



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1402 OF 2015

(Originally Meru Chief Magistrate's Court Civil Case No. 481 of 2007)

ASIYO LOJORE LOKWAMORU.....CLAIMANT

v

COMMANDING OFFICER,

MARIAKANI 77 ARMY BATTALION.....1st RESPONDENT

CHIEF OF GENERAL STAFF.....2nd RESPONDENT

ATTORNEY GENERAL.....3rd RESPONDENT

JUDGMENT

1. The Claimant instituted legal proceedings against the Respondents before the Chief Magistrate's Court in 2007 alleging unlawful termination of service on or around 10 August 2004.
2. The Respondents filed a Joint Statement of Defence on 27 January 2009 outside the prescribed time under the Civil Procedure Rules, and did not seek leave to admit the same formally.
3. The Claimant filed a Reply to the Defence on 9 February 2009.
4. The Claimant filed a List of Documents on 8 September 2011 and an Amended Memorandum of Claim on 6 May 2016.
5. On 27 September 2017, Ndolo J directed that the Cause proceed to formal proof on the ground that the Respondents had not filed a Response.
6. The Cause was heard on 17 April 2018. The Claimant testified and was cross examined by the Respondents.
7. The Claimant filed his submissions on 8 May 2018 while the Respondents filed their submissions on 7 June 2018.
8. The Court has considered the pleadings, evidence and submissions and adopted the Issues as identified by the Claimant in his submissions.

Unfair and unlawful dismissal contrary to the Employment Act, 2007

9. The Claimant was dismissed on 10 August 2004 long before the enactment of the Employment Act, 2007.
10. The Employment Act, 2007 commenced on 2 June 2008 and therefore it is not applicable the cause of action advanced by the Claimant.
11. Unfair termination of employment as a cause of action was introduced into our jurisdiction by the Employment Act, 2007 and was unknown under the statutory framework applicable at the time the Claimant separated with the Respondents.
12. This issue of termination therefore stands to be examined within the context of the Armed Forces Act and the common law.

The Armed Forces Act, Cap. 199

13. The Claimant stated that he was enlisted on 18 March 1989 and that he was discharged on 10 August 2004 on completion of colour service.

14. On 10 February 2004, the Claimant's Commanding Officer sent a signal indicating that he would be discharged from service on 7 August 2004 on completion of colour service. The signal also directed that the Claimant proceed on terminal leave from 30 May 2004 up to 7 August 2004.

15. The Claimant admitted that after the first 9 years of service, his contract was renewed annually in terms of the regulations in place.

16. Section 176 of the Armed Forces Act provided for modes of discharge of servicemen such as the Claimant. Under the section, a discharge could be given on about 9 different grounds including on mental/physical grounds.

17. A discharge could also be given on the ground that the serviceman's services were no longer required.

18. The Claimant testified that he was sickly and used to have asthmatic fits. He also admitted that his duties required physical strength.

19. The Claimant produced several medical records/notes talking to his state of health.

20. Although the Respondents did not lead any evidence as to the exact reason why the Claimant was discharged on completion of colour service, there is evidence that he had completed the 12 years prescribed by section 174 of the Act (he served for about 15 years).

21. On the strength of medical records and provisions of sections 174 and 176 of the Armed Forces Act, the Court is of the view that there was no unlawfulness in the discharge of the Claimant.

Terminal dues

Unpaid salaries to date

22. On account of terminal dues, the Claimant sought Kshs 3,961,160/- being what he pleaded as unpaid salary from 10 August 2004 to date.

23. By all accounts, the unpaid salaries cannot be terminal dues but could in an appropriate case be claimed as lost income.

24. This is not one such case as the discharge was within the provisions of the Armed Forces Act.

Leave allowances

25. The Claimant sought Kshs 84,280/- on account of leave allowance.

26. However, the Claimant did not draw the attention of the Court to the particular provision of law or contract making him eligible or entitled to the *leave allowance*.

27. This head of claim was not proved.

Certificate of Service

28. A *Certificate of Service* is a statutory entitlement under the Employment Act, 2007. The Act does not apply to the Armed Forces (now Kenya Defence Forces).

29. The Claimant was issued with a Certificate of Service for Servicemen/Women as required by the Armed Forces Act and he was rated as 'fair'.

30. According to the Claimant, he ought to have been given a rating of *good*.

31. In the view of the Court, if at all it is open to the Court to interfere with the rating, the Claimant did not lay sufficient evidentiary material to disturb the rating.

Conclusion and Orders

32. In light of the above, the Court finds no merit in the Cause herein and orders that it be dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 18th day of June 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kobia instructed by Mithega & Kariuki Advocates

For Respondents Mr. Mugiira, State Counsel, Ministry of Defence

Court Assistant Lindsey