



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION CAUSE NO. 51 OF 2012
(Formerly Misc. 586 of 2006 (High Court))

(Before Hon. Lady Justice Hellen S. Wasilwa on 4th April 2016)

MAJOR MANZI LUU MUSYONA PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL ON BEHALF

OF THE MINISTER FOR DEFENCE AND

CHAIRMAN, DEFENCE COUNCIL RESPONDENT

JUDGMENT OF THE COURT

1. The suit was commenced by way of Petition brought under Rule 11 and 12 of the Constitution filed in Court on 9th October, 2006, through the firm of Kamunya and Company Advocates. In the Petition the Petitioner prays for the following:
 - a. *That this Honourable Court do declare that the Kenya Army Commander's letter reference KA/COMD/110 dated 19.2.2001 violated the Petitioner's fundamental right to the secure protection of the law as guaranteed by Section 77 (1) of the Constitution.*
 - b. *That this Honourable Court do declare that the Defence Council that terminated the Petitioner's Presidential Commission on 14th March 2001 was unlawfully composed and illegally constituted.*
 - c. *This Honourable Court do further declare that the Defence Council that terminated the Petitioner's presidential commission on 14th March, 2001, was not a fair and impartial Court and violated your Petitioner's fundamental right to the secure protection of the law as guaranteed by section 77 (1) of the Constitution.*
 - d. *This Honourable Court do further declare that the Defence Council that terminated the Petitioner's Presidential Commission acted unlawfully as the issues were sub judice and were pending the High Court's determination vide High Court Misc. Civil Case No. 318 of 2000.*
 - e. *This Honourable Court do further declare that the Defence Council that terminated the*

Petitioner's Presidential Commission failed to comply with the laid down military disciplinary law as set out in sections 81(4) and 142 (1) of the Armed Forces Act (Cap199) hence violated the Petitioner's fundamental right to the protection of the law as guaranteed by section 77 (1) of the Constitution.

- f. The Honourable Court do further declare that the unlawful termination of the Petitioner's Presidential Commission and the unlawful denial of the Petitioner's terminal benefits constituted cruel degrading and inhuman treatment in violation of section 74 of the constitution and was therefore unlawful, null and void.***
- g. This Honourable Court do further declare that the termination of the Petitioner's Presidential Commission and unlawful denial of his terminal benefits by the Defence council on 14th March, 2001, amounted to discrimination in breach of section 82 (2) of the constitution in that the Petitioner was treated in a discriminatory manner by persons acting by virtue of a written law, namely the Armed Forces Act (CAP 199) or in the performance of public offices namely, the offices of the Kenya Army Commander and the Defence Council and was therefore unconstitutional, null and void.***
- h. This Honourable Court do further order the Respondents to reinstate the Petitioner's Presidential Commission and back to the serve of the Kenya Armed Forces and that the Petitioner be paid his salary arrears to the date of the determination of this Petition.***
- i. Damages be awarded consequent to the above declaration and/or such Orders, writs of directions for the purpose of enforcing and securing the enforcement of the provisions herein above disclosed as having been breached against the Petitioner.***
- j. The Respondent be condemned to pay the costs of this petition.***

2. The Petitioner avers in the Petition that he enlisted into the Kenya Armed Forces as a Cadet on 20th May, 1977 and after training at Military Training College in Nakuru he was awarded a Presidential Commission of the Kenya Armed Forces in the rank of Second Lieutenant and was thereafter issued the official Kenya Army Service Number 17679.
3. The Petitioner served in various stations and ranks and also attended further military training both locally and abroad and in March 1995 he was appointed as Staff Officer II, training in the Department of Defence Headquarters, Nairobi. On 28th August 1997, he was transferred to Western Command as Staff Officer II Personnel.
4. That in May 1997, unsubstantiated allegations of theft of stationery were leveled against the personnel of the Petitioner's training sub-branch in the Department of Defence. He states that instead of the said allegations being investigated internally by the Audit branch the same were referred to the Kenya Police Criminal Investigations Department (CID) Fraud Section. After intensive investigations the lead investigator of the police cleared the Petitioner of any wrong doing.
5. That despite being cleared of any wrongdoing on 12.4.1999, he was charged together with his 3 colleagues of the same offence in a Court Martial which led him to seek Judicial Review for the procedural violations in the High Court vide Misc Case No. 318 of 2000 and later an Civil Appeal 84 of 2000 obtaining Stay Orders halting the Court Martial proceedings.
6. That despite knowledge of the Orders of Stay the Respondent proceeded to confine the Respondent for 85 days but was released on 8th September, 2001, after the intervention of the Superior Court. Later, on 14th March, 2001, while the Stay Orders were still in place the Respondent constituted the Defence Council which purported to terminate the Petitioner's Presidential Commission. The Defence Council denied him his terminal benefits for his 23 years

and 299 days in Military Service.

