FAIR ADMINISTRATIVE ACTION ACT 2015**

**IN THE MATTER OF: CONTRAVENTION OF SECTION 9 (2) (d) OF THE FAIR ADMINISTRATIVE ACTION ACT 2015.**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTION 9 (2) (d) OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT 2017.**

**BETWEEN**

**JOSEPH KIPKEMBOI TANUL.....PETITIONER**

**VERSUS**

**CHIEF OF KENYA DEFENCE FORCES.....1<sup>ST</sup> RESPONDENT**

**KENYA DEFENCE FORCES COUNCIL.....2<sup>ND</sup> RESPONDENT**

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

**JUDGMENT**

**Introduction**

1. The Petitioner herein was enlisted into the Kenya Defence Forces on 27<sup>th</sup> October 1983 and commissioned on 16<sup>th</sup> November 2011. His commission was terminated by the letter dated 23<sup>rd</sup> March 2018. He avers that the termination of his commission was unconstitutional as he was not given any reason for the said termination and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not follow the correct procedure in conducting his disciplinary proceedings.

2. The Petitioner prays for:

**Declarations:**

- i. That the removal of the Petitioner herein from the Kenya Defence Forces was tainted with illegality, irregularity, unfairness and contrary to the principles of natural justice and hence invalid, null and void.
- ii. That the removal of the Petitioner from the Kenya Defence forces was in contravention of his right to a fair administrative action under Article 47 of the Constitution.

iii. That the process of termination of commission of the Petitioner was done in violation of the Petitioner's rights to human treatment, respect and protection of her dignity under Article 28 of the Constitution.

iv. A declaration that the termination of the Petitioner's commission was in violation of legitimate expectation.

v. A declaration that the termination of the Petitioner's contract of service was otherwise unlawful and unconstitutional.

**Orders that:**

i. The impugned decision of the Kenya Defence Service to terminate the Petitioner's regular commission be rescinded.

ii. The Petitioner be reinstated to the regular commission without loss of benefits together with other consequential benefits.

iii. In the alternative to the prayer of reinstatement, the Petitioner be paid full remuneration and benefits inclusive of pension from 23rd February 2018 to the date of retirement being 26<sup>th</sup> November 2022; 57 months x Kshs.224,022= Kshs.12,769,254 together with interest from the date of termination of employment until payment in full.

iv. The Petitioner be awarded damages/compensation for violation of his fundamental rights and freedoms.

v. The cost of this Petition be borne by the Respondents.

3. The petition is supported by the affidavit sworn by the petitioner on 31.12.2018 and his Supplementary Affidavit sworn on 22<sup>nd</sup> March 2019.

4. The Respondents opposed the petition by filing Grounds of Opposition and a Replying Affidavit sworn by Major Emmanuel Makokha Wandera, a Staff Officer II Records Department at the Kenya Defence Forces on 12<sup>th</sup> March 2019.

5. The Petition was disposed of by written submissions which were highlighted by Counsel on 17<sup>th</sup> July 2019.

**Petitioner's case**

6. The Petitioner avers that between October and November 2017, the 2<sup>nd</sup> Respondent caused a special audit to be conducted on the fuelling and servicing of underground generators for the period running July 2016 and November 2017. He avers that the audit revealed that there were alleged discrepancies of fuelling and servicing of underground generators. However, a separate audit conducted previously by the 2<sup>nd</sup> Respondent for the same period did not reveal any loss of fuel attributable to the Petitioner. He avers that he was away from the station from July 2016 to November 2017 at the United Nations Missions in South Sudan and when he came back he proceeded on leave until 31<sup>st</sup> October 2016.

7. He observes that the documents relied upon during the audit and produced as exhibits were signed by others and not him. He further observes that despite the lack of evidence linking him to the discrepancies, the 2<sup>nd</sup> Respondent proceeded to charge him with negligence in the performance of duty contrary to section 65 of the Kenya Defence Forces Act 2012 before the Base Commander on 16<sup>th</sup> February 2018 who then fined him 14 days' pay and the matter ended.

