



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 330 OF 2014**  
*(Before Hon. Lady Justice Maureen Onyango)*

**VINCENT KARANI ASIMUGE.....CLAIMANTS**

**-Versus-**

**1. THE MINISTRY OF DEFENCE**

**2. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

**JUDGEMENT**

The claimant brought this suit by way of a plaint dated 22nd September, 2004 and filed in court on 6th December, 2004. The claimant's prayers are for judgment against the Defendants jointly and severally for full salary and emoluments and costs of the suit for termination of his services as an army officer. In response to the plaint, the defendants filed a defence on 3rd May, 2005 generally denying the allegations contained in the plaint and praying for dismissal of the plaintiff's suit. The defendants later sought leave and filed an amended defence on 7th November, 2013 wherein they stated the plaintiff was dismissed from service in May 1980 for being involved in criminal activity.

In between the time of filing of the suit and the time when hearing began there were a lot of delays owing to the transfer of the case file from Busia, where the matter was initially filed to Nairobi.

Hearing kicked off with earnest on 27th January, 2014 before F. Tuiyott J. The plaintiff called only three witnesses. The essence of plaintiff's(PW1) evidence is as under. The plaintiff was recruited into the Kenya Armed Forces in 1979 and was deployed to 5th Battalion in Gilgil. It is his case that after working for sometime he requested for his annual leave in March 1980. He was granted 30 days leave and he reported to duty in April 1980. The plaintiff contends that on arrival at his work station, he received a report from his immediate boss that his service number was erroneous and that he was not properly recruited into the Army. He was thus asked to go home on a promise that the matter would be investigated and the results communicated to him through the office of the Provincial Administration. The plaintiff testified further that he has never received any communication on the issue despite numerous enquiries.

The plaintiff called two more witnesses. John Ouma Ekesa(PW2) and Faustin Emusugutu(PW3) who testified and confirmed that indeed the plaintiff was an army officer between 1979 and 1980.

The defendants called one witness Daniel Mutua(DW1), a staff officer in charge of records at Ulinzi House. He testified that it is true that the plaintiff was recruited into the forces on 16th February, 1979 as

a private soldier in 5th Kenya Rifles and stationed at Gilgil. That according to the terms of service, the plaintiff was eligible for initial 9 years. DWI testified further that the plaintiff was however involved in a criminal case of Robbery and was convicted for 1 year on 26th May, 1980 in **Busia CR 332 OF 1980**. He appealed to the High Court at Busia in **HCCRA 555 of 1980** but the appeal was dismissed. As a result of the conviction, the commander issued his discharge from service and did not recommend payment of any benefits. DWI produced the letter informing the Commander of the plaintiff's conviction as Exhibit 1 and the Commander's letter discharging the plaintiff from service as Exhibit 2.

I have duly considered the evidence adduced before court and submissions by the parties. To begin with, though the defendants did not raise the issue of time limitation in their defence, counsel cared to mention the same in their submissions. This matter was brought 24 years after the dismissal of the plaintiff from the forces.

Section 3 (1) of the Public Authorities Limitation Act Cap. 39 provides that:-

**“3 (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.**

**(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued .....**”

The plaintiff did not give any explanation as to the delay for 24 years and did he seek leave to file the matter out time. In my view the plaintiff is guilty of inordinate delay and in the absence of any explanation on the delay, this suit is a gross abuse of the court process and on this alone his claim should fail. Nyamu J in **PETER NGARI KAGUME & 7 Others v ATTORNEY GENERAL [2009] eKLR** was very clear in the issue of time limits. He stated thus:

**Courage and promptness are important blocks of justice.... Delays have to be explained and claims brought within a reasonable time depending on the circumstances even where the Constitution does not expressly stipulate the limitation period. The notion that future generations should pay for past sins would be justice turned on its head and the ideal is for each generation to pay for its sins. For example the idea that the independent states, who constituted the endless British Empire where the sun never set, should pay for the British sins in the former colonies is an issue that should be left to the current morality of the British Government and good international public policy. Perhaps in their case the sun should never set on reparation! If the domestic public opinion on the issue of reparation is that the new governments should be responsible, courts of law ought not be blind respecters of public opinion and ought in most cases establish new pathways of justice based on the demands of each situation before them.**

It is not in dispute that the plaintiff was an army officer between 1979 and 1980. The plaintiff insists that he was verbally dismissed from duty without any reasons being given. On the other hand the defendants claim that the plaintiff was dismissed from duty in the month of May 1980 after being convicted in a robbery case at Busia Law courts. What is the correct position?

The claims that it is after he returned from leave that he was verbally dismissed from duty. He did not produce any documents to show that he was on leave as he claims. On the other hand the defendants produced a letter showing that the plaintiff was involved and convicted in a criminal case. It is the case for the defendants that as a result he was dismissed under Section 176(c) of the Armed Forces Act(repealed) which allowed the Service Commander dismiss an officer summarily without the requirement to appear before the Military disciplinary Board. Section 176 of the Repealed Act provided as follows:

**176. A serviceman may be discharged by the competent service authority at any time during his period of colour service -**

- (a) if, within two years after the date of his attestation, his commanding officer considers that he is unlikely to be an efficient member of the armed forces; or**
- (b) for activities or behaviour likely to be prejudicial to the preservation of public security; or**
- (c) if he is convicted of a civil offence; or**
- (d) if he is pronounced by a medical officer to be mentally or physically unfit for further service; or**
- (e) on reduction of establishment; or**
- (f) at his own request on compassionate grounds; or**
- (g) if for any reason his services are no longer required; or**
- (h) if he is granted a commission; or**
- (i) if he is sentenced by court martial to be dismissed from the armed forces.**

From the foregoing section, it is clear under what circumstances a military officer could be discharged from the force. The defence produced in evidence court proceedings and a letter communicating the plaintiff's conviction in a robbery case. It is following this communication that the service Commandant exercised his power under Section 176(c) of the repealed to dismiss the plaintiff. The plaintiff has not denied this evidence and neither has he provided evidence to recant it. It is not for this court to interfere with powers of the Military service. To me this suit was an afterthought and the same ought to be dismissed.

I accordingly dismiss the same with no orders for costs.

**Dated, Signed and Delivered this 14th day of July, 2016**

**MAUREEN ONYANGO**

**JUDGE**