



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR**

**RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 32 OF 2013**

**POLYCARP MIYOGO NYAKORA.....PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR DEFENCE.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF OF DEFENCE FORCES.....3<sup>RD</sup> RESPONDENT**

Mr. Okenyo, Omwanza for petitioner

Ms. Mwangi for respondents

**JUDGMENT**

1. The petition was filed on 7<sup>th</sup> June 2013 and is supported by verifying and further affidavits of the petitioner annexed thereto. The petitioner worked for ten (10) years with the Kenya Defence Forces based at the Technical Transport Wing, Moi Airbase, Air Traffic Control, Crash and Rescue Sub-Unit.
2. The petitioner professes seventh day Adventist Christian faith. Petitioner worshipped on Saturdays, the seventh day. Worship for the faith starts on sunset Friday to sunset Saturday.
3. For the ten years, the petitioner was allowed to worship on Saturdays, by his superiors. Technical transport Wing had about two hundred officers. Seventy five were in the same section with the petitioner. They worked in shifts. If one was on duty today, he would be off the next day. This was the norm. They had two or three shifts and at most four.
4. Shortly before 31<sup>st</sup> May 2012, the petitioner reported to work on Monday. Usually the shift that begins on Monday worked throughout the weekend. Petitioner upon realizing that he would be on duty on Saturday went to Corporal, Biwott, since he was a Senior Private, to seek permission to be allowed to attend service on Saturday. The petitioner followed the matter on Friday and Corporal Biwott informed him that the crew commander had refused. His name was Sergeant Muli.
5. On 31<sup>st</sup> May 2012, the petitioner went through Cpl. Biwott to Sgt. Muli to seek permission to be allowed to go and worship but permission was refused. Mr. Muli said he wanted to ascertain if the

petitioner could work on Saturday or not.

6. The petitioner went to worship without permission and reported to work immediately after service at 1800 hours. This was a guard duty day for the petitioner and the guard commander made a charge against the petitioner for failing to attend duty in the morning and was given a morning.

7. The following Saturday on 8<sup>th</sup> June 2012, the petitioner was also required to be on fire shift stand by and sought permission to go and worship from Sgt Muli, who declined again. The petitioner attended service. Charges were drawn against the petitioner. On 13<sup>th</sup> July 2012 the Commander informed the petitioner that he had been posted to the guard of honour and was told to work on 14<sup>th</sup> June 2012.

8. The petitioner failed to work on 14<sup>th</sup> June 2012 and charges were drawn against him and he was imprisoned for 42 days for failure to work on Saturdays.

9. The petitioner was in addition deducted six (6) days' salary with severe reprimand not to appear before the Commander for failure to work on Saturdays again. The Commanding Officer was Mr. Otieno.

10. The petitioner proposed that there be a replacement while he was in church but the Sergeant had refused. The petitioner had also proposed to attend Sabbath for lesser hours but the proposal was also refused.

11. In the Kenya Defence Force, personnel worship in different denominations, including Catholics and Protestants who worship on Sundays and Muslims who worshiped on Fridays. They were allowed to worship. Other faiths are not so particular about the day of worship unlike seventh day Adventist. For ten years, the petitioner did not perform duties during worship time.

12. The petitioner prays for:

a. A declaration that the Kenya Defence Forces as an organ of government is bound by the constitution and that it is under duty to respect, uphold and defend the constitution in terms of Articles 2 (1) (3), 24 (5) (a) (b) (c) (d) (e) (f), 27 (1) (4), 28, 29 (a) (d) (f), 32 (1) (2) (3) & (4), 47 and 73.

b. A declaration that the imprisonment for 42 days and deduction of the Petitioner's salary for six days was illegal and in contravention of Article 27 (1) (4), 32 (1) (2) (3) & (4) and 47 of the Constitution of Kenya.

c. A declaration that the petitioner be compensated for wrongful confinement.

d. A declaration that the discharge of the petitioner from the service on grounds of religion was illegal and in contravention of Articles 2 (1) 3, 10, 19 (c), 20 (1) (2) (3), 24 (5) (a) (b) (c) (d) (e) (f), 27 (1) (4), 28, 29 (a) (d), (7), 32 (1) (2) (3) & (4), 47 and 73.

