



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE No.19 of 2016

REPUBLIC.....APPLICANT

VERSUS

GENERAL SAMSON MWATHETHE,

THE CHIEF DEFENCE FORCES, DEPARTMENT OF DEFENCE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

And

EX

PARTE

SENIOR SERGEANT SAMSON KAZUNGU

JUDGEMENT

1. By a Notice of Motion dated 15th August, 2016 the *ex parte* Applicant, Senior Sergeant Samson Kazungu is seeking for orders that;

(a) An order of mandamus, directed at the 1st Respondent directing him to immediately comply with the court order given on the 22nd october 2015 by inter alia reinstating the Applicant back to service on his previous rank, in default the 1st Respondent be cited for contempt

(b) ...

2. The applicant's case is set out in his Affidavit and Supplementary Affidavit and on the grounds that he was a senior Sergeant No.55274 with Kenya Army until 15th september, 2014 when he was convicted by the Court Martial and sentenced to 6 months in prison, dismissed from service and demoted from his position. Being dissatisfied with the judgement and sentence he appealed to the High Court in petition of appeal on 6th October, 2014 and judgement delivered on 22nd October, 2015 quashing the conviction and setting aside the sentence. The Applicant was also reinstated back to service with effect from 15th September, 2014. The 1st Respondent and Director of Public Prosecutions were served on 30th October, 2015 with the orders of the court and the 1st Respondent reminded to reinstate the Applicant but has refused to comply with the court orders.

Respondent's case

3. In response the Respondents filed Replying affidavit of Yvonne Kerubo Kiruia the Defence Court Martial Administrator at Defence headquarter for the 1st Respondent and avers that the 2nd Respondent is wrongly joined herein as a Respondent as he was not a party to Nairobi, **Criminal Appeal No.135 of 2014 – Samson Kazungu versus Republic** where judgement was delivered and is subject of these proceedings. The criminal proceedings were conducted by the Director of Public Prosecutions.

4. Ms Kiruia also avers that the reliefs sought by the Applicant if granted will deny the Respondents the rights under article 50 of the constitution and the rights at section 8(5) of the Law Reform Act. That under section 253(5) of the KDF Act and Chapter 4 of the KDF Standing Orders requires a service member who has served for more than 21 years to apply to the Service Commander for re-engagement on a yearly basis if they wish to continue in service. When the Applicant was undergoing court martial, he had served for 331 years and his service would have ended on 15th November, 2015 as he had not applied for re-engagement. The 1st Respondent is therefore unable to comply with the judgement of the court and the orders of 22nd October, 2015 and taking effect from 15th September, 2014.

5. Service in KDF is determined by age in terms of the KDF Act. The Applicant does not qualify for re-enlistment and his service expired on 15th November, 2015. The Notice of Motion should be dismissed with costs.

Submissions

6. Both parties filed written submissions.

The Applicant reiterated his pleadings and relied on the case of **Republic versus Principal Secretary, Ministry of Health ex parte Susan Wamaitha Kamau [2016] eKLR**.

7. The Respondent submits that the court has no jurisdiction to determine the matter in terms of article 162 of the constitution read together with section 34 of the Civil Procedure Act where the execution, discharge or satisfaction of the decree should be determined by the court which issued it. Proceedings before this court can only be enforced under the Rules of the Court pursuant to the provisions of section 13 of the Employment and Labour Relations Court Act. This court is not the executing court in terms of section 34 of the Civil Procedure Act.

8. The Respondent has relied on the following cases – **Townhida Awo Shariff & 2 others versus Registrar of Titles & 4 others [2012] eKLR; Peter Ngatia versus Attorney General, JR No.102 of 2010; Karisa Chengo & others versus Republic [2015] eKLR**.

Determination

9. The application moved the High Court in **Criminal Appeal No.135 of 2014 – Samson Kazungu versus Republic** where the court allowed the appeal and further directed the Respondent to reinstate the Applicant with his rank and benefits. Faced with such a decision, the Applicant should have instantly moved this court as the appropriate forum with jurisdiction to grant the orders of reinstatement back to his employment and the attendant benefits. The Applicant moved the High Court, Judicial Review division which has now transferred the matter to this court.