8. However, on 23<sup>rd</sup> February 2018 the petitioner was required to appear before the Kenya Air Forces (KAF) Commander but on the very day, he was involved in an accident while going to Nairobi. He avers that his request to seek medical attention before appearing before the KAF Commander was turned down. He avers that when he met the KAF Commander, he just casually informed him that his services at the KDF had been terminated without giving him the reasons for his decommissioning in writing and without granting any opportunity to be heard during the said termination process.

9. He further avers that, subsequent to his termination, The 1<sup>st</sup> and 2<sup>nd</sup> Respondents confirmed that the inefficiencies in the fuel dealings were caused by system faults such as faulty dispensers and leaking underground tank, which were replaced after his dismissal. He therefore maintains that the alleged loss of fuel could not be attributed to his fault and his dismissal was without any valid reasons as required under Section 251 (2) of the Kenya Defence Forces Act. He therefore avers that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted unreasonably by:

i. Attributing guilt to the him when he was away on a United Nations Mission and approved leave days for the better part of the period.

ii. Failing to consider exculpatory evidence submitted by him including the periodic audit report covering the same period which did not reveal any anomalies.

iii. Failing to review their decisions to terminate his commission despite subsequent revelations that the audit queries that were raised were as a result of the historical leakage and faults of the underground fuel tank points to unreasonableness.

10. He avers that Article 48 of the Constitution provides that the state shall ensure access to justice for all but the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not provide the reasons for his termination. He further avers that his termination was unlawful and procedurally unfair as the correct procedure under Part VII of the Kenya Defence Forces Act was not followed thus there was a violation of Article 47 (1) of the Constitution.

11. He avers that Section 156 (4) of Kenya Defence Forces Act provides that not more than one punishment is to be awarded but the 2<sup>nd</sup> Respondent terminated him after awarding him a fine. He contends that he made several attempts to have the case reviewed in his various letters sent to the 2<sup>nd</sup> Respondent and the Defence Council but he did not receive any response from them.

### **Respondents' Case**

12. The Respondents aver that the Petition is *res judicata* as the matters were determined through military trial proceedings on 16<sup>th</sup> February 2018. They aver that the Petitioner instituted these proceedings as a direct response to the termination of his commission whose reasons lie at the absolute discretion of the 2<sup>nd</sup> Respondent.

13. They deny that the Petitioner sought review of the decision terminating him and aver that even if he did, the Petition fails the test of illegality as all administrative remedies have not been exhausted. They further aver that the Petitioner accepted the outcome of the disciplinary measures thus, he is estopped from claiming violation of his rights thereafter.

14. They aver that the holding of a presidential commission is not a right and is at the discretion of the President and can be terminated at any time upon analysis of the record of an officer relating to disciplinary record, professional conduct and financial probity. They aver that termination of commission is not a recognised punishment against an officer under Section 155 of the Kenya Defence Forces Act and denied the alleged violation of the Petitioner's Constitutional rights.

15. In his Supplementary Affidavit, the petitioner maintained that he diligently sought a review of his case but all in vain. He further denied that he accepted the results of the military proceedings of 16<sup>th</sup> February 2018.

### **Petitioner's submissions**

16. The Petitioner submitted that under Article 22 (1) of the Constitution he can institute proceedings claiming that a right or a fundamental freedom in the Bill of rights has been denied, violated or infringed. He further submitted that Article 258 (1) of the Constitution provides that every person had a right to institute a Court action claiming a contravention of the Constitution.

17. He submitted that section 251 of the Kenya Defence Forces Act makes provisions on the termination of the president's commission and the termination is subject to the provisions of Article 47 of the Constitution. It was his submission that the absolute doctrine of pleasure in employment is contrary to the principles of fair labour practice and thus untenable in employment law in Kenya.

18. He further submitted that the Respondents' assertion that the exercise of military authority is or ought to be absolute is wholly unfounded. He submitted that this Court has the jurisdiction to interfere and challenge the excesses of a mandate exercised by administrative bodies. He relied on the decision in *Lieutenant Colonel Lukale Moses Sande v Kenya Defence Forces & Another [2018]eKLR* where this Court found that the Claimant had succeeded in proving that there was a violation of his right to fair labour practices, fair administrative action and fair hearing by the same respondents herein.