e. A declaration that the petitioner be compensated for lost employment and earnings.

f. A declaration that the petitioner be entitled to pension and monthly benefits as an ordinary retiree because the petitioner was ready to serve till he attains the retirement age of 12 years.

g. A declaration that the petitioner is entitled to general damages and compensation or the violation of his fundamental rights and freedoms.

h. A declaration that the petitioner is entitle to exemplary damages, petitioner is entitled to an aggravated scale of damages for imprisoning the petitioner unlawfully and in contravention of the Constitution.

i. Costs of the petition.

## **Response**

13. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a replying affidavit in opposition to the petition.

14. The respondents admit the particulars of employment of the petitioner. The respondents depose that the petitioner failed to report for guard duties on 2<sup>nd</sup> June 2012 on grounds that this was his day of worship.

15. That on 8<sup>th</sup> June 2012, the petitioner absented himself again without leave while knowing that he was on fire standby crew duties. He was again tried summarily for being absent without official leave. He was found guilty and slapped with a fine of 2 days' pay.

16. On the 14<sup>th</sup> July 2012, the petitioner failed to turn up for a guard of honour duties. He was again tried summarily and imprisoned for 42 days in terms of the Armed Forces Act, Cap 199, Laws of Kenya (repealed).

17. The petitioner was also recommended for discharge as his services were no longer required. The petitioner was discharged from service on 7<sup>th</sup> December 2012 under Section 255 (1) g of the Kenya Defence Forces Act on grounds that his services were no longer required.

18. The respondents submit that the petitioner was defiant in spite of constant advice to obey lawful orders of his superiors. That the charges and penalties meted on the petitioner were lawful and procedural.

19. Respondents depose that Seventh Day Adventist church is not superior to other religious and cannot be given preferential treatment in the Armed Forces. Doing so would amount to discrimination against other religious.

20. That the respondents did not discriminate against the petitioner. That he was accorded equal treatment as other military personnel who professed different faiths.

21. That the petitioner has not established violation of any of the alleged human rights and fundamental freedoms. The petition has no merits and should be dismissed with costs.

## **Determination**

22. The issues for determination are;

1. Whether the 3<sup>rd</sup> respondent violated any of the petitioner's guaranteed human rights and fundamental freedoms enshrined in the Constitution of Kenya, 2010.
2. Whether the discharge of the petitioner from service was lawful.
3. What remedies if at all are available to the petitioner?

## **Issue i**

23. The parties filed their respective submissions on 20<sup>th</sup> April 2017 and 5<sup>th</sup> July 2017 respectively.

24. The facts of employment of the petitioner and circumstances leading to his discharge from military service are not in dispute. The court will not regurgitate the same here.

## **The Law**

25. Article 2 (1) of the Constitution pronounces the supremacy of the Constitution and provides that the Constitution binds “..... **all state organs at both levels of government.....**”

26. Article 2 (4) of the Constitution of Kenya, 2010 provides among other things that any act or omission in contravention of the Constitution is invalid.

27. Article 3 of the Constitution of Kenya, 2010 obligates every person to respect, uphold and defend the Constitution and any attempts to establish a government otherwise than in the Constitution is unlawful.

28. Article 10 of the Constitution of Kenya, 2010 sets out the national values and principles of governance that bind all state officers state organs, public officers and all persons where they apply and interpret the Constitution, enact, apply or interpret any law, or make and implement public policy decisions.

29. Among the national values and principles of governance are national unity, the rule of law, participation of the people, equity, inclusiveness, equality, human rights, nondiscrimination, good governance, transparency and accountability.

