



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1529 OF 2015**

**LIEUTENANT COLONEL LUKALE**

**MOSES SANDE.....CLAIMANT**

**VERSUS**

**KENYA DEFENCE FORCES.....1ST RESPONDENT**

**HON. ATTORNEY GENERAL.....2ND RESPONDENT**

**JUDGMENT**

**Introduction**

1. The suit herein was filed on 31.8.2015 seeking the following prayers:

a) A declaration that termination of the Claimant's employment was unlawful, illegal null and void.

b) That the 1st Respondent be ordered to pay him Kshs. 56,719,989/= in addition to monies accruing out of annual increments and promotions as loss of future earnings together with pending allowances and damages for unlawful and illegal termination of the Claimant's

Commission and employment; or

c) In the alternative to prayer number 2 the 1st Respondent be directed to reinstate the claimant back to employment and be paid pending subsistence allowance of Ksh.4,106,657.59 and interest thereon.

d) That the 1st Respondent rectifies the claimant's Certificate of Service in accordance with the law to portray him in good light by changing the reason for leaving employment from termination of Commission to Retirement.

e) The 1st Respondent to pay costs of this Claim.

f) The Honourable Court to consider and grant any other remedy that it may deem fit to grant in the circumstances.

2. The Respondents filed their memorandum of response on 15th of October, 2015 admitting the employment relationship but denied that the employment was unfairly terminated. They averred that the Claimant was terminated due to his conduct and after following due process. They further averred that the claimant was paid all his lawful dues after the termination and denied the reliefs sought by this suit terming the same as speculative and unjustified.

3. The suit was heard in the open court when the claimant testified alone but the respondents called two witnesses. Thereafter both parties filed written submissions which I have carefully considered alongside the pleadings and the evidence tendered.

**Claimant's evidence**

4. In evidence, the Claimant stated that he was commissioned as an officer of the 1st respondent (KDF) on 15.11.2001 as a Cadet Officer (professional) and rose through the ranks to become a Lieutenant Colonel. He served in various capacities and places both in Kenya and abroad. In 2014, he found a brown envelope addressed to Defence Headquarters dated 6th May, 2014, and it read termination of commission

Officers which had not been copied to him. At the time, he was acting in the position of a full Colonel and he was earning a salary of a full Colonel being Kshs.313,000.00 per month. He contended that the termination was unfair and unlawful because he had done nothing wrong and the procedure followed was not in accordance with the law and rules of natural justice.

5. He stated that under section 251 of the Kenya Defence Forces Act 2012, officers above the position of lieutenant colonel can only be terminated by the president in writing and reasons for the termination must be given. However, he stated that in his case, he never received any direct communication from the president who is the commander in chief (CIC) of the KDF, terminating his commission and stating the reasons for the termination. He further stated that the termination was unlawful since section 251 of the Kenya Defence Forces Act 2012 was not adhered to.

6. He observed that the testimonial given after the termination of his commission was contradictory as on the one hand it talks of termination and on the other hand, retirement which in his view posed a challenge to his career as a lawyer. That the word termination in the testimonial impacted him negatively and even if his decommission was a retirement, the same would still be premature because he was 41 then and the age of retirement for specialised officers as at 2014 was 56 years. He contended that he wrote demand letters through his lawyer seeking to know the reasons for the termination and all that was said in response was that the matter was under consideration and he would be served with the reasons but that that was never done. Referring to the written witness statement by the defence witnesses, which suggested that he was dismissed for being in contact with defence counsel in court martial proceedings and giving him information, he denied the alleged contact with the said counsel.

7. He therefore prayed for the reliefs sought in the suit contending that he had a blossoming career with a bright future which could have soon seen him confirmed as Colonel and the Brigadier before reaching the retirement age of 56 years. He further contended that as a specialist his career path was predictable and prayed for damages for the unfair termination plus the salary he would have earned in fifteen years but for the premature termination at the rate of Kshs.313,000 per month.

