



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 11 OF 2013**

**NASIBO DABASO JILLO ..... PETITIONER**

*VERSUS*

**THE COMMANDER KENYA ARMY ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

(Sued for and on behalf of the

Defence Council, Kenya Defence Forces) ..... 2<sup>ND</sup> RESPONDENT

Mr Millimo Benson for Petitioner

Mr Mwimbo Momanyi for Respondent

**JUDGMENT**

1. The Petitioner having been recruited on 26<sup>th</sup> February, 2007 to the Kenya Army underwent military training for four months at the Recruits Training School (RTS) at Eldoret. She was allocated service number 77604.
2. On 20<sup>th</sup> September, 2007 on the day of the pass out parade having prepared herself and invited her family and friends for the event she was approached by a duty officer who informed her that she should leave camp immediately.
3. She alleges that she was not given the reasons but was bundled into a truck and dropped in Eldoret town.
4. In October, 2007 the Petitioner wrote a letter requesting for information on the incident and was informed vide a letter dated 16<sup>th</sup> January 2008 that she was discharged under section 17a of the Armed Forces Act on grounds that she was asthmatic. The Respondent continued remunerating her for six months until March 2008.
5. The Petitioner states that the said discharge violated her constitutional and human rights and also violated the Employment Act provisions in that the Petitioner was not granted a valid reason for the termination of employment as is required under Section 43 of the Employment Act 2007.

6. That the Respondent in its reply flipflops in between a discharge on medical grounds and discharge on the grounds that services were no longer required

7. That discharge for medical grounds is governed by **Section 176(d)** of the Armed Forces Act Cap 199 Laws of Kenya whereas discharge when services are no longer required is governed by **Section 176(g)**. That these are separate and distinct and the mix up is a sign of dishonesty on the part of the Respondent.

8. The Respondent in its letter dated 16<sup>th</sup> January 2008 stated that the Petitioner was discharged under **Section 176(g)** of the Armed Forces Act on grounds that she was asthmatic yet there is no medical report to verify that allegation. Respondent relies on medical notes which do not constitute a medical report.

9. That the punishment meted on her was harsh and was done without a hearing at all. The issue of the fair hearing was considered by Justice Wendo J in **Misc Civil application No 1847 of 2009**, Judicial Review Application whose judgment is annexed to the Petition. The Hon. Judge made a finding that the discharge was unfair and in contravention of the rules of natural justice. She then advised the Applicant to file a civil suit for compensation as the Petitioner has done herein at page 8 of the Judgment as follows;

*“I do agree that a board should have been constituted to investigate the reasons for the applicant’s discharge and that is the only way that the applicant could have been given a chance to be heard and evidence adduced as to her medical status or that her services were no longer required. The rules of natural justice requires that even where the statute does not provide for a hearing, it is expected a public body will act fairly and fairness require that one is given some form of hearing not necessarily in a court of law setting.*

*In the instant case the Applicant was not informed of the decision taken by the Respondent. It seems she did not have an idea why she was being returned to Eldoret. I find that the manner in which the applicant was removed from service just before the graduation was not done fairly at all. The manner of discharge of the applicant from the armed forces was gross and unfair.*

*The Respondent acted in an inhuman manner leading the applicant to believe that she would go through with the graduation only to bundle her out the last minute without an explanation.”*

10. Having read the replying affidavit of Lieutenant Colonel Joseph Karbuali Kosen a custodian of the records of discharged servicemen and therefore familiar with the facts leading to the discharge of the Petitioner as contained in her personnel file in his custody, nothing in the Affidavit persuades me to depart from the finding by my sister Judge of the High Court Wendo J. above.

11. The Claimant while undergoing training was diagnosed with pneumonia with bronchospasms and was given asthmatic treatment and was admitted at the training school’s medical reception on various dates. Copies of medical treatment notes are attached to the affidavit marked ‘DOD1’. Due to the admissions to the hospital the Petitioner was discharged from the Armed Forces on the 19<sup>th</sup> July 2007, the officer concludes.

12. It is common cause therefore that the Petitioner was not referred to a Medical Board to review her status and make a report with appropriate recommendations to the Armed Forces.

13. This is a mandatory requirement under the Armed Forces Act and the Armed Forces Standing Orders in order to discharge a service man on medical grounds.

14. The Petitioner was bundled out of the Training school on the day of the pass-out parade and in great anticipation of realizing her dream of becoming a soldier. This was done when her family and friends had travelled to witness her crowning by the Commander in Chief of the Armed Forces and the

President of the Republic of Kenya. These hopes were dashed when least expected and in a most inhumane way. The Claimant was left in Eldoret town not knowing the reasons for the misfortune that had befallen her.

15. This Court was referred to **Nairobi Industrial Cause No. 1161 of 2010 V.M.K. vs. C.U.E.A.** wherein I stated relying on Article 28 of The present Constitution of Kenya 2010, that;

*“Every person has inherent dignity and the right to have that dignity respected and protected. This is not only directed at the state vis a vis the people living in Kenya but also is applicable horizontally as against individuals towards each other. The employers in particular are enjoined through the various provisions of labour laws in Kenya to recognize respect and protect through work policy and practice at the work place the dignity of each and every worker.”*

16. Though the present case took place before promulgation of the present Constitution of Kenya, 2010 the erstwhile Constitution 1969 had similar provision on the protection of human dignity though couched in different words.