30. Article 21 of the Constitution of Kenya, 2010 provides;

***“(1) It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.***

***(3) All state organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, order members of society, persons with disabilities, children, youth, members of minority or marginalized communities and members of particular ethnic, religious or cultural communities.”***

31. Article 24 of the Constitution of Kenya, 2010 provides;

***1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:-***

**a. The nature of the right or fundamental freedom;**

**b. The importance of the purpose of the limitation;**

**c. The nature and extent of the limitation;**

**d. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

**e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

**2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom: -**

**a. In the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;**

**b. Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and**

**c. Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.**

**3. The state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.**

**4. The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.**

**5. Despite clause (1) and (2), a provision in legislation**

**6. may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service: -**

**a. Article 31 – Privacy;**

**b. Article 36 – Freedom of association;**

**c. Article 37 – Assembly, demonstration, picketing and petition;**

**d. Article 41 – Labour relations;**

**e. Article 43 – Economic and social rights; and**

**f. Article 49 – Rights of arrested persons**

**7. Article 27 of the Constitution of Kenya, 2010 provides for equality and freedom from discrimination and in particular provides that;**

32. Article 27 of the Constitution of Kenya, 2010 provides for equality and freedom from discrimination and in particular provides that;

**1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social sphere.**

**4. The state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4).**

33. Article 28 of the Constitution of Kenya, 2010 provides that;

**Every person has inherent dignity and the right to have that dignity respected and protected.**

34. Article 29 of the Constitution of Kenya, 2010 provides that;

**Every person has the right to freedom and security of the person, which includes the right not to be;-**

**a. Deprived of freedom arbitrarily or without just cause;**

**Subjected to torture in any manner, whether physical or psychological; or**

**f. Treated or punished in a cruel, inhuman or degrading manner,**

35. Article 30 of the Constitution of Kenya, 2010 provides that;

**1. Every person has the right to freedom of conscience, religion, thought, belief and opinion.**

**2. Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.**

**3. A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.**

36. Section 44 of the Kenya Defence Forces Act, 2012 provides that;

1. The right to freedom of conscience, religion, thought, belief and opinion set out in Article 32 of the Constitution shall be subject to limitations in respect of a person to whom this Act applies only under the conditions set out in subsection (2).

2. Nothing contained in or done under the authority of this Act shall be held to be inconsistent with or in contravention of freedom of conscience, religion, thought, belief and opinion set out in Article 32 of the Constitution if that act is reasonably done: -

a. in the interests of defence, security, public safety, public order, public morality or public health;

b. for the purpose of protecting the rights and freedoms of other persons including the right to observe and practice religion, belief, opinion without the unsolicited intervention of members of another religion; or

c. for good order and discipline in the defence forces.

37. Section 255 of the Kenya Defence Forces Act, 2012 provides that;

**1. A service member may be discharged by the Service Commander or an officer authorized in that behalf, at any time during the member's period of colour service; -**

**a. if, within two years after the date of attestation, the commanding officer considers that the member is unlikely to be an efficient member of the Defence Forces;**

**b. for activities or behavior likely to be prejudicial to the preservation of public security;**

**c. if the member is convicted of a civil offence;**

**d. if the member is pronounced by a medical officer to be mentally or physically unfit for further service;**

**e. on reduction of establishment;**

**f. at the member's request on compassionate grounds;**

**g. if for any reason the member's services are no longer required;**

**h. if the member is granted a commission; or**

**i. if the member is sentenced by a court martial to be dismissed from the Defence Forces.**

**2. The Service Commander or an officer authorized in that behalf, as the case may be, shall afford specific reasons in writing for any discharge, to the affected service member.**

38. It is the petitioner's humble submission, that his enjoyment of the fundamental right to freedom of religion, belief and observance of a day of worship as guaranteed under Article 32 (1), (2), (3) and (4) of the Constitution was violated because;

a. According to the petitioner's Certificate of Service dated 15<sup>th</sup> October 2012, marked and hereby produced as "Exhibit PMN-1", the reason that was advanced for him being discharged from the service is categorically captured thus;

***".....due to religious conviction with the service, he has been discharged from the service....."***

As such, the basis for discharge was clearly the petitioner's religious conviction of observing a day of worship which is admitted by the respondent.

In the case of **Dixon –vs– Hallmark Cos, 627 F.3d 849 (11<sup>th</sup> Cir, 2010)**. A supervisor of the respondent, uttered a remark to a Christian employee right after terminating his wife for hanging a religious picture and said, "**You are fired too. You are too religious.**" And these words it was held, constituted direct evidence of discrimination sufficient to survive summary judgment.