19. He denied that the suit is *res judicata* and submitted that there has never been a final determination of the dispute herein in a similar suit by this Court or any other court with competent jurisdiction. He contended that the Respondents have not proved the existence of any former suit where the dispute herein was resolved by a court with competent jurisdiction. He relied on *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015]eKLR*.

20. The petitioner further submitted that the Military Commander failed to conduct the automatic review of his case, as sought in his letters, after making the decision on summary proceedings as envisaged under section 159 of the Kenya Defence Forces Act. He submitted that in *Okiya Omtata Okiiti v Commissioner General Kenya Revenue Authority & 2 Others [2018]eKLR* the court underscored the exhaustion of local remedies rule and stated that if the appeal process is unsuitable the same can be overtaken. He therefore argued that the instant proceedings are exceptional case and the Court ought to allow the Petition since the review process has never been initiated by the Respondent as required.

21. As regards the documents attached to his Petition, the petitioner submitted that they were obtained in the course of his employment and that he cannot be denied the right to information obtained in the course of his employment. In support of this submission he relied on *Leland I. Salano v Intercontinental Hotel [2013]eKLR*.

22. He submitted that the Respondent condemned him with its findings on the Audit that was conducted between the period July 2016 and November 2017. He argued that the 2<sup>nd</sup> Respondent's reliance on evidence signed by others and further overwhelming evidence of system faults due to inefficiency was an affront of the Petitioner's rights under Article 47 (1) of the Constitution.

23. He argued that the KAF Commander casually informed him that his services had been terminated and was never given a letter of termination. He submitted that Section 4 of the Fair Administrative Action Act provides that reasons contemplated under Article 47 (2) of the Constitution must be written. He further submitted that section 251 of the Kenya Defence Forces Act provides that the mode of termination of commission and subjects the various modes of termination to the provisions of Article 47 of the Constitution.

24. He took offence with the fact that after being fined 14 days' pay for the offence of loss of fuel he was later terminated without being afforded a right to fair hearing. He submitted that the 2<sup>nd</sup> Respondent breached his legitimate expectation under section 156 (4) of the Kenya Defence Forces Act which provides that no more than one punishment is to be awarded. He further submitted that section 156(8) contemplates that only minor punishments may be awarded in addition to a fine. He submitted that the Respondents did not take the initiative of the automatic administrative review as required by law despite the fact that the Petitioner made numerous attempts to have its case reviewed.

25. Finally, he submitted that section 12 (3) of the Employment and Labour Relations Court Act extends jurisdiction to this court to grant the reliefs sought herein. He therefore urged the court to reverse the termination and reinstate him to his regular commission without loss of benefits. He further urged the Court to award him damages in line with *Lieutenant Colonel Lukale Moses Sande v Kenya Defence Forces & another [2018]eKLR*. He also urged the court to award costs of the Petition.

#### **Respondents' submissions**

26. The Respondents submitted that the Petition is *res judicata* as the Court has no jurisdiction to entertain the Petition based on the facts and that doing so amounts to usurping the role of the Commander under section 155 of the Kenya Defence Forces Act. They relied on *Gift Kambu Marandu v Kenya Defence Force Council & another [2017]eKLR* where the Court recognised that a summary trial before a Commander in the Kenya Defence Forces was a proper disciplinary panel established in law.

27. They submitted that the Petitioner was subjected to summary trial before his base commander as provided under section 155 (4) of the Kenya Defence Forces Act who found him guilty of negligently performing duty by deliberately authorising fraudulent release of fuel worth Kshs.2,848,175. They further submitted that the decision to terminate the Petitioner's service was an administrative prerogative rather than a punishment as alleged by the Petitioner.

28. They further submitted that the Petitioner ought to have exhausted all legal remedies provided in the Kenya Defence Forces Act after which the Court would then be invoked as a last resort, either by an appeal or judicial review. They maintained that the Petitioner deliberately failed to exhaust all available statutory avenues and prayed for the Petition to be struck out with costs. They contended that Section 9 (2) of the Fair Administrative Action Act provides that the High Court or Subordinate Court shall not review an administrative action unless the mechanisms, including internal mechanisms for appeal or review are exhausted. To fortify the foregoing contention, they relied on *Peter A. Imwatok (MCA) v Nairobi city County & 9 Others [2018]eKLR*.