8. He further prayed for the unpaid subsistence allowances (per diem) amounting to Kshs.4,106,657.59 in respect of further studies he pursued in Britain from 2008 to 2009 being a Master of laws Degree for which he was bonded to work for KDF for not less than 5 years after the course and was not paid ¼ rate per diem which he was entitled to for the entire period. He contended that the failure to pay him the said allowance was not only breach of the KDF regulations but also discriminatory because other officers who attended the course with him under the same scholarship, including Charity Njuguna were paid.

9. Finally, he prayed for the certificate of service (testimonial) to be rectified to paint him in a better picture of a retired officer as opposed to a terminated officer. He also prayed for costs and interest.

#### **Respondent's evidence**

10. RW1 was one Major Daniel Muu Kiama, Staff Officer II at DOD whose duty is to compile nominations for promotions for officers and prepares the proceedings for the Defence Council. That he receives nominations from Service Commanders after which he compiles a list and forwards to the Defence Council for deliberations. That promotions for specialised officers from lieutenant colonel is recommended by the Defence Council to the Commander in Chief depending on availability of vacancies and discipline. That for senior officers, the Defence Council deliberates and advises the Commander in Chief who then signs the executive order. He however contended that testimonials are given in accordance with the character of the officer during service and it must state the manner of termination.

11. RW2 was one Brigadier Kenneth Okoki Dindi, the Chief of Legal Services at the Defence Headquarters. He averred that the Claimant had been observed as generally uncooperative and working towards countering the order of service affairs. That during the review of the Armed Forces Act (now repealed) the claimant was pushing for amendments that went against the grain of a disciplined force. That sometime in 2013 various court martial were convened pursuant to section 163 of the Kenya Defence Forces Act for the trial of several service offenders, but the Claimant expressed his position against proceeding with the trials arguing that they were doomed to fail. That he reluctantly took instructions claiming that since revised regulations under the Kenya Defence Forces Act had not been promulgated the trials would be prejudiced. That the claimant resisted instructions from him and continually undermined command maintaining the antagonistic position despite the Act having transitional provisions.

12. He further stated that during the trial of one Phineas Mugo, who was represented by the Claimant's advocate herein, Mr. Odera Were, and during the preliminaries of the said trial it was observed that the Advocate had specific details on the administration and employment of Officers in the legal branch at the Defence Headquarters that he was using to argue an application to stop proceedings of the Court Martial trial and after investigations were done, it was revealed that the source of Mr. Were's information was the Claimant herein. He further contended that the KDF being a security organ, discipline and loyalty are key tenets that are strictly upheld. He emphasised that all information with respect to the defence forces operations is classified and should not be disclosed to unauthorised persons.

13. The said conduct by the claimant was reported to the Kenya Army Commander who referred the matter to the Defence Council and there after the council recommended the termination of the Claimant's commission which, was subsequently, approved by the President who is the CIC. He contended that communication between KDF and the CIC is through the Defence Council and it is all classified and as such, he could not produce them as exhibits herein. He however admitted that termination of a senior officer like the claimant can only be done by the president (CIC) in writing stating the reason for the termination and addressing the letter to the officer directly. He however admitted that he was not aware whether the president wrote any termination letter to the claimant. He further admitted that there was no evidence to prove that the claimant was given a hearing before the termination.

14. He admitted that the claimant was the senior most lieutenant colonel in the legal department but denied he was guaranteed of promotion to Colonel contending that promotion was dependent on performance, discipline and vacancy and not seniority alone. He further contended that, prior to the Claimant's termination, he had not been recommended for promotion by his service commander to be considered by the Number 1 Board and the Defence Council. He therefore maintained that the allegations by the claimant that he would have been Colonel in 2015 and Brigadier in 2018 are misguided.

15. On the claim for subsistence RW2 stated that the Claimant was not being discriminated against as he had sourced for the scholarship without authority of his commanders and as such the approval of his attendance to further studies was at no cost to government. He contended that the scholarship package from the British government included his subsistence allowances and the claimant was paid full salary while abroad. He therefore maintained that the claimant was not entitled to payment of any subsistence allowance from the Kenya government.

