



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1542 OF 2013**

**JAPHETH MUTIRIA.....CLAIMANT**

**VERSUS**

**PERMANENT SECRETARY MINISTRY OF STATE.....1<sup>ST</sup> RESPONDENT**

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

**Mrs Wairegi for Claimant**

**M/s M. N. Chege for Respondent**

**JUDGMENT**

1. The Claimant filed a memorandum of claim on the 25<sup>th</sup> September, 2013 and sought the following prayers;

- i. A declaration that the termination of employment of the claimant by the respondent was unfair, unlawful, illegal *abinito* and null and void.
- ii. A declaration that it was not legally open for the 1<sup>st</sup> Respondent to exercise its power of terminating the claimant through a wrong forum.
- iii. Reinstatement of the claimant to his rank of Warrant Officer I
- iv. An order for repayment of the claimant's terminal benefits by the 1<sup>st</sup> Respondent.

2. The Respondent filed a memorandum of response on 18<sup>th</sup> October 2012 and list of documents on 11<sup>th</sup> April 2014.

3. On 6<sup>th</sup> June 2012, the claimant was charged and fined under section 67 of the Armed Forces Act 1968 with;

*“Aiding, abetting, concealing procuring or conniving at the commission of an offence”*

4. The particulars of the offence were that on diverse dates in the months of March, April and May 2012, he aided, abetted, concealed and connived with 60748 Sgt Peter Onyango, 63562, Sgt James Mutuku and

66275 Sgt Hampton Mutui Kariuki to steal 1409 litres of diesel being public property valued at Kshs 141,012.72.

5. The charge sheet was produced and marked exhibit 'jmm1a'. The claimant was employed in 1979. On 6<sup>th</sup> June 2012, the Commanding Officer conducted a summary trial of the Claimant and the record of proceeding was produced as exhibit 'jmm1b'.

6. The claimant was asked whether he had sufficient time to prepare for the trial and he answered in the affirmative. The charge sheet was read to the claimant and the claimant stated he understood the charge and would accept the verdict of the Commanding Officer instead of electing to be tried by court martial.

7. The Claimant made an oral statement in which he denied the charge and the particulars of the charge. The Claimant explained that he received Mpesa payments from his co-accused because they were his customers. He supplied rice to them from Mwea. He denied being part of a syndicate that was stealing fuel from TPt Bu POL point and stated that he received money to buy rice from Sgt Onguso, Sgt Mutuku and from Mr Gababa but was unaware that they were involved in a fuel theft syndicate.

8. The claimant was found guilty of failing to perform his duties as expected thereby occasioning the loss of 1409 litres of diesel amounting to Kshs 141,322.70. The claimant was reduced in rank from WO1 to WO II and was discharged from service on SNLR subject to service Comd. KA approval. The verdict is dated 7<sup>th</sup> June 2012 by Lt Col. D. Kitilit, Commanding Officer. A letter of application for discharge from service on SNLR 11416 WO 1 Japheth Mutegi was sent to the Ministry Headquarters on the same day.

9. The Army Commander upheld the decision of the Commanding Officer on 27<sup>th</sup> June 2012 and authority to discharge the claimant from service without service gratuity and pension was granted.

10. The issues for determination are;

- i. Whether the claimant's dismissal was for a valid reason
- ii. Whether the dismissal was in terms of a fair procedure
- iii. What remedies are available to the claimant

#### **Issue i**

11. From the record of proceedings, the Claimant was the deputy TCO and his duties included detailing vehicles, supervisory duties at TPt Bu POL Point, responsibilities in the Glo98 store and signing off work tickets. The duties also included checking the stock level of fuel and reconciling with the leader. The claimant held that responsibility from 2007 to date of dismissal.

12. The claimant received a call on 12<sup>th</sup> May 2012 from WOII Mutua who informed him that Sgt Onguso the shuttle bus driver had been arrested by military police with two drums of diesel in his vehicle. The claimant sent for a replacement driver. The claimant's telephone was confiscated for investigation purposes. Mpesa transactions confirmed that the Claimant was receiving money from the Officers involved in the case, namely Sgt Onguso and Sgt Mutuku.

13. The court is not satisfied with the explanation by the Claimant that he was not aware and was not part of the fuel theft syndicate. The evidence before court shows that the Respondent had proved on a balance of probability that the Claimant regularly received money via mpesa from colleagues who were caught stealing fuel. Investigations also revealed that fuel had been stolen on diverse dates in the months of March, April and May 2012 and the Claimant had not reported the loss in spite of his admission that it was his responsibility to check and reconcile fuel stocks to prevent theft.

14. Accordingly, the respondent had a valid reason to dismiss the claimant from service as provided under

section 43 as read with section 45 of the Employment Act, 2007.

15. The Claimant has therefore failed to show on a balance of probability that his discharge from military service was wrongful.

**Issue ii**

16. The Commanding Officer conducted orderly room proceedings in terms of the Law and laid down procedure. The officer provided the charge sheet to the claimant and provided him with adequate time to prepare for the case. Witness statement of 60748 Sgt Peter Onguso was relied upon to establish the case together with FF825 POL issue Voucher Nos 1,4,6,18,24,34; transport tickets and mpesa accounts.

17. The procedure followed allowed the claimant to refute the aforesaid evidence but failed to do so adequately and was found guilty. The claimant had the option not to be tried by the Commanding Officer but be referred to a court martial but had opted for the summary trial.

18. The Claimant cannot now be heard to repudiate the process under which he was tried and found guilty. It is the court's finding that the discharge of the Claimant from the military was pursuant to a lawful and fair procedure. The finding of guilty and discharge was confirmed by the Commander Kenya Army in terms of the laid down procedure.

19. The court has found that the discharge of the claimant from the military was for a valid reason and in terms of a fair procedure. Accordingly, the Claimant is not entitled to any of the remedies sought.

20. In the final analysis, the suit by the Claimant is wholly dismissed with no order as to costs the Respondent being the Hon. Attorney General and recognizing that the Claimant had served the military for a long time before he was discharged with no benefits at all.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of March 2016.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**