



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 6 OF 2013

**IN THE MATTER OF ENFORCEMENT OF ARTICLES 2, 22, 23, 28, 35, 41 & 47 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF UNLAWFUL RETIREMENT, UNFAIR LABOUR PRACTICE, AND
UNFAIR ADMINISTRATIVE ACTION**

LT. COL (RTD) RICHARD NCHAPI LEIYAGU..PETITIONER

VERSUS

CHIEF OF KENYA DEFENCE FORCES.....1ST RESPONDENT

MINISTRY OF STATE FOR DEFENCE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Petitioner filed this petition seeking redress for infringement of certain Articles of the Constitution of Kenya. The Petitioner set out the facts in support of his petition and stated that he joined the Armed forces on 24th June 1985 as an Officer Cadet and was posted to 1 Kenya Rifles in June 1986 after completion of his training at Lanet. He served with distinction and was promoted through the ranks to a Lieutenant Colonel in 2006. The Petitioner stated that he was born on 24th November 1963 in Samburu District in the Rift Valley Province. The Terms and Conditions of Service of the Kenya Armed Forces, a Lieutenant Colonel is meant to retire at 49 years of age with a 2 year extension to 51 years. The date of retirement for the Petitioner – the Run out Date – was to be 23rd November 2012. The run out date previously was June 2012 but the Petitioner had sought a publication of Part Two orders and corrected it. He applied for his level two extension on 18th January 2011 and this was recommended and approved by the military command and by letter of 7th February 2011 the extension was confirmed in writing. On 27th June 2011 the Petitioner's grant of extension was withdrawn without affording him a hearing or giving him an explanation. After the withdrawal of the extension the 2nd Respondent issued instructions by a letter dated 18th July 2011 to retire him from service and computed the run out date as June 2012. Due to the withdrawal of the extension the Petitioner was deprived of the opportunity to serve for a further 2 years. The Petitioner thus sought a declaration that the unlawful alteration of

the Kenya Defence Forces records by the servants/agents of the 1st and 2nd Respondent was a gross violation of the Petitioner's constitutional right to fair labour practices and fair administrative action, a declaration that the withdrawal of the level two extension was an act of discrimination and a gross violation of the Petitioner's rights to equal protection and equal benefit of the law, an order for compensation for the sum of Kshs. 7,728,558 being the payment of five months service Kshs 1,33,510, and Kshs 6,396,048 being two years earnings, general damages or compensation for violation of the Petitioner's fundamental rights and for being subjected to degrading and inhuman treatment and that the costs of the petition be borne by the Respondent's in any event.

2. In answer to the Petition the Respondents filed a Replying Affidavit sworn by Lieutenant Colonel Paul Mwangemi Kindochimu the custodian of all records in the Defence Forces. He deponed that according to the records the Petitioner was enlisted on 24th June 1985 with date of birth of 1962 as shown by his ID card S/No. **[particulars withheld]** and that despite filing his birth certificate and causing it to be published in Part II orders his records could not be changed as the Petitioner did not follow the requisite legal procedures. He deponed that the Petitioner's withdrawal of service (Level Two) was withdrawn under the authority of the Commander Kenya Army. He further deponed that there was no irregular alteration of the records as the Commander's remarks on the extension of service is clearly indicated as 'Not recommended'. he deponed that the Petitioner was discharged lawfully and warned in advance of the run out date.
3. The parties agreed to file submissions and the Petitioner filed his submissions on 22nd January 2015. In the submissions the Petitioner submitted that he was recruited into the Armed Forces on 24th June 1985 as an Officer Cadet and was posted to 1 Kenya Rifles in June 1986 after training for one year at the Armed Forces Training College, Lanet. He submitted that at the time of the unlawful discharge and premature termination he was serving in the rank of a Lieutenant Colonel and that under the terms and conditions of service of the Kenya Armed Forces, he was meant to retire at 49 years of age with a two year extension to 51 years. He submitted that his date of retirement which is referred to as the Run Out Date (ROD) was to be 23rd November 2012. He submitted that the records kept by Kenya Army had previously had wrongly indicated that the Petitioner's ROD as June 2012 but the Petitioner had requested for a correction which was duly effected by way of a publication of Part Two Orders and subsequently the Petitioner applied for a level two extension on 18th January 2011, which was granted and the grant of extension of service for twelve **12** officers, including the Petitioner was confirmed by a letter dated 7th February 2011 from the Kenya Army headquarters. The Petitioner submitted that the grant of extension was irregularly and unprocedurally withdrawn without affording him a hearing or giving him any written explanation. The Petitioner submitted that the conduct of the 1st and 2nd Respondents is not that expected of the disciplined forces, but rather is one of reckless impunity, which must be censured by this Court. He submitted that the records at the Defence headquarters were thereafter fraudulently changed to reflect that the Army Commander had not recommended the Petitioner's extension and that the handwriting and ink used to recommend in the original document annexed by the Petitioner to his affidavit of 7th January 2013 is markedly different from the altered document annexed to the Respondent's replying affidavit sworn on 8th March 2013. He submitted that the Respondent issued a letter to prematurely terminate his services in a blatant violation of the Petitioner's fundamental rights hence the action by the Petitioner seeking for appropriate relief before this Court.
4. The Petitioner submits that the issues for determination are as the following:
 - i. *Whether the Petitioner's constitutional rights to fair labour practices, fair administrative action and infringement of the protection afforded by Article 41 & 47 have been violated;*
 - ii. *Whether the Petitioner's rights to equality and freedom from discrimination afforded by Article 27 have been violated;*