### **Claimant's Submissions**

16. It was submitted on behalf of the Claimant that, his termination was not done in accordance with the law and the rules of natural justice and as such, it was unfair, unlawful, and null and void. That under Section 251 of the Kenya Defence Forces Act, a commission can only be terminated by the Commander in Chief who is the President of the Republic of Kenya, in writing and stating the reasons for the termination. That section 41 of the Employment Act, 2007 and Fair Administrative Actions Act were also not adhered to and the reasons fronted by RW2 as the basis of the Claimant's termination were not proved and as such Court should disregard the same.

17. To underscore the import of the right to due process he relied on *David Gichana Omuya Vs Mombasa Maize Millers Limited (2014)eKLR* where it was held that section 41 of the Employment Act requires an employer to explain to the employee in a language the employee understands the reasons for which he is considering for terminating the services of the employee and thereafter hear and consider any representation which the employee may make before making the decision to terminate the employee.

18. On the remedies sought, it was submitted that since the Claimant's termination was unfair he is entitled to the prayers pleaded in the memorandum of claim including general damages for the unfair termination and legitimate expectation of working up to retirement age. He relied on case *Pravin Bowry Vs Ethics & Anti-Corruption Commission [2013] eKLR* where the Claimant was awarded Kshs 34,684,000.00 for remaining period of his fixed term contract.

19. On payment of subsistence allowance, it was submitted that the Armed Forces Pay Allowances and Regulations, 2007, applies to all the officers and servicemen including the Claimant and specifically relied on regulation 109 of the said Regulations to urge that the claim for subsistence allowance at quarter (1/4) rate during the one year of studies in Britain is due and payable to him.

### **Respondent's submissions**

20. It is submitted for the respondents that, the Claimant was lawfully terminated for his misconduct as outlined in their pleadings and the evidence of their witnesses. They cited the case of *Felix Barnabus*

*Shikutwa Vs Ministry of State for Defence & 4 Others [2016] eKLR* where the Court found that the Claimant's commission was rightfully terminated for conducting himself in an unbecoming manner.

21. As to the Claim that the decision of the Defence Council to terminate him was a nullity because the term of office of the chief of Defence Forces had lapsed, it is submitted that, the sitting Chief of Defence Forces lawfully remains in office until a successor relieves him of the command. In addition it was submitted that the notice terminating the Claimant was signed and issued by the Secretary of the defence council with the approval of the president and as such the decision was lawful and without any procedural impropriety since the secretary was just implementing the instructions.

22. As to whether the Claimant would have risen through the ranks of Colonel in 2015 and Brigadier in 2018, it was submitted there was no guarantee to the said promotion, pointing to the testimony RW2 which was to the effect that as at the time of his decommissioning, the claimant had not even been recommended for promotion by his Service Commander. It was further submitted that, promotion for specialist officers is time bound only up to the rank of Major after which, promotions are conducted as per the terms and Conditions of Service subject to availability of vacancies for officers promulgated pursuant to section 304(1) (d) of the Kenya Defence Forces Act, 2012. They cite the case of *J N Wafubwa Vs Attorney General & 2 Others [200]eKLR* to buttress the position.

23. On the issue of discrimination in payment of subsistence allowances during further studies abroad, it is submitted that unlike his colleagues who had received express authority to apply for the Chevening Scholarships, the Claimant sourced the scholarship without authority of his commanders as stipulated in the Terms and Conditions of Service pursuant to section 304(1)(a) of the KDF Act.

24. It was denied that the Claimants liabilities were not overstated as alleged since the clearance process from the Armed Forces entails computation of the liabilities owed to Government which are deducted from the lump sum after the officer acknowledges the same by signing the certificate of Government liabilities.

25. Finally, it was submitted for the defence that the Claimant has failed to prove his case against the Respondents and therefore the court was urged to dismiss the suit with costs.

### **Analysis and determination**

26. There is no dispute that the claimant served as a commissioned officer of the KDF from 15.11.2001 till 6.5.2014 when his commission was terminated. The issues for determination herein are:

- a) Whether the Claimant's termination was lawful
- b) Whether the Claimant is entitled to the remedies sought.

