



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 470 OF 2014

BETWEEN

GIFT KAMBU MARANDU.....CLAIMANT

VERSUS

1. KENYA DEFENCE FORCES COUNCIL

2. THE ATTORNEY-GENERAL..... RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Mwanyale & Kahindi Advocates for the Claimant

State Law Office Mombasa, for the Respondents

JUDGMENT

1. The Claimant was enlisted as a Recruit with the Kenya Defence Forces, and posted to Kenya Navy Base at Mtongwe in Mombasa, on 5th April 1983. He worked for 31 years, attaining the highest rank of a Non-Commissioned Officer, to wit, Warrant Officer Class 1. He became pensionable, after 12 years of service.

2. He was served with an abstract of evidence and charge sheet on 1st April 2014. He was charged before his Commanding Officer for an offence under Section 121 of the Kenya Defence Forces Act 2012, found guilty, and dismissed from service.

3. He avers dismissal was illegal, unlawful and unfair. The Commanding Officer Tech Services, together with the Appointed Officer Tech Wing, conducted a search of his bag on 31st March 2014. The said Commanding Officer Tech Wing, was also the Commanding Officer who tried, and dismissed him. Punishment for Warrant Officer Class 1 does not include dismissal from the service.

4. In his Claim filed on 7th October 2014, the Claimant prays for Judgment against the Respondents as follows:-

a) Declaration that Dismissal of the Claimant from service was unfair and illegal.

- b) Lump sum gratuity computed at Kshs. 3,036,686.
- c) Monthly pension of Kshs. 37,958 from April 2014.
- d) 12 months' salary in compensation for unfair dismissal.

5. The Respondents filed their joint Statement of Response on 31st October 2014. They hold that by virtue of Article 41 of the Constitution of Kenya, the Claimant has no right to Claim against the Respondents under any Labour Law. He took oath as a Serviceman, and knew there are limits and restrictions which go with the nature of service. The only terms of service applicable to the Claimant were those under the Kenya Defence Forces Act No. 25 of 2012. The Employment Act 2007 does not apply to the Claimant. The Respondents concede the Claimant was employed by the Kenya Defence Forces as an Electrical Technician. He dishonoured the service, and lost his job. He was fairly heard and dismissed. Punishment was at the discretion of the Commanding Officer. Under Section 156 (2) of the Kenya Defence Forces Act, an Officer loses all benefits. The Respondents pray the Court to dismiss the Claim, with costs to the Respondents.

6. The Claimant testified, and closed his case, on 13th July 2017. The hearing date was taken in open Court by Parties' Representatives, on 28th November 2016. The Respondents did not participate in the hearing. Proceedings closed on 13th July 2017. The matter was last mentioned on 2nd October 2017, when the Claimant confirmed filing of his Closing Submissions.

7. In his evidence, the Claimant confirmed his employment history, and the terms of service, as captured in his Pleadings and Documents on record.

8. He was recruited in 1983, and trained at the Eldoret Training College. He signed a contract to serve for 9 colour years. It is mandatory for Servicemen to serve 9 colour years. (The term '*colour service*' is defined under the Kenya Defence Forces Act No. 25 of 2012, to mean service in the Defence Forces, other than service in the reserve, or in the Cadet Force, and does not apply to Officers).

9. If one wishes to continue upon completion of 9 years, he signs a contract of 3 years. At the end of 12 years he becomes pensionable. Renewal can go on, for a period of 3 years each, until one serves for 21 years. After 21 years, the contractual period is reduced to 1 year. This contract of 1 year can be renewed until one retires after attaining the age of 56 years.

10. The Claimant had already gone beyond the colour service, and was pensionable, when dismissed.

11. He was Warrant Officer Class 1. This is the highest rank for Non-Commissioned Officer.

12. Officers used to be ferried for lunch by the facility's bus. The Claimant was instructed to inspect Officers who had boarded the bus, by Officer Commanding, Major Kosgey. It had been alleged that Officers were stealing items from the Kenya Navy.

13. The Claimant inspected Officers and their bags. He found nothing. He was summoned by Commanding Officer, Lieutenant Colonel Oguga. The Claimant explained to the Court that Commanding Officer, is senior to Officer Commanding.

14. The Claimant's bag was brought in. It was alleged 4 kg of copper wire, the property of the Kenya Navy, had been found stashed in the Claimant's bag.

15. Subsequently, he was brought a written statement by Military Police, and asked to sign, or face the Court Martial. The Claimant was cowed, and signed the written statement. He explained that no Soldier likes to be court-martialed.

16. He was then taken before a Table. In military parlance this is a disciplinary panel. This was

composed of the Commanding Officer, and Officer Commanding. The Claimant objected to the composition, and asked for a different panel. His objection was ignored.