17. Indeed the Petitioner relies on the preamble to The Universal Declaration on Human Rights (UDHR) which proclaims that:

*“whereas recognition of the inherent dignity and of the equal and inalienable rights of all member of the human family is the foundation of freedom, justice and peace in the world,  
.....*

*Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”*

18. The African Charter on Human and peoples’ Rights also recognizes and guarantees human dignity. Article 5 of the Charter provides that:

*“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruelty, inhuman or degrading punishment and treatment shall be prohibited.”*

19. The Petitioner prays for;

(i) a declaration that the discharge, and or removal of the Petitioner herein from the Kenya army was tainted with illegality, irregularity, unfairness, in contravention of the established rules of natural justice and therefore invalid, null and void abinitio.

(ii) a declaration that the discharge and or removal of the Petitioner from the Kenya Army was in violation of her right to a fair administrative action.

(iii) A declaration that the discharge and or removal of the Petitioner from the Kenya army was so done in violation of the Petitioner’s rights to human treatment, respect and protection of her dignity.

(iv) A declaration that the discharge and or removal of the Petitioner from the Kenya Army on the purported ground of medical ground was so done in violation of the Petitioner’s right to equal protection and benefit of the law and non-discrimination on the basis of health status and or disability.

(v) A declaration that the Petitioner's discharge and or removal from the Kenya Army was in violation of her right to fair labour practices and legitimate expectations.

(vi) A declaration that the continued Respondent's retention and detention of the Petitioner's personal belongings and documents inclusive of her National Identification card has occasioned and continues to occasion a denial and or breach of the Petitioner's rights set out at paragraphs a – g.

(vii) A mandatory injunction do issue directed against the Respondent jointly and severally to release forthwith the Petitioner's personal belongings and documents inclusive of National Identification Card and or any other items, goods, personal effects of whatever nature or description belonging to the Petitioner.

(viii) An order for compensation directed against the Respondents jointly and severally to compensate the Petitioner for violation of her rights and fundamental freedoms in the sum of Kshs.50 million or as the Court may asses and grant.

(ix) An order for compensation to compensate the Petitioner for salary / or suffered career advancement and or terminal dues for sixty (60) years she would have served in the sum of Kshs.19,515,335.40.

(x) Interest and costs of the Petition.

## 20. **Determination**

The High Court made a finding that the Claimant's rights and fundamental freedoms had been violated in High Court Miscellaneous Application No.184 of 2009 wherein a judgment was delivered by R.P.C. Wendoh J. as stated earlier in this judgment.

21. The Judge further directed the Petitioner to file a civil suit to claim damages / compensation for the violations.

22. The Court is persuaded by the evidence by the Petitioner that her discharge from the service only on the basis that she suffered a curable illness namely, pneumonia with bronchospasms without a medical Board reviewing her case was unlawful and in violation of her right to lawful employment in the Armed Forces of Kenya.

23. The manner in which the discharge was done, on the day of the pass-out parade, while her family had arrived for the event was both degrading and inhumane and grossly violated the right of the Petitioner in that respect.

24. The Petitioner as a result, lost prospects of a career in the Armed Forces without a valid reason or justification.

25. The Court notes that the Armed Forces have very good medical facilities at the disposal of the Petitioner and there is no iota of evidence that the illness she suffered was terminal and / or was debilitating to the extent that the Petitioner was unable to serve as a service woman in the Armed Forces.

26. The medical notes relied upon by the Respondent annexed to the Replying Affidavit do not demonstrate this inability. No medical officer testified or filed an Affidavit to demonstrate that the illness suffered by the Petitioner was of such a nature that, she could not discharge her duties as a service woman.

27. The Respondent had a duty to provide the Petitioner with valid reasons for her sudden discharge from the service after she had completed the basic training and on the day of graduation without any

prior notice.

## 28. **Compensation**

The Petitioner has sought Kshs.50 million as compensation for the violation of her rights and freedoms demonstrated in this case.

The Petitioner was a young woman from Moyale. The Court takes Judicial notice that this is an arid area of Kenya lagging far behind in development and the girl child from this area has little chance of getting gainful employment. The recruitment of the Petitioner was a lifesaving measure for her family and the community she came from.

29. This is a factor the Respondent ought to have taken into account before taking the drastic measure meted on the Petitioner. The Respondent as it were condemned the Petitioner to a life of deprivation and poverty.

30. Considering all the circumstances of this case, including that, the Petitioner had prospects of earning a salary until retirement and prospects of earning a salary until retirement and that she was denied a fulfilled life of service to the nation and prospects of career advancement in the military service, the Court awards the Petitioner as against the Respondents jointly and severally a gross sum of Kshs.3,000,000 as general damages for pain and suffering as a result of denied employment and violation of her human rights as described in this Petition.

31. The Court is satisfied that the personal belongings of the Petitioner were transmitted to the District Commissioner Moyale with directives to give the belongings including National identity card to the Petitioner.

32. The Attorney General, the 2<sup>nd</sup> Respondent herein is to confirm to the Court within thirty (30) days from date of this judgment that the personal belongings have been given to the Petitioner and report to the Court accordingly.

33. The award is payable with interest at Court rates from date of this judgment till payment in full.

34. The Respondents to also pay the costs of the suit.

**Dated and Delivered at Nairobi this 19<sup>th</sup> day of June, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**