## **Unfair Termination**

27. The Claimant testified that one day he found a brown envelope addressed to Defence Headquarters dated 6th May, 2014, thrown under his office door and it read termination of Commission Officers. He further testified that the letter was not copied to him and as at the time he gave his testimony herein, he had not been served with any written termination notice from the CIC giving him the reasons for termination as required by 251(1)(a) of the Kenya defence Forces Act.

28. On the other hand, the Respondents stated that the Claimant's conduct of undermining command and compromising prosecution in the court Martial was unbecoming of an officer in the disciplined forces and that led his Service Commander to refer the matter to the Defence Council which recommended termination of his commission. RW2 produced a letter of termination of commission addressed to headquarters but not copied to the Claimant.

29. Section 82 of KDF Act provides that insubordination is an offence therein. Rw2, His Commanding Officer, testified that the Claimant was antagonistic in relation to prosecution before the court martial and had undermined his command on various occasions forcing him to report him the Army Commander who in turn referred the matter to Defence Council. However, the claimant denied the alleged misconduct and maintained that he was not accorded any hearing before the termination. Under to the KDF Act, the alleged misconduct by claimant justified the termination his commission by the CIC under the provisions of section 251 of the Act.

## **Procedure**

30. Section 251 of the Kenya Defence Forces Act provides for the procedure of terminating the commission of KDF officers in the following terms:

***“ 251(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;***

***(2) In any case of termination of a commission in this section, the President, the Defence Council or the Service Commander, as the case may be, shall accord and specify reasons for the termination of***

***the commission to the affected officer, in writing.***

(Emphasis mine)

31. In this case no evidence was adduced by the defence to prove that the Claimant was served with a written termination of his commission from the president who is the CIC stating the reasons for the termination. Whereas the court does not doubt that the records of the KDF are to a larger extent classified, I do not take for granted the testimony by the Chief of Legal Services of the KDF that the claimant could only be terminated by the CIC in writing stating the reason for the termination. Without any such letter from the CIC being produced as an exhibit herein, I return that the claimant's commission was unlawfully done contrary to the express provision of section 251 of the KDF Act and it was therefore null and void.

32. In addition to the foregoing finding I agree with the claimant that the termination of the claimant's commission was also unfair because it was done without according him a fair hearing. Although I entirely agree with the submissions by the defence that Section 3(2) of the Employment excludes the application of the Act to the Defence Forces, I also strongly hold the view that the right to terminate the claimant's commission was subject to his right to fair labour practices, fair administrative action, fair hearing, and right to protection from dismissal, removal from office, demotion or otherwise subjected to disciplinary action without due process of the law as guaranteed under Article 41, 47, 50 and 236(b) of the constitution, KDF Act and the rules of Natural Justice . The said express constitutional provisions as enshrined in the Bill of Rights supersedes any statutory provisions and privileges and are thus binding on the respondents. And I dare say that they cannot be violated without the consequence of this court making declaration and decree for compensation of the victims of the respective violations.

## **Reliefs**

33. In view of the finding herein above that the termination of the claimant's commission was procedurally flawed, I make a declaration that termination of the Claimant's commission by the respondents was unlawful and unfair, but I will not declare the termination null and void as prayed. The reason for the foregoing view is that the claimant accepted the termination, albeit unlawful and unfair when he brought this suit on 31.8.2015 seeking compensatory damages for the unfair termination. For the same ground the prayer for reinstatement is declined.

## **Compensatory damages**

34. The claimant prayed that the 1st Respondent be ordered to pay him Kshs.56,719,989/= in addition to monies accruing out of annual increments and promotions as loss of future earnings together with pending allowances and damages for unlawful and illegal termination of the Claimant's Commission and employment. This prayer in my view comprise two components, namely anticipated salary lost through the said unlawful and unfair termination of the claimant's commission till the age normal retirement being 56 years, and damages for the unfair termination of the commission.

35. The first component of the relief in my view is not tenable both in the public policy and the law and lacks no support from judicial precedents. The claimant cited ***Pravin Bowry Vs Ethics & Anti-Corruption Commission [2013] eKLR*** but with due respect I wish to state that the facts in the said case were distinguishable from the facts of this case. Unlike in this case, the claimant in the cited case was employed