7. The Petitioner further states that he sought an explanation for the unlawful termination and he was handed a copy of the Kenya Army Commander's letter dated 19.2.2001, apparently ordering his subordinate commanders to "clean up" their command by any means necessary to ensure that all disciplinary matters were concluded and forwarded to his office with recommendations either for "termination of commission" for the officers and "Services no longer required" for servicemen *"and any commander who will attempt to bring excuses, explanations and rationalizations of any nature at the deadline will himself become subject to disciplinary action."*
8. That as a result of the said actions of the Respondent, the Petitioner alleges that his rights and more particularly his right to presumption of innocence, right to be heard, not to be treated in a cruel inhumane and degrading manner, right against discrimination were all violated.
9. That the Petitioner subsequently sought redress from the Defence Council pursuant to section 225(1) of the Armed Forces Act which efforts were unsuccessful.
10. That as a result of the foregoing treatment the Petitioner has suffered great anguish, embarrassment and humiliation to himself, his family and friends. He also alleges that his termination has caused him great financial loss as he lost his sole means of support long before the attainment of the established official public service retirement age of 55 years.
11. The Respondent filed a Replying Affidavit on 17.11.2006, sworn by one Lieutenant Colonel Elvis Karue Kiriaku where he admits that the Petitioner was an officer in the Armed Forces of rank of Major till the termination of his Presidential Commission. He stated that part of the Petitioner's duties as a staff officer II involved procurement, delivery and supply of stationery to Military training institutions.
12. He avers that sometime in May 1997 it was discovered that stationery worth about Shs. 20,519,839.75 had been stolen from the Armed Forces. He states that investigations were launched immediately against the Petitioner and other officers being the prime suspects and were court martialled.
13. He also stated that it was a requirement of the Evidence Act that confessions be recorded before a Magistrate or a police officer of the rank of inspector or above and since some servicemen were willing to confess the matter was handed over to the Department of Criminal Investigations. That the said investigations were headed by one Chief Inspector Ndambuki who died before he could clear the Petitioner and his co-accused.
14. The Respondents aver that the Petitioner was arraigned before a Court Martial but he obtained stay Orders from the High Court which Orders were vacated leading the Petitioner to appeal and obtained Stay Orders against the Court Martial and then abandoned the Appeal. That the Petitioner together with his co-accused were placed under close arrest by their respective commanding officers who have custody of the accused officers.
15. That the Orders of the High Court and Court of Appeal stayed the Court Martial proceedings but did not release the Petitioner from close arrest. That an officer under close arrest is not in a cell but his movement is limited to the confines of the barracks.
16. The Deponent further states that the Petitioner then obtained orders to release him from close arrest and then abandoned the appeal which has not been prosecuted to date.
17. The Respondent states that the Petitioner's actions of challenging the process of military justice and the adverse effect of those actions on discipline and loyalty which are the pinnacle in the armed forces the Defence Council in exercise of its discretion decided to terminate the Petitioner's Presidential commission in accordance with the Armed Forces Act.

