



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO 47 OF 2012

[FORMERLY HIGH COURT CONSTITUTIONAL APPLICATION NO. 295 OF 2007]

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70,71,72,72,74,77 & 83 OF THE CONSTITUTION OF KENYA (1998) REVISED EDITION 2001 AND CHAPTER FOUR ARTICLES 19,20(3)(B),27,28,30,31,40,43(3),47,49 & 50 OF THE CONSTITUTION OF KENYA, 2010

(THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

BETWEEN

ELLEN NYAMBURA MACHARIA SUING AS THE ADMINISTRATOR OF THE ESTATE

OF MAJOR EDWIN MACHARIA (DECEASED) SVC NO. 027108.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. This Petition was initially filed in the High Court by Major Edwin Macharia (now deceased). On 2nd May 2012, **Majanja J** allowed substitution of the Petitioner with his widow and administrator of his estate, Ellen Nyambura Macharia. On 3rd December 2012, the learned Judge of the High Court determined that he had no jurisdiction to hear and determine the Petition and therefore transferred it to this Court.

2. On 12th March 2014, my brother, **Rika J** began hearing the Petitioner's case. Upon Rika J's transfer from Nairobi station, the matter was allocated to me and the parties agreed to proceed from where my brother Judge had stopped.

The Petition

3. In her Petition as amended on 11th March 2012 the substituted Petitioner, Ellen Nyambura Macharia, suing as the Administrator of the Estate of Major Edwin Macharia (Deceased) SVC No. 027108 pleads as follows:

- a. That the rights of Major Edwin Macharia (now deceased) were grossly violated and his right to life denied in a manner not reasonably justifiable in a democratic society in that he was condemned to a life of penury and untold inconvenience by the Respondent;
- b. That he was subjected to inhumane and degrading treatment in that he was unlawfully detained at various prisons, subjected to torture and his right to personal liberty violated;
- c. That he was deprived of his property and proprietary rights by the Respondent in depriving him of his commission and his personal goods and belongings expropriated by the Respondent;
- d. That his right to employment was violated by the Respondent resulting in deprivation of his right to earn a living;
- e. That he was subjected to inhumane and degrading treatment;

4. The Petitioner prays for the following:

- a. A declaration that the arrest, detention and torture of Major Edwin Macharia (now deceased) by the Respondent violated his constitutional rights;
- b. A declaration that his removal from the Air Force service and the Armed Forces was unconstitutional;
- c. A declaration that the failure to pay him his dues and an appropriate pension was unconstitutional;
- d. A declaration that he was entitled to his commission and position in the Air Force;
- e. A declaration that the Petitioner is entitled to general damages for the said violations;
- f. A declaration that the Petitioner is entitled to the payments set out in the document annexed to the Petition as quantum.

5. In her affidavit in support of the Petition, the Petitioner fully adopts the supporting affidavit sworn by the late Major Edwin Macharia on 21st March 2007. In his affidavit, the late Major Edwin Macharia deponed that he was enlisted as a Flight Cadet in the Kenya Air Force on 7th October 1970. He was commissioned as a Lieutenant II on 7th April 1972 and was granted a Presidential Commission on 28th September 1973.

6. The late Major Edwin Macharia rose through the ranks and by 1982, he had risen to the rank of Major and was Officer Commanding Supply Squadron KAF Nanyuki.

7. The late Major deponed that on 31st July 1982, having handed over his duties to Major Fred Wachira, he left Nanyuki Airbase for KAF Eastleigh in Nairobi, where his family was housed. He got to his house in Eastleigh at 8.30 pm. At about 2 am he heard heavy gun fire and went outside to check what was happening.

8. Outside, the late Major saw Trucks and Land Rovers full of uniformed men shooting in the air. He did not recognize any of the men and saw no officers. He therefore concluded that Airmen had mutinied. As the gunfire continued, the late Major, in the company of Captain Justus Waithaka of KAF Eastleigh left the Airbase to seek assistance from the Department of Defence (DOD).

9. On their way, they learnt that a coup had been staged by KAF men. The two officers went back to the Airbase and proceeded to the Officers' Mess where they found a few officers who told them that they had made contact with DOD and advised to remain at the Mess.

10. On 7th August 1982, the late Major and two other officers were handcuffed and taken to Kamiti Prison. On the same day, they were taken to G.K Prison Naivasha. On 14th August 1982, his family was evicted from the house they were occupying at Eastleigh Airbase. Three months later, the late Major was moved back to Kamiti Prison and on 3rd March 1983 he was among 35 soldiers who were put in an Army truck and taken to Kahawa Garrison from where they were released. They were each given one month's pay plus fare home.