29. The Respondents submitted that there is no proof that the Petitioner's letters seeking redress over termination were dispatched or received by his employer. On the other hand, they submitted that pursuant to section 68 (2) (c) of the Evidence Act all secondary documents ought to be certified failure to which they would be rendered inadmissible. To support the foregoing submission they relied on *Dickson Ngigi Ngugi v Morrison Njenga Waweru [1979]eKLR*.

30. The Respondents submitted that due to the nature of military work, section 3 (2) of the Official Secrets Act prohibits the exposure of documents that service personnel handle. They therefore contended that the documents relied on by the Petitioner were illegally obtained and inadmissible. They further urged the Court to consider section 60 (1) (c) of the Evidence Act which prohibits any person from taking photographs of military equipment in a barracks without authority. They relied on *David M'iti Makwachi v Kenya Defence Forces [2019]eKLR* where the court refused to admit similarly classified documents.

31. They submitted that the Petitioner's allegation that he was awarded more than one punishment is misleading. They submitted that termination of commission does not fall under section 155 (5) of the Kenya Defence Forces Act but is recognised as one of the methods under section 27 (c) by which service of a member may be terminated.

32. They submitted that the Petitioner is not entitled to any reliefs as he had failed to substantiate his claims on constitutional violations hence the Petition should be dismissed with costs. They further submitted that the Petitioner is not entitled to remuneration due to the loss of public funds and urged the court to dismiss the Petition with costs.

#### **Analysis and determination**

33. After considering the Petition, Affidavits and Submissions filed, it is clear that the Petitioner was a commissioned officer of the Kenya Defence Forces (KDF) from 16<sup>th</sup> November 2001. It is also common knowledge that as at the time of his termination on 26<sup>th</sup> March 2018, he was serving as the Motor Transport Officer (MTO) at Laikipia. It is further common knowledge that the Petitioner was charged with fuel losses before his Base Commander on 16<sup>th</sup> February 2018 and fined 14 days' pay. Finally, it is a fact that on 23<sup>rd</sup> February 2018, the petitioner was again summoned before the KAF Commander over the same issue of fuel losses and thereafter his commission was terminated.

34. The main issues for determination are:

- a. Whether the suit is *res judicata*.
- b. Whether the suit violates the doctrine of exhaustion.
- c. Whether the petition is supported by inadmissible documentary evidence.
- d. Whether the petitioner's fundamental rights and freedoms were violated.
- e. Whether the Petitioner is entitled to the reliefs sought.

##### **a. Whether the matter is *res judicata***

35. The Respondent avers that this matter is *res judicata* as it was adequately dealt with in the summary trial proceedings on 16<sup>th</sup> February 2018. The said argument is not only ridiculous but also unsubstantiated by evidence that a Court of competent jurisdiction has determined

the dispute in the petition herein. Internal disciplinary proceedings within the disciplined forces do not extinguish the right of an officer to institute proceedings against the respondents under Article 22(1) of the constitution to seek relief for violation of his constitutional rights. Consequently, I agree with the petitioner that the suit herein is not *res judicata*.

**(b) Whether the suit violates the doctrine of exhaustion.**

36. The respondents contended that Section 9 (2) of the Fair Administrative Action Act prohibits the High Court or Subordinate Court from reviewing an administrative action unless the mechanisms, including internal mechanisms for appeal or review are exhausted. They therefore urged the court to decline the petition because the locally available remedies in the military system were not exhausted before filing the petition.

37. The petition has however contended that the said internal mechanism of appeal and review were frustrated by the respondents when they failed to do the automatic review of the impugned decisions even after he served them with several letters asking for review and also appealing against the termination.