18. The Respondent states that the decision to terminate the Petitioner's Presidential Commission was administrative and if the Petitioner was dissatisfied, he had the option of challenging the decision by way of Judicial Review within six months of such decision.
19. They aver that pensions and gratuities for the military are provided for by the Armed Forces (Pensions and Gratuities) (Officers and Servicemen) Regulations 1980 pursuant to Section 227 of the Armed Forces Act and not any other Act of Parliament. That the said Regulations give the Defence Council discretion which it exercised judiciously in denying the Petitioner pension considering his conduct.
20. The Respondent further states that pursuant to the termination of the Petitioner's Presidential Commission he was not entitled to military housing and or treatment at the Armed Forces Memorial Hospital. That the Petitioner withdrew his membership of the Armed Forces Contributory Medical Insurance Scheme and as such could not enjoy the facilities. They have annexed documents to this effect to the Replying Affidavit as "EKK2".
21. The Respondent avers that the minute the Petitioner ceased to be an employee of the Armed Forces he could not avail himself the remedies under Section 225 (1) of the Armed Forces Act in any way.
22. That the Defence Council terminated the Commissions of several other officers and hence did not discriminate against the Petitioner as alleged.
23. That retirement of Commissioned Officers is pegged on rank and the Petitioner having been a Major aged 43 years was due to retire the following year at the age of 44 unless he got promoted. Age of retirement is as per the Armed Forces Act and Regulations made thereunder and not at the age of 55 as is the case with the civil service.
24. The parties agreed to proceed by way of submissions.
25. The Petitioner in his submissions states that no reasons whatsoever were preferred for his termination of Presidential Commission. He states that the subject matter of the Court Martial process against him and other officers had been investigated by the CID branch as it also involved civilian suspects and the police failed to find any proof of commission of any offence leading to the close of their file.
26. The Petitioner further states that the allegation that some servicemen wanted to confess prompting the involvement of the Kenya Police CID branch is untrue since to date there has been no confessions that were made. They also state that the Respondent has not tendered proof to indicate that the officer in charge of investigations died leading to discontinuation of investigations.
27. The Petitioner urges the Court to consider the fact that the Petitioner was not arraigned in Court for lack of evidence and as such there was no basis to either establish any crime as speculated or to warrant being charged in Court.
28. The Petitioner admits that the Judicial Review case subsists to date and that the Judgment in the Court of Appeal was delivered on 7th July, 2000, while the Petitioner's commission was removed on 14th March, 2001 less than a year after the Order but no formal application was ever made to set aside the Orders granting stay of the Court Martial process which subsists to date.
29. That it follows that the close arrest of the Petitioner cannot be justified since the Court Martial proceedings had been stayed pending the High Court case. The subsequent actions of the Respondent infringed on the Petitioner's right to freedom of movement and personal liberty.
30. It is also submitted in favour of the Petitioner that filing of cases in Court is part of the rule of law and it does not in any way amount to challenging the Military Justice and neither does it have any

effect on discipline and loyalty. That the Defence Council is a creation of law and must operate within the law.

31. The Petitioner also states that the discretion of the Defence Council to terminate him ought to have been exercised lawfully, legally, judiciously, fairly in accordance with the dictates of human rights and transparency. The Defence Council in this case failed to prove that its actions were within the law trampling on the Petitioner's rights under section 77 of the former Constitution. They rely on the case of **Peter M. Kariuki Vs Attorney General (2014) eKLR**; at page 14 where the Superior Court held that:

“...we are satisfied that the cumulative violation of the Appellant's right to sufficient time to conduct his defence, the refusal to summon General Mulinge, who the Appellant wished to call as witness, the general conduct of the judge advocate was to compromise beyond salvage the appellant's constitutional right to a fair trial...”

32. The Petitioner further states that the allegation that the decision to terminate the Petitioner's Presidential Commission was in breach of his constitutional right and rely on the case of Benjamin **Muema Vs Attorney General (2006) eKLR**; At page 25 where the Court held that:

“...it is my persuasion that the Defendants have been in breach of the statutory law which protects the Plaintiff as a commissioned officer. Through such illegality the Plaintiff, was a dependable officer with good prospects then aged 36 years taken out of military service some 13 years ago... obviously the Plaintiff does not stand to blame, someone else does and breaches of the law are quite apparent. The Courts task is to redress such wrongs and this is done by considering the Plaintiff's prayers individually...”

33. The Petitioner submits that the decision to terminate his commission based on any matters before the Court Martial, Judicial Review or Appeal was unlawful as the Defence Council in reaching its decision infringed on the Petitioner's human rights without cause whereas his record at the Armed Forces was sterling.

34. As to the remedy of Judicial Review that the Petitioner would have pursued after termination of his Commission, the Petitioner states that there is already an existing Judicial Review action challenging the decision of the Court Martial and noting the limited jurisdiction of the Court in Judicial Review the election of the Petitioner to file the Constitutional Petition is proper as the two cases address two different causes of action.