Employers must try to accommodate the religious needs of its employees and adjust the requirements of the job so that the employees can remain employed without giving up the practice of their religion, provided the adjustment would not work an undue hardship on the employer.

b. Religious conviction and observance of a day of worship even for people in the Kenya Defence Forces or the National police Service cannot in any circumstance be limited as Article 24 provides for areas that can be limited and observance of a day of worship is not among them.

c. Inasmuch as Section 44 of the Kenya Defence Forces Act, 2012 provides that Article 32 shall be subject to limitations, the said Section outlines the circumstances under which a religious right/freedom can be limited. The conditions and circumstances includes;

1. In the interests of defence;
2. In the interests of security;
3. In the interest of public safety;
4. In the interest of public order;
5. In the interest of public morality;
6. In the interest of public health;
7. For the purpose of protecting the rights and freedoms of other persons;
8. For good order and discipline in the Defence Forces

39. The court finds that none of the aforementioned circumstances and/or conditions existed to warrant

the freedom of worship enjoyed by the petitioner for ten years to be denied by the 3<sup>rd</sup> respondent.

The court finds that the petitioner's constitutional right not to be discriminated upon on grounds of religion; freedom to worship; and right to dignity were infringed upon by the respondent in a most cavalier manner and is deserving of deterring sanctions by this court.

## **Issue ii**

41. The second issue for consideration is whether the discharge of the petitioner from service was lawful. Following the finding that the curtailment of the petitioner's right to attend church service on Saturdays was a violation of his constitutional right and freedom of workship, the 3<sup>rd</sup> respondent had no valid reason to terminate the employment of the petitioner. The orderly proceedings that were premised on this illegality were null and void *ab initio*.

42. It follows that the deduction of salary for six (6) days and imprisonment for forty two (42) days was illegal and in furtherance of violation of the petitioner's constitutional rights and freedoms specifically set out in the petition.

43. In **cause No. 116 of 2010 VMK V. CUEA [2014] eKLR** this court relied on Article 1 of Convention No. III – Convention on Discrimination in respect of Employment and Occupation, 1958 which define discrimination thus;

*“For the purpose of this Convention the term discrimination includes:*

*(a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impacting equality of opportunity or treatment in employment or occupation.”*

(emphasis mine).

44. This is important because discrimination is not defined in the Constitution of Kenya, 2010. This court finds that this definition is applicable to discrimination in terms of our Constitution by dint of Article 2 of the Constitution of Kenya, 2010, which provides;

*“2(5) The general rules of international law shall form part of the law of Kenya and*

*“2(6) Any treaty or convention ratified by Kenya, shall form part of the law of Kenya under this Constitution.”*

45. Convention 58 was ratified by the Republic of Kenya and is part of our municipal law therefore.

46. In the present case, it is opportune to note that the petitioner had been, for a period of ten (10) years allowed by the respondent to attend church service on Saturday, according to his faith.

47. In the case of **Prisca Kemboi & 2 others Vs. Kenya Posts Office savings Bank [2014] eKLR** Justice Ndolo held;

*“The petitioners submit that there exists an established waiver by the respondent of its right to enforce the Terms and Conditions of Service and Code of Conduct as far as working on Saturdays is concerned. The respondent responds that any exemptions granted to the petitioners arose from local arrangements within their respective departments and did not constitute the official position of the respondent.*

*This argument begs the question as to the mandate and authority of the respondent's supervisors and departmental heads to organize work in the departments they head. The letter to the 3<sup>rd</sup>*

*petitioner is signed by the manager/special duties and petitioners consistently for periods ranging from 16 up to 20 years took time off on Saturdays with the full knowledge and acquiescence of their departmental heads.”*

48. The court finds that the respondent was estopped from stopping the petitioner from attending Saturday service after having allowed him to do so for a period of ten (10) years. This added to the illegality of the discharge and is in itself an aggravating factor.