38. I have carefully considered the evidence and the submissions by both parties. It is true that Section 9 (2) of the Fair Administrative Action Act discourages courts from entertaining review of administrative actions before the internal review and appeal mechanisms are exhausted. In **Peter A. Imwatok (MCA) v Nairobi City County & 9 Others [2018] e KLR**, the High Court downed its tools and held that:

***“This court has jurisdiction to deal with constitutional matters but where a clear procedure has been set out, that must first be exhausted. This court cannot be turned into an investigating agency. It’s important that room is given to the various agencies mandated to carry out investigations to do so before a matter is rushed to the court...”***

39. In **Catherine Muthomi Mwamra v Hamida Yoroi Shek Nuri & 5 Others [2018] e KLR** the High Court also held that:

***“... even where the court has jurisdiction, where there is an alternative effective remedy, then this court’s jurisdiction would be limited to the extent that a party must first exhaust that other remedy... This is the spirit and letter of Article 159(2)(c) of the Constitution and section 9 of the Fair Administrative Actions Act, 2015.”***

40. In this case however the petitioner has exhibited copies of six letters, which he wrote to the respondents for review and also appeal but none was respondent to. The respondent denied ever being served with the said letters and maintained that the internal review mechanism has not yet been exhausted.

41. Section 159(3) of the Kenya Defence Forces Act provides that:

***“(3) The administrative review under subsection (1) shall not preclude the accused person from seeking other legal redress from any other authority provided for under this Act or any other written law, or applying for a review to the Defence Council.”***

42. The foregoing provision provides for alternative avenues for seeking remedy against the summary proceedings. In **Okiya Omtatah Okoit v Commissioner General, Kenya Revenue Authority & 2 others [2018]eKLR** Mativo J had the following to say about the principle of exhaustion:

***“This approach ... is same one suggested by the Court of Appeal in R v National Environmental Management Authority [2011]eKLR where the court explained that : The Principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”***

43. I entirely agree with the foregoing precedents but wish to add that in cases where the internal mechanism has been frustrated by the decision maker at the expense of the victim of the impugned decision, such conduct should be treated as a factor in determining whether an exception should be made to the exception rule. It follows therefore that a decision maker who stands in the way of an the internal review or appeal process provided by a statute or contract will be estopped from pleading the defence of exhaustion if the court’s jurisdiction is invoked by the other party. Accordingly, I return that the respondents’ objection on ground of exhaustion must fail because they failed to comply with the law in informing the petitioner about the outcome of the automatic review in writing setting out the reasons therefore, as required by section 159 (2) and section 251(2) of the KDF Act. As a result of the said default, the right to lodge an effective internal appeal or review was curtailed and led the petitioner into writing appeal letters either prematurely or to the wrong fora. I will revisit the said provisions herein after.

**c. Whether the exhibits filed by the petitioner are inadmissible.**

44. The respondent objected to the documents annexed to the petition on ground that they were not marked and certified as true copies as required by section 68 (2)(c) of the Evidence Act. They further contended that the documents are confidential military documents which should not be admitted in evidence by dint of section 60(1)(c) of the Evidence Act. The Respondents have however not proved that all the said documents were obtained illegally. I have no doubt that some of the documents were given to the petitioner by the respondents voluntarily when the claimant was charged before the Base Commander in February 2018. I therefore admit such documents and expunge any other documents not forming part of the bundle served on him during such proceedings, which are now under review.

45. In *Leland I. Salano v Intercontinental Hotel [2013]eKLR* Rika J held that:

***“the point is that once the employee has left employment, there is less onerous obligation to demand that the employee honours confidential information that may have been acquired during employment... The claimant has a right under the Constitution of Kenya, to access information that assists in prosecution of the claim. He has a right to be free of unfair labour practices. The respondent has not shown in what way, its right to privacy and fair trial would be compromised by the admission in evidence, of the contested information.”***

46. On the other hand, however, I have confirmed that the documents are unmarked except the President’s Commission which is marked “JKT”. Likewise, the documents are all not certified as true copies. In *Dickson Ngigi Ngugi v Morrison Njenga Waweru [1979] eKLR*, the Court of Appeal held that:

***“We are of the opinion that copies of documents which are filed in court being secondary evidence and which could be certified should be certified as required in the Evidence Act... The court must be satisfied of the authenticity of the copies filed...”***

47. The foregoing opinion is binding on me and I agree with it entirely. However, in this case the court is satisfied about the authenticity of the impugned documents because they were served upon the petitioner by the respondent in compliance with the statutory procedure of conducting Summary proceedings. The respondents have also confirmed the authenticity of the documents by objecting to their production on ground of confidentiality. I therefore return that the documents are admissible.