35. That pension is a human right and by withholding it, the Respondent infringed on the Petitioner's right to property. The Armed Forces (Pension and Gratuities) (Officers and Servicemen) Regulations 1980 can be challenged as being unconstitutional for denying his right to Pension. That since he was unconstitutionally terminated, then his right to medical attention and housing were also infringed.

36. The Petitioner also states that he is entitled to the remedies under Section 225 of the Armed Forces Act since he was illegally terminated and also to remedies for breach of his constitutional rights.

37. The Petitioner's also submits that he was discriminated against since other officers in his rank who were retired were paid their terminal benefits and other officers' circumstances were different from his.

38. On the allegation that as a Major, the Petitioner would have been retired at the age of 44, the Petitioner states that this is not correct as he was entitled to promotions and pension and all other people of his rank when he was unfairly terminated went ahead to become generals.

39. In conclusion the Petitioner states that the Army Commander's letter violated his right to secure

protection of the law and that the Defence Council that terminated him was not properly constituted as several members were not present, the decision to terminate him was sub-judice and in contempt of the orders made by the Court. That denial of his pension amounted to cruel, inhumane and degrading treatment.

40. He prays for reinstatement and computation and payment of salary arrears and entitlements as follows:

Pension	-	2,552,860.80
Gratuity	-	1,215,648.00
Terminal leave	-	180,519.00
Salary upto 60 years	-	8,664,912.00
Total	-	12,613,939.80

41. In support of the reliefs sought the Petitioner relies on the case of **Peter M. Kariuki Vs Attorney General (2014) eKLR**; at page 19 where the Superior Court held that:

“we have found that the violations of the Appellants constitutional rights went far beyond his right to liberty and fundamentally implicated his right to a fair trial. Those violations cannot be approximately remedied by an award of damages alone. A conviction founded on such palpable and glaring violations of the right to a fair trial ought not to be allowed to stand. A conviction arrived at on the back of egregious violations of the magnitude and scale we have in this appeal, is in addition not only a danger not only to the Appellant, but to society itself. This is particularly the case when the violations are committed by a body created by law and enjoined to uphold the rule of law.”

42. The Court of Appeal in the above case awarded Shs. 15,000,000.00 as general damages for violation of constitutional rights, quashed the conviction and sentence, awarded salary arrears and allowances, restored the Appellant’s ranks benefits and honours and decorations and awarded costs. They also relied on the case of **Benjamin Muema Vs Attorney General (2006) eKLR** where the Court relied on similar principles in awarding damages for violations of human rights.

43. The Respondent in their submissions has set out issues for determination namely:

- 1. Whether the letter reference KA/COM/110 dated 19.2.2001 violated the Petitioner’s fundamental right to the secure protection of the law as guaranteed by Section 77(1) of the Constitution.**
- 2. Whether the Defence Council that terminated the Petitioner’s Presidential Commission on 14.3.2001 was unlawfully composed and illegally constituted.**
- 3. Whether the Defence Council that terminated the Petitioner’s Presidential Commission on 14.3.2001 was not a fair and impartial Court and violated the Petitioner’s fundamental right to secure protection of the law as guaranteed by section 77 (1) of the Constitution.**
- 4. Whether the Defence Council that terminated the Petitioner’s presidential commission acted unlawfully as the issues were sub judice and were pending the High Court’s determination vide High Court Misc. Civil Case No. 318 of 2000.**
- 5. Whether the unlawful termination of the Petitioner’s Presidential Commission and the unlawful denial of the Petitioner’s terminal benefits constituted cruel, degrading and inhuman treatment in violation of section 74 of the Constitution and was therefore unlawful,**

null and void.

- 6. Whether the termination of the Petitioner's Presidential Commission and unlawful denial of his terminal benefits by the Defence Council on 14.3.2001 amounted to discrimination in breach of section 82 (2) of the Constitution in that the Petitioner was treated in a discriminatory manner by persons acting by virtue of a written law, namely the Armed Forces Act (Cap 199) or in the performance of public offices namely, the offices of the Kenya Army Commander and the defence Council and was therefore unconstitutional, null and void.**
- 7. Whether the Respondents can re-instate the Petitioner back to the Kenya Armed Forces and that the Petitioner be paid his salary arrears and other entitlements with effect from 14.3.2001 to the date of the determination of the petition. Is this an efficacious remedy?**
- 8. Whether the Petitioner is entitled to damages for the above declarations and/or such Orders, writs of directions for the purpose of enforcing and securing the enforcement of the provisions herein above disclosed as having been breached against the petitioner.**

44. On the first issue, the Respondent submits that Section 77(1) of the Repealed Constitution provided that if a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.

