



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1603 OF 2014**

**HENRY OSIEMO OBAIGWA.....CLAIMANT**

**VERSUS**

**MINISTRY OF STATE FOR DEFENCE.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed his suit on 4<sup>th</sup> October 2013 seeking the determination of an issue he framed as the wrongful and unlawful termination of the Claimant's services and failure by the Respondent to pay terminal dues to the Claimant. The Claimant averred that he was employed as a Senior Sergeant in the Tailoring Unit by the Respondents and was dismissed after 24 years service on allegations that he had stolen an ATM card belonging to Senior Sergeant Makanga of Transport Battalion. He averred that he was handed over to civil police for appropriate investigations and which were undertaken and he was arraigned in court where he was acquitted on appeal and sought by letters dated 15<sup>th</sup> April 2013 and 20<sup>th</sup> August 2013 for reinstatement or compensation in view of his acquittal but the same was rejected by Commander Kenya Army for lack of merit through letter dated 25<sup>th</sup> September 2013. The Claimant averred that he served the Respondents with loyalty and diligence until June 2007 when he was wrongfully and unfairly terminated from service without any remuneration pending the outcome of the case where he was exonerated from any criminal liability. The Claimant averred that he was dismissed without any warning contrary to the stipulations under Section 40 of the Employment Act 2007 and that the malicious and unfair allegations were fabricated to facilitate the unlawful termination of his employment. He thus prayed for a finding that the reasons and procedure for termination of the Claimant's services was wrongful; that the refusal and neglect to pay the Claimant his rightful terminal benefits and other unpaid dues as unlawful and untenable; payment of aggravated, exemplary and/or special damages whichever combination the court deems just and expedient; the sum total of all monies, allowances and benefits due to him from the time of interdiction to date; costs of the suit; interest on the sums due as allowances and benefits and any other relief the court may deem just and fit to grant.

2. The Respondents filed a reply to the Memorandum of Claim on 11<sup>th</sup> October 2013 and subsequently filed an Amended Reply to the Memorandum of Claim on 27<sup>th</sup> March 2015. In the amended reply, the Respondents averred that Claimant stole an ATM card belonging to the Claimant's colleague Senior Sergeant Yuvinus Makanga and withdrew money to the tune of 869,000/- and was charged before the officer commanding on 20<sup>th</sup> June 2007 and was charged with the offence of conduct to the prejudice of good order and service discipline contrary to Section 68 of the Armed Forces Act 1968 (now repealed). The Respondents averred that the Claimant admitted to having stolen a total of Kshs. 643,200/- from the account of Senior Sergeant Yuvinus Makanga and went ahead to propose a repayment plan. It was denied that the Respondents handed over the Claimant to the Police and that if that occurred then it was the Claimant who was the sole author of his misfortune. The Respondent averred that the Claimant's acquittal in the criminal trial is not a ground for overturning the disciplinary action taken against him. The Respondents averred that the Claimant's arrest and arraignment in court was as a result of the theft not in any way influenced by the 1<sup>st</sup> Respondent. The Respondents averred further that the office of the Director of Public Prosecutions was then a department under the 2<sup>nd</sup> Respondent and was therefore independent and not subject to the control of the Respondents in the discharge of its constitutional mandate. The Respondents aver that the orders prayed for by the Claimant are not justified at all and that the suit should be dismissed with costs to the Respondents.

3. The Claimant testified on 28<sup>th</sup> January 2016 and stated that he was a former Senior Sergeant Kenya Army having been employed on 24<sup>th</sup> April, 1984. He was based at Kahawa. He was a tailor earning Kshs. 54,000/= a month and a travelling allowance of 30,000/= each year. He was terminated in June, 2008 after 24 years of service. He stated that at that time, he and his colleague Yuvinus Makanga a Senior Sergeant were intending to commence business, disagreed at some point when their business partners managed to swindle them of some 643,200/= and his colleague thought he was involved in the swindle. He tried to talk to his colleague and they did not resolve the matter and after consulting others, the issue was reported to the head of his department. He testified that the head of department then reported to his Commander Colonel Kilathi and when the complaint was taken to the Commander, his colleague said the Claimant owed Kshs. 643,200/= later changed to Kshs. 800,000/= subsequently Kshs. 770,000/=. He stated that he was told to go out and thereafter a letter was drafted and the Commander advised him to be careful as he could lose his employment. He testified that he got emotional and that he thought the letter that was drafted was on the issues discussed and he signed it without reading it. He was taken to Commanding Officer who is involved in issues of discipline at about 6.30 pm and he did not expect much but it was actually an interview which could result in dismissal. He testified that at the Commanding Officer's office he was asked questions some of which he answered in the affirmative and others in the negative. Finally he was informed that he had been dismissed from work. He was not given any warning letter or anything relating to dismissal. At the time he was serving at Kahawa Barracks at KATU (Kenya Army Tailoring Unit). He testified that after leaving the Commanding Officer, he did not know what was next and outside he found Military Police who handcuffed him. He stated that he was requested to hand over all the items that belong to the Army. He went to where he lived and surrendered the items and was taken in a Military vehicle to Hurlingham Department of Defence Headquarter and was later taken to Fraud Office to be investigated. He stated that he was taken to the fraud office and that those are civil Police. He was taken to Kileleshwa Police Station and then charged and taken to Court before Chief Magistrates' Court. He testified that after the case was concluded, it was held that he was not guilty on appeal in 2012. After the termination of the case,