#### **d. Whether the petitioner’s fundamental rights and freedoms were violated**

48. The petitioner contended that the respondents breached his right to fair administrative action as envisaged by Article 47 of the Constitution by terminating his commission. He contended that the respondents breached the procedure of conducting Summary disciplinary proceedings set out in the KDF Act which, by dint of section 147(1)(a), has been subjected to the principles of fair administrative action set out under Article 47 of the Constitution.

49. First, he contended that the base commander attributed guilt on him unreasonably for fuel losses that occurred during the period when he was abroad on official duties from July 2016 and November 2017, and overlooking overwhelming evidence of system faults, leaking underground tank, the exhibits used in the case having been signed by other officers and not him, and finally other audits reports.

50. Second, he contended that the respondents failed to follow a fair procedure before terminating his commission. To begin with, he averred that the KAF Commander conducted the hearing on 23.2.2018 casually by not questioning him on the issue of fuel losses and instead asked him to explain his history in the forces and then interrupted to tell him that his commission had been terminated. He further contended that the commander neither gave him the reasons for the termination in writing nor opportunity to defend himself. He further contended that no termination letter was ever served on him by the Commander at all. Finally, he contended that the KAF Commander failed to automatically cause a review of the petitioner’s case 14 days after the hearing on 23.2.2018 as required by section 159 of the KDF Act and subjected the petitioner to double punishment contrary to section 156(4) of the KDF Act.

51. The respondents denied the alleged violation and averred that the termination of the petitioner’s commission was lawful because the petitioner was duly notified of the termination by the Commander. The attribution of guilt was because the petitioner returned from abroad in April 2016 and the fuel losses occurred from July 2016 to November 2017; and the petitioner was not subjected to double punishment since the termination is not a punishment under section 155(5) of the KDF Act.

52. I have carefully considered all the material before me and found no dispute that there were fuel losses by the respondents between July 2016 and November 2017 at the Laikipia Base. There is also no dispute that the lost fuel was under the custody of a department headed by the petitioner. Although he alleges that he was abroad during the time when the losses occurred, he did not prove that indeed he was away throughout the period under review. According to the copy of passport annexed to the petition, the claimant left the country on 26.7.2016 but there is no clear stamp of the date when he returned to the country.

53. The burden is upon him to prove his allegation that he returned after the fuel losses under review. He has not discharged that burden and I return that he was on duty when the said losses were caused through fraudulent transactions involving a group of officers. Consequently, I find that the Base Commander never acted unreasonably by attributing the fuel losses on the petitioner because it is clear that he failed to exercise diligence in his work and thereby caused loss of fuel through fraudulent officers.

54. As regards the procedure followed, section 155 of the KDF Act provides as follows:

***“1) After investigating a complaint against an officer or a cadet, the military police shall forward the investigation report in the form of an abstract of evidence and appropriate charges, if any, to the commanding officer, who—***

***(a) may deal summarily with the charge if it is one that the commanding officer has power to deal with summarily, and the commanding officer considers that the charge should be so dealt with;***

***(b) may dismiss the charge on the grounds that it ought not to be further proceeded with; or***

***(c) shall refer the abstract of evidence and the charge in the prescribed manner to the Director of Military Prosecutions or the appropriate superior authority as the case may be, in any other case.***

*(2) If the commanding officer deals with a charge summarily and records a finding of guilt, the punishments that may be awarded to an officer of the rank of captain or corresponding rank or below are, subject to the limitations hereinafter provided, those set out in the following scale—*

- (a) forfeiture of up to six months' seniority of rank;*
- (b) a fine not exceeding half a month's pay;*
- (c) severe reprimand;*
- (d) reprimand;*
- (e) admonition; or*
- (f) if the offence has occasioned any expense, loss or damage, stoppages.*