45. The Petitioner was a member of the Armed Forces and as such he was subject to Court Martial proceedings for trial of the offence charged. That the Petitioner would still have been afforded a fair hearing and the letter dated 19.2.2001 did not violate the Petitioner's fundamental right to the secure protection of the law as guaranteed by Section 77 of the Constitution.

Issue No. 2

46. The Respondent submits that the Petitioner has not demonstrated to the Court how the Defence Council that terminated him was unlawfully composed and illegally constituted.

47. Section 5(4) of the Repealed Armed Forces Act provided that:

"The Defence Council may make rules and standing instructions providing for:-

- a. the organization of the work of the Council and the manner in which it may perform its functions, subject to any assignment of responsibilities by the chairman under subsection (3);***
- b. the procedure to be followed by the Council in conducting its business; and***
- c. all matters which the Council may consider it necessary or desirable to provide for, in order to secure the better performance of the functions of the Council".***

48. Section 5 (5) of the Repealed Armed Forces Act provided that acts and instructions of the Defence Council may be signified, by command of the Defence Council, under the hand of the Secretary of the Defence Council.

49. Further they stated that Section 17(2) of the Repealed Armed Forces Act provided that the Defence Council may terminate the Commission of any officer of the rank of major or corresponding rank or below. The Petitioner was in the rank of major and as such the Defence Council was within the law when it decided to terminate his commission.

50. The Respondent submits that the Defence Council, acted within the law when it decided to terminate the commission of the Petitioner and that the same was lawfully composed and

constituted.

Issue No. 3

51. The Respondent submits that the Petitioner has not demonstrated to this Court that the Defence Council that terminated his Commission was not a fair and impartial Court. The Defence Council is not a Court but rather the body with the overall control and direction of Armed Forces as at that time.
52. The Respondent in their Replying Affidavit stated that after discovery that stationery had been stolen, investigations were expediently launched and the Petitioner alongside others were Court Martialed.
53. The Petitioner then filed Judicial Review proceedings in the High Court and obtained stay proceedings. The High Court ruled against him prompting him to appeal wherein he obtained a stay of Court Martial proceedings. The Petitioner apparently abandoned his appeal thereafter.
54. The Respondent further states that immediately the Petitioner together with his co-accused were arraigned before the Court Martial where they were put under close arrest under their respective commanding officers. The Respondent contends that the Orders issued by the Superior Court stayed the proceedings of the Court Martial but did not make an order for the release of the Petitioner from close arrest.
55. That after obtaining the desired Orders, the Petitioner abandoned the application challenging the Court Martial to-date. That the Petitioner's actions of challenging the Court Martial proceedings and the adverse effect of those actions on discipline and loyalty which is the pinnacle of the Armed Forces, the Defence Council in exercise of its discretion decided to terminate the Petitioner's Presidential Commission.

Issue No. 4

56. The Respondent submits that the Defence Council acted within the law. They cite Section 52(1)(f) of the repealed Armed Forces Act, which provided that any person subject to this Act who willfully interrupts the proceedings of a Court Martial or otherwise misbehaves before the Court shall be guilty of an offence.
57. Section 62 of the Repealed Act further provided that every officer who behaves in a scandalous manner, unbecoming the character of an officer shall be guilty of an offence and shall, on conviction by Court Martial, be dismissed from the Armed Forces. That the Petitioner was charged alongside other officers for the offence of theft of stationery but their case was never determined since the Petitioner challenged the Court Martial proceedings leaving the Defence Council no choice but to terminate the Petitioner.
58. The Respondent states that the sole intention of the Petitioner filing Judicial Review Application and consequently filing appeal was for the sole intention of interrupting the proceedings of Court Martial.