he wrote to the Commander Kenya Army in April, 2013 attaching the judgment and that did not get a reply to this letter and that he wrote again in August 2013 and got a reply on 5<sup>th</sup> September, 2013. In the reply it was said that though he had been found innocent, there was no merit for him to be reinstated or compensated and he therefore decided to come to court. He was referred to the exhibit marked AG1 and stated that this is a form used in the Military and it is filled when an officer is dismissed. He stated that in the service, there is no time to give explanation and that you respond with either a yes or no. He was referred to AG2 and stated that was when he was before the Commanding Officer and that the replies were the same. He had had no time to say more but only either yes or no. He was referred to AG3 and stated that it was his statement which stated that he was willing to repay the money so that he keeps his job. He stated that he signed AG3 without even looking at it. He felt sad that he served for 24 years and in a short time without being given a chance or time to explain what happened, he was out of employment. He felt that the termination was unlawful and sought that the court orders payment of his rightful dues.

4. In cross-examination by Miss Chege, he testified that he worked alongside his colleague but in different departments. He stated that they were business partners and that was business rivals who stole the money. He stated that the money partly was his but more belonged to Yuvinus Makanga and that his share was about 100,000/= or thereabouts. He was referred to AG2 and stated that at present he had strength to speak and that he did not have opportunity to speak then. He testified that when he was taken to Commanding Officer he was tense. He knew what was going on at Commanding Officer's office and it is recorded that he said he was guilty. He stated that he did not fathom and did not have right frame of mind. He testified that he could withdraw money from the ATM on behalf of his colleague and that he went to withdraw the cash on two occasions only at the Eastleigh branch of Barclays Bank and the cash stolen in Wendani. He stated that he was with Makanga and that they did not report the theft. He stated that his colleague Makanga collaborated with Department of Defence and that he was handed over to Military Police. He testified that his colleague was the complainant and prosecution was by Police. He said there was also Military Police who was a witness and that the issue that brought issues at camp was Kshs. 643,000/= which was lost and the fabrication of Kshs. 860,000/= and Kshs. 770,000/= made it difficult to Commanding Officer to ascertain and so the CO asked Banking Fraud to investigate. He stated that fraud investigations were undertaken on the account of Yuvinus Makanga which was not a joint account. He testified that Makanga trusted him and sent him having given the PIN. He stated that he had not committed any offence against good order. He said that he understood that if the Military dismisses you, you have no appeal and are taken out of the camp. He stated that the military did not follow what is supposed to happen and that he was charged, dismissed, taken to civilian Police and charged. He wondered how many times one can be punished for one issue. He testified that according to Army Standing Orders after dismissal it is hard to undertake clearance. He stated that he did not take himself to court and that the Department of Defence handed him over to Police. He did not clear with the force to his surprise.

5. In re-examination by Mr. Swaka he testified that it was the Commanding Officer who handed him over to be prosecuted in the civilian court. He stated that at the time they were at Kahawa Wendani, there were 5 people – himself, Yuvinus Makanga 2 Tanzanian's and a Mr. Kuria. He admitted that he wrote the letter of April, 2013 and that of August, 2013 to Commanding Officer Kenya Army and that it was not dated because he was called to an interview in a short period. He testified that he went to Corps Commander and thought they had agreed that he refund and that when he went out the letter had been written. He was told by the Corps Commander "Take care lest you lose your job" and then he signed the letter and did not look at the contents.