17. Testimonial on Discharge issued, to the Claimant by the 1st Respondent, dated 24th February 2017, indicates the Claimant interacted well with his juniors and seniors alike; he served Kenya Navy with zeal and diligence; he was loyal, hardworking and disciplined; he was awarded several medals in recognition of his service; and left service after serving for 30 years and 362 days.

18. The Claimant defended himself before the disciplinary panel. He told the panel it was not possible for him to carry 4kg of copper wire in his bag.

19. Dismissal, the Claimant testified, did not disentitle him from receiving his pension and gratuity.

20. The Respondents, as stated at paragraph 6 of this Judgment did not participate in the hearing. Their joint position, unsupported in evidence, is set out under paragraph 5 of the Judgment.

21. The issues in dispute as filed by the Claimant on 10th July 2017, can be reduced to one single issue, which is, whether the Claimant is entitled to pension and lump sum gratuity.

The Court Finds:-

22. The Claimant submits he no longer wishes to pursue the prayer for 12 month's salary in compensation for unfair dismissal.

23. This retreat is accepted by the Court. The prayer was based on the remedies granted to Employees in Claims for unfair termination, under Section 49 of the Employment Act 2007.

24. Section 3(2) of the Employment Act 2007 states that the Act does not apply, to among others, the armed forces or the reserve, as respectively defined in the Armed Forces Act (Kenya Defence Forces Act).

25. The Court would not have the basis to consider the Claimant's grievance within the provisions of the Employment Act 2007.

26. The statement made by the Respondents at paragraph 4(1) of their Response, to the effect that Article 41 of the Constitution of Kenya bars the Claimant from bringing any claim against the Respondents, under any Labour Law, is incorrect.

27. The Kenya Defence Forces Act 2012, under Part V, gives Limitation of Rights and Fundamental Freedoms of Persons Subject to the Act. Despite the political rights set out in Article 38 of the Constitution, a Person to whom the Kenya Defence Forces Act applies, shall not form, join, or campaign for any political party or serve as a Member of Parliament, Senate or County Assembly.

28. Despite the right to assemble given under Article 37, Persons to whom the Kenya Defence Forces Act applies, shall not assemble, demonstrate or picket.

29. Section 52 of the Kenya Defence Forces Act limits what is termed under the Act, as right to labour relations. Despite the right to fair labour practices set out in Article 41, Persons to whom the Kenya Defence Forces Act applies shall not form, join, agitate or participate in the activities of trade unions, or go on strike.

30. These limitations under the Kenya Defence Forces Act, are made pursuant to Article 24(5) of the Constitution. They are not aimed at denying persons to whom the Kenya Defence Forces Act applies, fundamental rights and freedoms. They do not bar Persons working in the Defence Forces from pursuing employment claims, as suggested by the Respondents.

31. The Respondents' perception of the term 'Labour Law' and the scope of Part V of the Kenya Defence Forces Act, is quite narrow. Article 41 grants every Worker the right to fair remuneration and the right to reasonable working conditions. These are not limited under the Kenya Defence Forces Act.
32. 'Labour Law', which is sometimes used interchangeably with the term 'Employment Law,' includes legislation and body of Rulings pertaining to working people and their organizations. It includes Collective Labour Law, which involves relationships amongst Trade Unions, Employers and Employees. Individual Labour Law involves concerns for Employees' rights at the workplace.
33. It is incorrect to assume that because the Employment Act 2007 does not apply to the Armed Forces; and that because the Kenya Armed Forces Act 2012 limits certain fundamental rights and freedoms under Article 24(5) of the Constitution of Kenya, Soldiers do not have the right to pursue employment grievances against their Employer.
34. Pension Law is a Social Security Law, and part of our Labour Laws. The Claimant pursues pension rights, a subject which falls within the jurisdiction of this Court.
35. Going back to the main facts of this dispute, the Court is satisfied that the Claimant was recruited by the Kenya Defence Forces on 6th April 1983. He worked in the Electrical Department, Kenya Navy base, at Mtongwe, Mombasa. He worked for 30 years, 362 days.
36. There is sufficient material on record to justify Claimant's discharge from Kenya Defence Forces.
37. Exhibit 5 in the Abstract of Evidence, is Claimant's Statement. He conceded he took Kenya Navy's copper wire. He explained that he intended to use it at his home. He did not think the issue was a big deal. There is no evidence to suggest that the Claimant's statement was made involuntarily.
38. His Redress Letter of 15th April 2014, confirms the contents of Exhibit 5 above. He states he realized he had the wire when the Commanding Officer, and Officer Commanding, ordered for an inspection. He states, "*At this juncture, I remembered I had the wire, but I could not convince anybody otherwise*". His evidence in Court was a stark departure from what the Claimant wrote in his own hand, during investigations and disciplinary process. He for example, alleged it was him who conducted the search, and found nothing.
39. The Claimant was reported for the offence of '*Conduct to prejudice of good order and discipline contrary to Section 121 of the Kenya Defence Forces Act 2012.*'
40. Section 121 prescribes the penalty in event a Person is convicted under Section 121. The penalty is imprisonment for a term not exceeding 2 years, or any lesser punishment provided for by the Act.
41. The Respondents state at paragraph 8 (vi) of the Response, that punishment of dismissal from service, was proper, legal and practical, and within the discretion of the Commanding Officer under Section 156 of the Kenya Defence Forces Act.
42. Section 121 under which the Claimant was charged, and the penalty thereunder, apply when a suspected offender is taken through a Court Martial.
43. The Claimant was taken through summary disciplinary proceedings under Part VIII of the Act.
44. Section 155(3) (a) under summary proceedings, imposes the punishment of dismissal of convicted Cadets from the Defence Forces. Section 156(2)(a) imposes the punishment of dismissal of convicted Warrant Officers or Non-Commissioned Officers, from the Defence Forces.
45. The Claimant describes himself as Warrant Officer Class 1. He was taken through summary proceedings. In the Court's view, the punishment of dismissal from the Defence Forces, for convicted Warrant Officers, is based on Section 156(2) (a) of the Kenya Defence Forces Act.