- iii. *Whether the Petitioner's constitutional rights to freedom from torture and cruel, inhuman and degrading treatment or punishment afforded by Article 25 have been violated; and*
 - iv. *Whether the Petitioner is entitled to compensation for unfair termination and general damages for violation of his fundamental rights under the constitution.*
5. He relied on the case of **Rose Wangui Mambo & 2 others v Limuru Country Club & 17 Others [2014] eKLR** for the position that the Constitution of Kenya and the bill of rights under Article 20(1) bind all persons and state organs. He relied on the case of **Severine Luyali v Ministry of Foreign Affairs and International Trade & 3 Others [2014] eKLR** for the position that there was a shift in labour relations with the Employment Act 2007 and employees without distinction as to whether they are in public or private sector now enjoy a protective labour environment unlike before. He submitted that the withdrawal of the service extension was in blatant disregard for the rules of natural justice. He relied on the decision in **James Mwangi Nguri v Egerton University [2013] eKLR** where the Court held that the respondent was bound by the provisions of Article 236(b) of the Constitution which provides that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary process without due process of law.
 6. The Petitioner submitted that the confirmation of the grant of extension accorded to the Petitioner a right that could only be withdrawn for a legally justifiable reason. He submitted that the extension was granted then later withdrawn through a series of letters and without assigning a reason for it. The Petitioner submitted that the records were fraudulently altered to give effect to the withdrawal of the 2 year extension.
 7. The Respondents submitted on 10th February 2015. In the submissions filed the Respondents isolated 3 issues for determination. These were as follows:-
 1. What was the Petitioner's run out date (date of retirement)
 2. Why was the two years extension not granted to the Petitioner?
 3. Was there any violation of Constitutional rights of the Petitioner in the entire process?
 8. The Respondents submitted that the date and year of the Petitioner's birth were the first issue to be considered. The Respondent submitted that according to the Kenya Armed Forces Attestation paper dated 24th June 1985 to which the Petitioner appended his thumbprint upon recruitment to the armed forces shows that he was twenty three years by the date which meant that he was born on 24th June 1962. The Respondent submitted that it was a known fact that by the time the Petitioner was recruited, the old generation Identity Cards never indicated dates of birth. It was submitted that Section 181(1) of the Armed Forces Act cap 199 made provision that the sanctity/validity of the attestation paper was preserved which meant that in the case of any conflict between the attestation paper and any document the attestation paper would carry the day. The Respondent submitted that despite filing his birth certificate and causing it to be published in Part II Orders his records could not be altered as he did not follow the required legal procedure to change his date of birth. The Respondent submitted that the Petitioner was thus not entitled to the 5 months and 2 years extension as alleged. The Respondent submitted that he who comes to equity must do so with clean hands. The Respondent cited paragraph 751 of Halisbury's Laws of England where it states

“that a court of equity will refuse relief to a plaintiff's misconduct in regard to the subject matter of the litigation if it has been improper.....This principle is to be applied no less flexibly than its common law counterparts; and it requires the court to undertake a balancing exercise and to consider whether or not it would be an affront to the public conscience to grant the relief sought having regard to the conduct of the person seeking it”

The Respondent relied on the case of **Mumo Matemu Civil Appeal No 260 of 2012** where the court refused the idea that it can be used as a political vehicle under the guise of enforcement of constitutional rights thus:

“However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such a person and must reject their application at the threshold.