Issue No. 5

59. The Respondent states in connection to the issue raised that Section 81(4) of the Repealed Armed Forces Act provided that where the appropriate superior authority deals with a charge summarily and records a finding of guilty the punishments which he may award are, subject to the limitations hereinafter provided, those set out in the following scale (a) forfeiture of upto twelve months seniority of rank and the prescribed manner; (b) a fine not exceeding one month's pay; (c) severe reprimand; (d) reprimand; (e) admonition (f) where the offence has occasioned any expense, loss or damage, stoppages.

60. That the decision of the Defence Council to terminate the Petitioner's commission was purely administrative and if dissatisfied with the decision, the Petitioner would have challenged it by way of Judicial Review.

Issue No. 6

61. The Respondent states that the decision to terminate the Petitioner was lawful and did not constitute any cruel, degrading and inhuman treatment in violation of section 74 of the Constitution. There was a valid cause that warranted the dismissal of the Petitioner from service.

Issue No. 7

62. That termination of the Petitioner was lawful and denial of his terminal benefits did not constitute discrimination in breach of Section 82(2) of the Repealed Constitution. They rely on the meanings of discrimination therein set out and state that the Petitioner was not treated differently by virtue of his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex. The Respondent submits that the Petitioner has not demonstrated how the manner of his termination was discriminatory or in breach of Section 82(2) of the Constitution.

Issue No. 8

63. The Respondent relies on the case of **Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR**; where the Court of Appeal noted as follows:

“reinstatement is one of the remedies provided for in section 49(3) as read with section 50 of the Employment Act and section 12(3)(vii) of the Industrial Court Act that the Court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of Industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that Courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for business, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.”

64. The Respondent submits that the present case is not one fit for reinstatement as a remedy but rather damages for unlawful termination.

Issue No. 9

65. The Respondent submits that the Petitioner has not demonstrated that he is entitled to any damages as he has not demonstrated to the Court how his fundamental rights were breached and as such he is not entitled to any of the reliefs sought.

66. The Respondent submits that the Petition should be dismissed with costs to the Respondents.

67. I have considered the pleadings and submissions of the parties herein and set the following as the Court's issues for determination:

- 1. Whether Defence Council that terminated the Petitioner was properly constituted.**
- 2. Whether the Defence Council that terminated the Petitioner's Presidential Commission complied with the law.**

3. **Whether the Defence Council that terminated the Petitioner's Presidential Commission acted unlawfully as the issues were sub judice and pending before the High Court.**
4. **Whether termination of Presidential Commission violated the Petitioner's rights as guaranteed in the Constitution.**
5. **What remedies this Court will grant in the circumstances.**

68. Defence Council is established under Section 5 of the Repealed Armed Forces Act. The Section provides as follows:

1. *There is hereby established the Defence Council, which shall consist of:-*

- a. *the Minister, who shall be Chairman;*
- b. *the Assistant Minister, who shall be vice-chairman;*
- c. *the Chief of General Staff;*
- d. *the Commander of each service of the armed forces;*
- e. *the Permanent Secretary of the Ministry,*

and the chairman of the Council may appoint a person to be secretary of the Council.

2. *The Defence Council may delegate to the Minister, the Assistant Minister, a public officer or a member of the armed forces the exercise of any power or the performance of any duty conferred or imposed on it by this Act, other than a power to make subsidiary legislation.*
3. *The chairman of the Defence Council may assign to the Permanent Secretary of the Ministry, the Chief of General Staff, the Commander of any service of the armed forces or the secretary of the Council responsibility for any business of the Council:-*

Provided that the exercise of powers and the performance of duties specifically conferred or imposed on the Defence Council by this Act may not be assigned under this subsection.

4. *The Defence Council may make rules and standing instructions providing for:-*
 - a. *organization of the work of the Council and the manner in which it may perform its functions, subject to any assignment of responsibilities by the chairman under subsection (3);*
 - b. *the procedure to be followed by the Council in conducting its business; and*
 - c. *all matters which the Council may consider it necessary or desirable to provide for, in order to secure the better performance of the functions of the Council.*
5. *Acts and instructions of the Defence Council may be signified, by command of the Defence Council, under the hand of the secretary of the Defence Council.*
6. *The President may appoint officers to be Chief of General Staff and Commanders of each service of the armed forces”.*

69. Having considered the submissions of the Petitioner, he does not state that there was a parallel Defence Council other than that spelt out in the law. This Court in this regard will consider what the Court Martial did being one of the organs that may be used in achieving the work of the

Defence Council.