46. This law empowers the Commanding Officer to charge Officers summarily, record a finding of guilt, and impose punishment. The action against the Claimant was taken by his Commanding Officer. There is nothing on record to show the Claimant complained against the disciplinary panel which heard him, or that he was in any way prejudiced by its composition. He made the panel's work light, by admitting to being involved in removal of his Employer's copper wire.

47. The Court does not find removal of the Claimant from the Defence Forces illegal or unfair. It was based on valid ground, and carried out in accordance with the Kenya Defence Forces Act 2012.

48. The question which remains to be answered is whether upon dismissal, the Claimant became disentitled to pensions and gratuity.

49. Section 156(2) of the Act does not state that once a Serviceman has been dismissed, he automatically loses any benefits. The Court similarly has not found provisions under Section 155 on summary proceedings, or Section 180 onwards, on Court Martial, which expressly states that the punishment of dismissal from service, should have the additional punitive element, of loss of pensions and gratuity.

50. Section 244 of the Act provides that Members of the Defence Forces shall be entitled to such pensions and gratuity as shall be determined by the Treasury, in consultation with the Defence Council, in accordance with the Regulations.

51. Where an Officer or Service Member has been dismissed under any circumstances, provided for under the Act, the Defence Council may withhold, reduce the amount or suspend any such benefits payable to the Officer or the Service Member under Sub-section (1).

52. A decision to withhold, reduce the amount, or suspend any benefits of an Officer or a Service Member, contemplated under Sub-section (2), shall be made with the concurrence of the Public Service Commission of Kenya.

53. The Court has not come across any provision in the Act, where pensions and gratuity can be withheld, reduced, or suspended automatically.

54. To interfere in any way with the pensions and gratuity rights of an Officer or Service Member, requires the involvement of the Defence Council and the Public Service Commission of Kenya. It is not a simple matter, involving Commanding Officer, or Officer Commanding.

55. There are regulations under Section 244, which should offer guidance to Officers and Service Members, in pursuing pensions and gratuities under the Kenya Defence Forces Act.

56. Like other pension legal regimes, the regime under Section 244 does not avail Officers and Service Members, a direct route to the Courts, in event of pensions and gratuity disputes with their Employer.

57. The Claimant worked for 30 years, and 362 days. He became pensionable on the 12th year. He was caught up in a rather ill-advised indiscretion. The copper wire he was said to have stolen was valued at no more than Kshs. 1,400. Should this have cost him his job, and loss of pensions and gratuity?

58. The answer on loss of pensions and gratuity, should be given by the organs identified under section 244 of the Kenya Defence Forces Act.

59. In his letter of demand before action, the Claimant sought terminal benefits totaling Kshs. 3,200,000, and monthly pension of Kshs. 42,000. The figures are different from what is sought in the Claim. He has not shown what provisions of the Kenya Defence Forces Act, or Pension Regulations, the specific figures, are based on.

IN SUM, THE COURT ORDERS:

a) It is declared the Claimant was dismissed from the Kenya Defence Forces, in accordance with the Kenya Defence Forces Act 2012.

b) Whether pensions and gratuity should be paid, and in what amounts, are matters the Claimant should pursue with the Defence Council and the Public Service Commission of Kenya, under the Kenya Defence Forces Act, and the relevant Regulations under the Act.

c) It is not possible for the Court, to grant the specific orders for payment of pensions and gratuity.

d) The Claim shall therefore be treated as dismissed, with no order on the costs.

Dated and delivered at Mombasa this 15th day of December 2017.

James Rika

Judge