10. The essence of the application before court it that upon the judgment of the Court in **Criminal Appeal No.135 of 2014 – Samson Kazungu versus Republic**, the Applicant was returned back to the position subsisting before he was court marshalled. To reason the judgement of the High Court in any other manner or context would be to lose the essence and orders issued by the High Court on 22nd October, 2015 when the court found the Applicant should be reinstated back to his position without losing his rank and benefits. To change this judgement, only an appeal against it can rule otherwise. The decision of the Court Martial can therefore not stand on the face of the High Court orders.

11. The jurisdiction of the court is well set out under Article 162 of the constitution read together with section 12 of the Employment and Labour Relations Court Act. This court has the exclusive jurisdiction to issue orders of reinstatement of an employee where such an order has been issued or on its own motion and fining that this is the appropriate order to issue. Upon the Criminal appeal of the Applicant to the High Court and the setting aside of the sentence and conviction, the court proceeded to direct the restatement and restoration of rank and benefits of the Applicant. To enjoy such orders of reinstatement and noting there is concurrent jurisdiction with the High Court, where the Criminal division has issued orders with regard to the applicant's employment. Upon the orders of the court, the jurisdiction of this court is properly invoked by Judicial Review and orders of *mandamus* for the Applicant to be able to enjoy the fruits of his judgement. This cannot then be challenged that the Applicant has moved this court without the appropriate jurisdiction.

12. The rationale is that a party should not have to go to the moon and back so as to enjoy lawful orders of the court. The forum, manner and process of moving the court, in this case Superior Court should be in a manner that is facilitative of justice rather than overreliance on form and technicalities. Where the Applicant is able to address the substantive issue at hand and moves the court as appropriate, the issue at hand should be addressed instantly and without undue regard to technicalities.

13. In addressing the form, style and manner of filing a suit the Court of Appeal in **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** held that;

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

14. In **Mradula Suresh Kantaria versus Surech Nanillal Kaptaria; Civil Appeal Number 277 of 2005**, the Court of Appeal observed that;

In this regard, we believe one of the principles of the double O principle [the oxygen principle] is to enable the court to take case management principles to the centre of the court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap.

15. The orders sought relate to the reinstatement of the Applicant back to his rank with the 1st Respondent and further that where there is no compliance, the 1st Respondent should be cited for contempt. The impugned orders were issued on 22nd October, 2015 by the High Court.

16. The orders of 22nd October, 2015 relate to proceedings from a criminal appeal petition. Judgement was delivered and orders/decree extracted. The Applicant obtained leave to commence judicial review proceedings which leave was granted and served upon the respondents. Nothing stops this court from proceeding forward and addresses the suit as appropriate particularly as regards the question of reinstatement and work benefits.

17. In this case, I am satisfied that there is a judgement and decree, the Respondents were directed to reinstate the Applicant, pay his dues and restore his rank and this has not been done. There is no appeal against the orders of the court and the judgement of 22nd October, 2015 stands undisturbed. Despite demand to comply and abide the judgement and orders of the court, there is no willingness on the part of

the 1st Respondent to comply.

18. I find the Applicant has made a good case for the grant of the prayers for judicial review orders of *mandamus* to compel the 1st respondent, the Chief Defence Forces, Department of Defence to reinstate him back into the service on his previous rank. Upon such reinstatement, the Respondents should pay the back wages/salaries due and owing to the Applicant noting the reinstatement. Where retirement of the Applicant is regulated in statute, such shall be put into account upon the reinstatement and payment of his due based on his restored rank.

Accordingly, I hereby grant the judicial review orders of *mandamus* compelling the 1st Respondent to reinstate the Applicant back into the service on his previous rank and to pay owing dues back to the date of dismissal, the 15th September, 2014 within the next 30 days from the date of this order. In default the Applicant shall be at liberty to institute contempt proceedings to enforce the *mandamus* orders.

Each party to bear own costs.

Delivered, dated and signed in open court at Nairobi this 3rd day of March, 2017.

M. MBARU

JUDGE

In the presence of:

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