70. On the first issue, Part VIII of the Repealed Armed Forces Act provides for how a Court Martial may be constituted and by who and the membership thereof amongst other issues. Section 85 of the said Act provides:

1. *A Court Martial may be convened by the Chief of General Staff or by the Commander.*
2. *An order convening a Court Martial shall be signed either by the Chief of General Staff or by an officer not below the rank of major or corresponding rank authorized in writing by the Chief of General Staff to sign such orders on behalf of the Chief of General Staff or the Commander.*
3. *An order convening a Court Martial and purporting to be signed by the Chief of General Staff, the Commander or an officer authorized under subsection (2) shall, in proceedings be presumed to have been so signed, and in the last-mentioned case the officer shall be presumed to have been duly authorized, until the contrary is proved”.*

71. On matters of Constitution of Court Martial Section 86 provides as follows:

“(1) A court martial shall consist of a presiding officer and not less than two other members:

Provided that a court martial shall consist of a presiding officer and not less than four other members if:-

- i. *an officer is to be tried; or*
- ii. *the only punishment or the maximum punishment which can be awarded in respect of the charge before the court is death.*

(2) The presiding officer of a court martial shall be a person who:

- a. *is an officer not below the rank of major or corresponding rank:*

Provided that, if the convening officer is of opinion that such an officer having suitable qualities is not available having regard to the exigencies of the service, and records his opinion in a written statement (which shall be conclusive of his opinion), the presiding officer may be an officer not below the rank of captain or corresponding rank; and

- b. *has been an officer for a period of not less than five years or for periods amounting in the aggregate to not less than five years, appointed in writing by the convening officer.*

(3) The other members of a court martial shall be persons who have been officers for a period of not less than two years or for periods amounting in the aggregate to not less than two years, appointed in writing by the convening officer, and at least two of them shall be of or above the rank of captain or corresponding rank.”

72. Under Section 87:

“(1) The convening officer shall not be a member of the court martial which he convenes.

(2) An officer who, at any time between the date on which the accused was charged with the offence and the date of the trial, has been the accused’s commanding officer, and any other officer who has investigated the charge against the accused, or who under service law has held or been one of the persons holding an inquiry into matters relating to the subject-matter of the charge against the accused, shall not be a member of the court martial which tries that accused, nor shall he be judge advocate at the Court Martial.”

73. The Petitioner has submitted that the Defence Council which terminated his Presidential Commission on 14.3.2001 was unlawfully composed and illegally constituted. My resolve to 1st decide on this aspect is key because without a properly constituted Court Martial then whatever happened was annulity.
74. Annexure 3 is the letter appointing Lt Col. F. M. Murgor as the investigating officer and he was to be assisted by one Major Kabugu. This was done on 28.7.98. The appointment was made by one L.A Nteere Col. Commandant and the investigating officer was asked to investigate suspected fraudulent dealings by personnel at DOD Trg Branch.
75. This court does not have the advantage of seeing the investigation report that resulted from this appointment as none is annexed.
76. However on 6.3.2000 the Petitioner and others were expected to appear before the Court Martial as per annexure 1. The presiding officer was Lt. Col. W. R. Oteba and members were Maj. Kanja, Maj. N.O. Ogai, Maj. P. S. Sulubu and Maj. D. K. Tarus. The waiting members were Lt. Col. Ayore, Maj. C. K. Mutai and Maj. R. O. Boi. They faced various charges relating to stealing of public property and disobedience to standing orders.
77. The Petitioner has submitted that during the Court Martial proceedings, the Court Martial was unlawfully composed and illegally constituted. The Petitioner has however not demonstrated why he submitted that it was illegally constituted as the same was constituted on 18/2/2000 by the Army Commander and this is in tandem with the provisions of Section 85(1) of the Repealed Armed Forces Act as quoted above.
78. On the membership the list of members is as listed above which were 4 in number. The Petitioner has not demonstrated that not all the members listed were present as no evidence is produced before this Court in for of proceedings to show who attended and who failed to attend.
79. It is therefore this Court's position that the Court Martial was properly convened and properly constituted contrary to the Petitioner's submission.
80. The second issue, the Petitioner has submitted that the Defence Council that terminated him failed to comply with the law. This submission is based on his submission that his right as guaranteed under Section 77(1) of the Repealed Constitution was not complied with and that the said Commission was not a fair and impartial Court and violated his rights to the secure protection of the law as guaranteed by Section 77(1) of the Repealed Constitution.
81. Section 77 of the Repealed Constitution states as follows:
- “if a person is charged with a criminal offence then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law”.***
82. What however the Petitioner has failed to demonstrate is how the Court Martial infringed on his right as enshrined under Section 77(1) of the Repealed Constitution. However in the Petition before Court, the Petitioner has averred that the allegations raised were investigated by Police Investigator Chief Inspector Ndambuki who cleared the Petitioner and his 3 colleagues of the allegations.
83. He averred that despite this clearance, he was still being subjected to the Court Martial and charged with offences for which they had already been cleared as aforesaid.
84. He avers that due to this violation, he sought Judicial Review from High Court vide High Court Misc. No. 318/2000 and eventually appealed to the Court of Appeal on 7.7.2000 where he was granted stay halting the Court Martial proceedings and leave to apply for the prerogative orders of