11. The late Major later collected Kshs. 38,000 from DOD and was issued with an Officers Certificate of Service, stating that he had retired on completion of his military service. He deponed that he was 34 years old at the time of discharge and that he earned a pittance monthly pension of Kshs. 2,304.65 as at July 2007.

The Respondent's Response

12. The Respondent's response is contained in a replying affidavit sworn by Lieutenant Colonel Paul Mwangemi Kindochimu sworn on 11th July 2012. Lieutenant Colonel Kindochimu who was a Staff Officer (Records) in the Ministry of State for Defence depones that the effective date of the late Major Macharia's retirement was 15th March 1983. He maintains that the late Major's commission was lawfully terminated by the Defence Council pursuant to Section 17(2) of the Armed Forces Act.

13. Lieutenant Colonel Kindochimu denies the allegations in the Petition that the late Major Macharia was subjected to inhumane and degrading treatment.

Findings and Determination

14. From the pleadings, testimony and submissions offered by the parties, the following issues have emerged for determination in this Petition:

- a. Whether the Petition herein is defeasible by limitation of time;
- b. Whether the substituted Petitioner is entitled to the remedies sought.

Limitation of Time

15. In the submissions filed on behalf of the Respondent, learned State Counsel, Mr. Odukenya devoted a lot of time persuading the Court to strike out the Petition because it had been filed much too late. While recognising that constitutional petitions are not bound by the timelines

set for other forms of civil litigation, Counsel submitted that this was not an open licence to litigants to sleep on their rights and come to court at will. He termed the current Petition as stale and an abuse of the court process.

16. In advancing this point Mr. Odukenya made reference to several decisions of the Constitutional and Human Rights of the High Court notably, *Charles Gachathi Mboko v Attorney General [2014] eKLR* and *Wellington Nzioka Kioko v Attorney General [2016] eKLR*. By these decisions, concern was raised at the possibility of abuse of the open time limit for claims on enforcement of fundamental rights and freedoms.

17. My reading of these decisions, which are highly persuasive, is that there is no open licence for a party to come to court late. There ought to be an explanation for the delay. The current Petition was filed on 22nd March 2007, 25 years after accrual of the cause of action. This is a long time by any standard.

18. The Court however considered the events leading to the cause of action. In this regard, the Court formed the opinion that having been a Commissioned Officer of the Kenya Air Force, which regiment was blamed for the coup attempt in August 1982, it was not possible for the original Petitioner to bring action earlier. The delay was thus explainable and excusable and the Court found no ground to strike out the Petition on the basis of limitation of time.

Remedies

19. Having dispensed with the preliminary issue of limitation of time, the next question is whether the Petitioner is entitled to the remedies sought. The Petitioner seeks general damages for violation of the late Major Macharia's constitutional rights on account of unlawful arrest, detention, torture and removal from the Armed Forces. The Petitioner further seeks payment of salaries, allowances, amenities and terminal benefits.

20. From the evidence on record, the late Major was detained in custody for a period of six (6) months after which he was released and discharged from the Armed Forces under the 'no offence' list. Apart from the unexplained incarceration and unsupported discharge from the Forces, the Court did not find evidence of torture.

21. This did not however diminish the negative impact on the late Major and his family. Serving as a Commissioned Officer in the Kenya Air Force was prestigious. At the time of his discharge, the late Major was at the prime age of 34 years. Assuming that he remained in the same rank, he would have retired from the Armed Forces at the age of 44 years. Removing him from the Forces without due process and much worse for no offence was a grave violation of his constitutional rights.

22. Having so found, the next question has to do with the level of damages payable to the Petitioner. As affirmed by the Court of Appeal in *Peter M. Kariuki v Attorney General [2014] eKLR* the assessment of damages is a matter of discretion to be exercised judiciously, taking into account the general conditions prevailing in the country and prior decisions.

23. Having served in the disciplined forces, the late Major could not do much else. He was therefore denied his source of livelihood for no reason. Furthermore, the fact that he had been arrested in connection with the failed coup left a permanent blot not only in his career as a soldier but also as a member of society. I have balanced this with the finding that there was no proof of torture and award the Petitioner Kshs.2, 000,000 as general damages. The claim for payment of salaries, allowances, amenities and terminal benefits was not proved and is dismissed.

24. Finally I enter judgment in favour of the Petitioner in the sum of Ksh. 2,000,000 being general damages.

25. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

26. The Petitioner will have the costs of the case.

27. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 5TH DAY OF MARCH 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MARCH 2018

ONESMUS MAKAU

JUDGE

Appearance:

Mrs. Madahana for the Petitioner