*(3) If the commanding officer deals with a charge summarily and records a finding of guilt, the punishments that may be awarded to a cadet are, subject to the limitations hereinafter provided, those set out in the following scale—*

- (a) dismissal from the Defence Forces;*
- (b) severe reprimand;*
- (c) reprimand;*
- (d) admonition; or*
- (e) such minor punishments as may be prescribed.*

*(4) If the commanding officer refers a charge to the appropriate superior authority, the appropriate superior authority shall either—*

- (a) deal summarily with the charge, if it is one that the authority has power to deal with summarily, and the authority considers that the charge should be so dealt with; or*
- (b) in any other case, refer the charge in the prescribed manner to the Director of Military Prosecutions.*

*(5) If the appropriate superior authority deals with a charge summarily and records a finding of guilt, the punishments that may be awarded are, subject to the limitations hereinafter provided, those set out in the following scale—*

- (a) forfeiture of up to twelve months seniority of rank;*
- (b) a fine not exceeding one month's pay;*
- (c) severe reprimand;*
- (d) reprimand;*
- (e) admonition; or*
- (f) where the offence has occasioned any expense, loss or damage, stoppages.*

*(6) Except where expressly provided for 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 not exceeding one month's basic pay.*

*(9) Notwithstanding subsections (1) to (8), the recovery under this section, in any one instance, shall not be more than half of the basic salary.*

55. The petitioner produced a bundle of the Abstract of Evidence that was served upon him by the investigating officer and which was used against him during the summary proceedings before the Base Commander. The said bundle is proof that a complaint was made and

investigation were done before charging the petitioner as required by section 155 (1) above. I therefore dismiss the allegation by the petitioner that the matter was not investigated and return that the summary proceedings were founded on an investigations report that painted him as a negligent manager who presided over fuel losses.

56. As regards the procedure followed, I find that the sentence awarded by the Base Commander was subject to an automatic review by the service Commander being the KAF Commander under section 159 of the KDF Act.

57. Section 159 of the KDF Act provides:

***“(1) Upon reaching a determination in relation to any offence tried by the commanding officer, the commanding officer shall, within fourteen days, submit the findings of the trial in writing, to a superior commander for review.***

***(2) The superior commander shall within fourteen days of receipt of the findings, review the findings and inform the accused person of the outcome of the review, in writing.***

***(3) The administrative review under subsection (1) shall not preclude the accused person from seeking other legal redress from any other authority provided for under this Act or any other written law, or applying for a review to the Defence Council.”***

58. The Base Commander complied with the foregoing review procedure because the petitioner admitted that he was summoned by the KAF Commander on 23.2.2018 and he was informed that his commission was terminated. That happened within the 14 days' period prescribed by subsection (1) above. Under subsection (2) above, there is no requirement that the officer reviewing the proceedings shall hear the accused officer. All what it requires is that the review be done within 14 days and the accused officer be informed of the outcome of the review in writing.

59. In this case, the KAF Commander found that the correct punishment for the petitioner was termination of his commission and informed the him verbally on 23.2.2018. The KAF Commander did not have the power to pass the said sentence under section 251 of the KDF Act and as such, he recommended the sentence the relevant military organ for approval. In this case, the petitioner was commissioned in November 2001 and the review under section 159 of the Act was done on 23.2.2018. Section 251 of the Act provides that:

***“(1) Subject to Article 47 of the Constitution-***

***(a) the president may terminate the commission of any officer above the rank of major or corresponding rank or above;***

***(b) the Defence Council may terminate the commission of any officer of the rank of major or corresponding rank or below; or***

***(c) a Service Commander may terminate the commission of any officer during the first eighteen months of the officer's actual commission in service.***

***(2) In any case of termination of a commission in this section, the president, the Defence Council or Service Commander, as the case may be, shall accord and specify reasons for the termination of the commission to the affected officer, in writing.”***

60. Having considered the chronology of events in the summary proceedings herein and the statutory procedure discussed above, I am satisfied that the procedure followed before terminating the petitioner's commission was fair to the extent that a complaint was made, investigations done, summary hearing done by the Base Commander, automatic review done by the Service Commander and enhanced the sentence to termination within 14 days, and finally the Defence Council approved the termination of the commission.