### **Issue iii**

49. The next issue for determination is what remedies are available to the petitioner in view of the finding by the court above;

### **malicious prosecution and false imprisonment.**

50. The claimant was unlawfully prosecuted and confined for forty two (42) days. His liberty and dignity was infringed upon as a result. Following the Decision of the **High Court in HCCC No. 360 of 1995 at Kisumu Dr. Odiambo Olel Vs. Attorney General**, where the plaintiff was arrested and held at Nyayo house for seventeen (17) days and was forced to plead guilty to a false charge and upon which he was convicted and sentenced to five years. The Court of Appeal quashed the conviction and awarded the appellant Kshs.12,477,675 constituting; special damages Kshs.1,547,435; loss of salary; Ksh.1,500,000; General damages Kshs.4,500,000 and exemplary damages of Kshs.4,000,000.

51. In case of **Peter M. Kariuki Vs. attorney General, Petition No. 4030/2006**. The petitioner was awarded general damages of Kshs.7,000,000 for false imprisonment.

52. In **Gitobu Imanyara & 2 others Vs. Attorney General (consolidated petitions Nos. 80 and 81 of 2010)**. The petitioner was awarded general damages Kshs.15,000,000.

53. In the present case, the petitioner did not undergo torture as in the above cited cases, during the forty two (42) days he was in confinement. He however lost his freedom, dignity and earnings.

54. The court awards the petitioner Kshs.3,000,000 for malicious prosecution.

### **55. General damages for violation of human right and fundamental freedoms.**

56. The court has found that the petitioner's right to free worship was violated. This violation became also the reason for his malicious prosecution and false imprisonment, loss of job and deduction of his salary. The court must protect employees from abuse by their employers. In **Cause No. 1161 of 2010, VMK Vs. CUEA [2014] eKLR**, this court awarded the claimant Kshs.5,000,000 for discrimination on grounds of pregnancy and HIV status. The present case is one of discrimination on grounds of religion. As stated earlier, this right is jealously guarded by our Constitution and the court frowns at the conduct exhibited by the Armed Forces of Kenya, towards its gallant soldiers. Accordingly, the court awards Kshs.5,000,000 to the petitioner for this violation.

### **Exemplary damages**

57. This case has various aggravating circumstances including unlawful loss of employment and means of livelihood; non payment of pension of the petitioner upon termination; false imprisonment; deduction of salary duly earned and indignity that accompanied the general conduct, by the various officers towards him.

58. This is a proper case to award exemplary damages as in the case of **Dr. Odhiambo Olel (supra)** relied upon by Musinga J. as he then was in **HCCC at Nairobi Misc. case No. 1185 of 2003, Gitari Cyrus Mungai Vs. Attorney General**, where the applicant was awarded Kshs.3,000,000.

59. The court awards the petitioner Kshs.3,000,000 exemplary damages accordingly for the indignity he suffered at the hands of the 3<sup>rd</sup> respondent.

**Lost earnings and loss of employment**

60. With respect to the lost earnings by fact of unlawful and unfair discharge from service. Considering that the petitioner lost years of service in the military and is not being paid pension to date, the court awards equivalent of one month's salary for each lost year of service, which is equivalent of twelve (12) months salary compensation. In addition the court directs the respondents to treat the petitioner as an ordinary retiree from the date of discharge and he be paid pension, (both lumpsum and monthly) in accordance with the relevant Armed Forces law and regulations.

61. In the final analysis, the court enters Judgment in favour of the claimant as against the respondents jointly and severally as follows;-

- a. General damages in the sum of Kshs.3,000,000 for malicious prosecution and false imprisonment.**
- b. General damages in the sum of Kshs.5,000,000 for violation of the petitioner's human rights and fundamental freedom to worship in accordance to his religion.**
- c. Exemplary damages in the sum of Kshs.3,000,000.**
- d. General damages for lost earnings equivalent to twelve (12) months salary to be computed and filed in court within thirty (30) days of Judgment.**
- e. Petitioner be treated as an ordinary retiree and be paid lumpsum and monthly pension in terms of Kenya Defence Forces Act, and relevant regulations within sixty (60) days of this Judgment.**
- f. Interest at court rates from date of Judgment till payment in full.**
- g. Costs of the suit.**

**Dated and Delivered at Nairobi this 21<sup>st</sup> day of July 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**