certiorari and prohibition vide Civil Appeal No. 84 of 2000.

85. The Petitioner has not demonstrated how the trial was conducted as to term it unfair and therefore this court is unable to make a finding that Section 77 of the Repealed Constitution was infringed upon.

86. On the 3rd issue, the Petitioner has already stated that he moved to Court in Judicial Review proceedings and later to the Court of Appeal in Court of Appeal No. 84/2000 where he obtained orders halting a stay of Court Martial proceedings. That in spite of the Court of Appeal's aforesaid order, he was unlawfully confined by the Respondent's agents for a further 85 days and was eventually released on 8.9.2000 following the Superior Court intervention.

87. That on 14th March 2001 during the pendency of the aforesaid Judicial Review proceedings the Defence Council purported to terminate his Presidential Commission vide Section 171(2) of the Armed Forces Act.

88. This position is agreed upon by the Respondent who submit that the Section 52 (1) (f) of the Repealed Act provides that anybody who is subject to that Act who willfully interrupts the proceedings of a Court Martial or otherwise misbehaves before the Court shall be guilty of an offence and liable or conviction by Court Martial, other than the Court in relation which the offence was committed to imprisonment for a term not exceeding two years or any less punishment provided by this Court.

89. The Respondents are in effect stating that the act of moving to the High Court for Judicial Review proceedings and to the Court of Appeal was "misbehavior and disruption of the Court Martial Proceedings" for which they punished him by terminating his Presidential Commission.

90. This was in this Court's finding an infringement on the Petitioner's right to seek redress in a Court of competent jurisdiction as provided for under Section 9 of the repealed Constitution which provides that:

"A Court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial and where proceedings for such a determination are instituted by a person before such a Court or other adjudicating authority the case shall be given a fair hearing within a reasonable time".

91. It is my finding that the Respondent erred by disobeying the Stay Orders from the Court of Appeal and also by terming seeking redress from Court an interference with the Court Martial proceedings.

92. This in my view also answers issue No. 4 above as I find that the Respondent violated the Petitioner's rights as enshrined in the said Constitution.

93. The Respondents action after this event amount to further infringement of the Petitioner's rights and by further failing to give him his terminal dues.

94. I therefore find for the Petitioner as follows:

1. ***A declaration that the termination of the Petitioner's Presidential Commission was unlawful.***
2. ***Denial of his Petitioner's terminal benefits constituted a cruel, degrading and inhuman treatment as provided for under Section 74 of the Repealed Constitution.***
3. ***That Petitioner be forthwith paid his terminal benefits as an employee who had retired from the service in the normal course of duty.***

4. *That the Petitioner be further be paid salary amounting to 12 months salary as compensation for unlawful termination based on what would have been his salary at retirement.*
5. *The order for reinstatement is not tenable at the moment given the long time lapse.*
6. *The Respondent to meet costs of this Petition.*

Read in open Court this 4th day of April, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Petitioner – Present

Odawa for Petitioner – Present

No appearance for Respondent – Absent