The Respondent submitted that chapter 4 of the Armed Forces Standing Orders paragraph 2(b) states very clearly that the extension of the two years period is discretionary. The Respondent submitted that the two year period was granted but later withdrawn due to the realization that the Petitioner had involved himself in collusion with junior officers to alter his record irregularly. This, the Respondent submitted, is gross misconduct that triggered the refusal by the Respondent to grant the extension of 2 years. The Respondent submitted that the Respondent had not shown how the relevant sections of the Constitution were violated and that it was not right for him to state that his rights were violated when he was the one that participated in the irregularity, misconduct himself. The Respondent submitted that the Petitioner was not entitled to the extension and thus was ineligible for the 5 months payment. The Respondent urged the Court to thus dismiss the petition with costs to the Respondent as the Petitioner did not deserve the orders sought.

9. The Petition seeks relief for the infringement of the Petitioner’s rights. The Respondent asserts that the Petition is misplaced as the Petitioner was involved in the irregularity. The Petitioner asserts that his rights were violated. I had sought from the Respondent the original documents and gave the Respondent ample time to avail the original documents in its bundle. These were tellingly not availed.

The grant of extension crystallised certain rights in the Petitioner’s favour. He expected his run out date to be November 2012, he anticipated service to this Nation for the remainder of the period of the extension. Any violation of those rights would in my estimation amount to sufficient cause for seeking relief before the Courts. Article 27 makes provision that everyone is equal before the law and has the right to equal protection and equal benefit of the law. The Petitioner is not excluded.

10. Article 236 of the Constitution of Kenya makes provision as follows:-

236. A public officer shall not be—

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

11. The abrupt withdrawal of the Petitioner’s service extension was in blatant disregard of the rules of natural justice. In the case of **James Mwangi Nguri v Egerton University [2013] eKLR** the Court held that the respondent was bound by the provisions of Article 236(b) of the Constitution. The Petitioner who was a public officer should not have been removed from office without due process of law. He was not advised when the Respondent proceeded to irregularly alter the grant of extension by forging documents on his file to suggest that the Commander had not granted the extension nor was he called to a disciplinary hearing to ascertain the manner and reason for the alteration of his records which the Respondent stated was irregularly done. The decision in the Mumo Matemu case was misplaced in this case. No political grandstanding has taken place, no political agenda was being propagated and the only relevant portion that may have been of note was the issue of assertion of rights.

12. The 1st and 2nd Respondent were duty bound to accord some degree of fairness in the process of withdrawal of the service extension. It was alleged the Petitioner colluded with junior staff to alter his records. This was not shown to have been the case. The alteration was contained in documentation and processes that the Armed Forces use and it was a process that was not under

the control of the Petitioner. Whereas the grant of extension is discretionary, the discretion was eventually expressed in his favour but was irregularly withdrawn. For this the 1st and 2nd Respondent would be liable. The Petitioner has served the Nation in the capacity of Lieutenant Colonel and given the nature of service in the military it would not be fitting to return him to serve the remainder of the extension. The best would be a monetary compensation for the infringement of his rights. He lost 5 months of his run out and these would of necessity be restored to him. The Petitioner was bundled out of a career that was stellar and without blemish without regard to the dictates of fairness. He is entitled to compensation which I grant but limit it to a period of 12 months. General damages were sought. In a Constitutional petition, damages can be awarded. In considering the award of general damages, I am persuaded by the holding in **Dominic Arony Omolo vs. Attorney General. High Court Misc. Application No. 494 of 2003**, where it was held that monetary compensation must be reasonable and fair and taking into account all the circumstances of each case. The Petitioner suffered to some degree and taking into account the circumstances of his case I would award compensation in the sum of Kshs. 3,500,000/-.

- i. A declaration is hereby issued that the unlawful alteration of the Petitioner's Kenya Defence Forces records was a gross violation of the Petitioner's constitutional rights to fair labour practice and in contravention of Articles 41 and 236(b) of the Constitution of Kenya.
- ii. The Petitioner be awarded 5 month of service Kshs. 1,332,510/-.
- iii. The Petitioner be awarded one years earnings as compensation for alteration of run out date Kshs. 3,198,024/-
- iv. Petitioner be awarded Kshs. 3,500,000/- as general damages for violation of his constitutional rights.
- v. The Petitioner be awarded costs of the Petition
- vi. The Petitioner be awarded interest at Court rates on the sums above from the date of the judgment until payment in full.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of June 2015

Nzioki wa Makau

JUDGE