61. However, I find that the KAF Commander failed to comply with the review process by communicating the outcome verbally instead of doing so in writing as required under section 159(2) of the Act. I further find that the Defence Council also failed to comply with section 251(2) of Act by failing to notify the petitioner in writing that she had terminated his commission giving the reasons for the said decision. Today the petitioner has not yet received any written notice of the termination of his commission but the respondents have blamed that on the him because he disappeared after being transferred to the Head Quarters to do clearance. The foregoing notwithstanding, I return that the respondents violated the petitioner's constitutional right to fair administrative action as envisaged under Article 47 of the Constitution.

62. Section 147 of the KDF Act provides that:

***“(1) Summary disciplinary proceedings under this Act shall be guided-***

***(a) by Article 47 of the Constitution; and***

***(b) with necessary modifications, and without derogating from the essence of the right or limiting the right to fair hearing of an accused person by Article 50 of the Constitution.”***

63. Article 47 of the Constitution provides that:

***“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”***

64. The foregoing fundamental right is defined and implemented under the Fair Administrative Actions Act (FAA Act). Section 2 defines administrative action to include any act, omission or decision of any person or body that affects the legal rights or interests of any person to whom such action relates. The Act applies to all state and non-state agencies including any person exercising administrative authority; person performing a judicial or quasi-judicial function under the constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom such action relates.

65. Under section 7(1) of the Act, any person aggrieved by an administrative action has the right to apply for review of the administrative action or decision. Under subsection (2), a court has jurisdiction to review an administrative action or decision if:

***“(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;”***

66. I have already held herein above that the respondents failed to comply with Section 251 (2) of the KDF Act by failing to serve him with any termination letter informing him of the reasons upon which his commission was terminated. The said default had a negative effect to his right to fair hearing because he could mount any effective appeal or review under section 159(3) the KDF Act.

67. This case is however distinguishable from *Lieutenant Colonel Lukale sande v Kenya Defence forces & another [2018]eKLR* where the commission was terminated by the president on recommendation by the Defence Council before conducting any Summary Disciplinary hearing like in instant case. In the said case claimant was never accorded any hearing after a report was made to his Service Commander and instead the case was handled in a mysterious manner under confidential and classified correspondences, which were neither shown to the claimant nor the court.

**(e) Whether the Petitioner is entitled to the reliefs sought**

68. In view of my earlier finding that the respondents failed to inform the petitioner the outcome of the automatic review of the summary proceedings in writing, and further failed to give him the reasons for the termination of his commissions in writing as required by section 159(2) and section 251(2) of KDF Act respectively, I make declaration that the termination was in contravention of his right to a fair administrative action under Article 47 of the Constitution and it was therefore unlawful and unconstitutional.

69. The petitioner urged the court to follow *Lieutenant Colonel Lukale sande v Kenya Defence forces & another [2018]eKLR* where an award of Kshs.20,000,000 was made for related violations. However, as I have observed herein above, the facts of the said case are distinguishable from this case in terms of the number and the magnitude of the violation, and also the expected time of service before retirement. Accordingly, I award the petitioner Kshs.3,000,000 for the violation of his constitutional right declared above. In granting the said quantum, I have considered the fact that he contributed to the termination through misconduct which caused loss of fuel worth millions of shillings. I further considered the fact that the violation herein did not invalidate the finding that the petitioner was culpable. Finally, I have considered the fact that he had only four years to work before attaining his retirement age.

70. The alternative prayer for his remuneration and benefits from the date of his termination 23<sup>rd</sup> February 2018 to 26<sup>th</sup> November 2022 when he was scheduled to retire, amounting to Kshs.12,769,254 is dismissed. The said prayer is not tenable since it amounts paying the Petitioner salary without rendering any service to the Kenya Defence Forces.

71. The claimant is awarded costs of the suit since he was forced to file the petition herein by the respondent's failure to comply with the express statutory provisions. He will also have interest at court rate from the date hereof but the decreed sum is subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 8th day of November, 2019**

**ONESMUS N. MAKAU**

**JUDGE**