6. Further hearing was scheduled for 30<sup>th</sup> March, 2016 at 9.00 am but the case did not proceed at the other dates it was set for hearing. After the case was revived in 2017, the case was slated for hearing on 18<sup>th</sup> October 2017. The Respondent called Major Gilbert Gichuhi the Staff Officer II in-charge of Personnel Records at Staff Headquarters who testified that he had worked for the Respondent for 15 years and had the brief on the case. He stated that the Claimant was accused of taking some substantial amount of money from a colleague 56282 Senior Sergeant Makanga using Makanga's ATM card. He stated that the sum taken was about Kshs. 600,000/= or thereabout and that once the offence was reported, the Claimant appeared before Officer Commanding who charged him as is the procedure and the Major heard the case and referred to the Lt. Colonel the Commanding Officer on 10<sup>th</sup> July, 2007. The charge was stated that at Kahawa Garrison at diverse dates in 13<sup>th</sup> May, 2007 and 28<sup>th</sup> May, 2007 the Claimant used an ATM Card in respect of 56282 Senior Sergeant Yuvinus Makanga of KACT to withdraw Kshs. 643,200 from Senior Sergeant Makanga's account without the consent of the Senior Sergeant. He was referred to AG1 the charge report and stated that the Armed Forces normally keep a record of proceeding and that the accused in that case was put through a series of questions and the answers were recorded. He was referred to AG2 the record of proceedings and stated that the Claimant was asked if he (Claimant) understood the charge and replied in the affirmative and admitted guilt. He stated that the Claimant was found guilty and the Commanding Officer awarded dismissal from Armed Forces subject to Army Commander's approval. The Claimant was dismissed after the Army Commander approved and that one is allowed to appeal. He testified that the Claimant did appeal though 6-7 years late but after consideration the appeal was dismissed as it lacked merit. He was aware the Claimant was charged in a criminal court and found guilty of the offence of stealing contrary to Section 275 of the Penal Code and sentenced to 2 years, appealed and was acquitted. He stated that the Claimant had admitted guilt and the withdrawal of the money. He was referred to AG3 the statement of admission and stated that due to the fact that soldiers live in close proximity at Barracks there is zero tolerance to theft and the Armed Forces cannot admit the Claimant back. He stated that one is not entitled to benefits after such discharge.

7. In cross-examination by Mr. Swaka he testified that there was a trial. He was referred to AG2 and confirmed that there is no certification on the document. He believed the record shows the Claimant was present and that the Commanding Officer was asking the questions. He noted that the document does not indicate who is asking the questions and that the format does not indicate who is answering the questions. He testified that the Claimant was asked to respond to the charges and that there is no indication is given on the right to either remain silent or answer questions. He stated that the document does not show any oral warning and that the Claimant was charged in the Chief Magistrate's Court and that he was not aware of the circumstances but was aware of the verdict. He confirmed that the Claimant did write in 2013 and sought reinstatement and that on failure to being reinstated would seek terminal benefits. He testified that the Armed Forces does not pay any terminal benefits in such a case and that the Claimant worked in the Military from 1984 to 2007 a period of about 23 years. He stated that apart from this case the Claimant did not have disciplinary issues.

8. In re-examination by Mr. Kioko, he testified that the proceedings are per the record before court and he believed the Claimant sought review. He stated that the Armed Forces have a strict code of conduct which they abide by and that they also respect the courts. That marked the end of oral testimony.

9. The case before me relates to the service of a serviceman who was engaged in tailoring for the Army. He served his employer for 24 years from his account. During the course of his employ, he is alleged to have taken an ATM card from his colleague Ssgt. Yuvinus Makanga and withdrew without any authority or right various sums from the said account. He was arraigned before the Corps Commander and before the Commanding Officer admitted to having taken the ATM card and stealing from his colleague. There is a letter to this effect, a confession so to speak. He was handed over to civil police for appropriate investigations and after the investigations were undertaken and he was arraigned in court where he was convicted upon trial and sentenced to 2 years but he was acquitted on appeal. The Claimant was discharged from service upon the arraignment before the Commanding Officer. The dismissal was okayed by the army top brass and the discharge was communicated to the Claimant. He appealed his dismissal some 6 or so years later and the appeal was considered and upheld. The Armed Forces have a zero tolerance to theft. He was therefore bereft of recourse but to this court. The dismissal took place in June 2007 and he filed his claim on 4<sup>th</sup> October 2013. This was outside the limits prescribed under the law his dismissal was subject to being the Employment Act cap 226 (now repealed) and Section 4(1) of the Limitation of Actions Act cap 22 which set the time limit within which to mount a suit as 6 years for a contract. The Claimant nevertheless was dismissed for cause, his theft of his colleagues ATM was sufficient basis for a discharge from employment as being an offence against good order in the Armed Forces. The Claimant stated that in his appearance after the issue was escalated to the Commander was one in which there was fear and trepidation and that he did not know what to say. I do not for one buy that. He seemed rather articulate and capable of speaking up for himself even if to spin a tale. He was in the military for 24 years from his account and could therefore not be a softie at the time of his discharge. In the final analysis, I find that the suit, albeit time barred, has no merit and I dismiss it. I however will not make any order as to costs.

It is so ordered.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of November 2017**

**NZIOKI WA MAKAU**

**JUDGE**