



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT OF KENYA AT NAIROBI**  
**PETITION NO. 7 OF 2015**

*(Formerly High Court Nairobi Petition No. 586 of 2014)*

**SILVESTER TOM MASARE ..... PETITIONER**

**VERSUS**

**THE CABINET SECRETARY,**

**MINISTRY OF DEFENCE ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF OF THE KENYA**

**DEFENCE FORCES ..... 2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF DEFENCE ..... 3<sup>RD</sup> RESPONDENT**

**THE COMMANDER, KENYA AIRFORCE ..... 4<sup>TH</sup> RESPONDENT**

**THE COMMANDER, KENYA NAVY ..... 6<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF KENYA ..... 7<sup>TH</sup> RESPONDENT**

Mr. David Ondieki for the Petitioner

M/S Moimbo Momanyi for the Respondent

**JUDGMENT**

1. The Petition dated 28<sup>th</sup> November 2014 is supported by a verifying Affidavit of the Petitioner Tom Masare who seeks a Declaration that the Regulation as per the communication dated 29<sup>th</sup> January 2013 classifying retirement age by ranks particularly those enumerated in paragraph 10 of the Petition are inconsistent with the Constitution of Kenya the mother Act and, therefore, null and void to the extent of its inconsistency with the Constitution as it infringes on the fundamental rights and freedoms contained under Articles 2(2), 3, 27, 47 and 50 of the Constitution.
2. A Declaration that Regulation as per the communication dated 29<sup>th</sup> January 2013 classifying

- retirement age by ranks, made by the Respondents, is unconstitutional.
3. An order of certiorari to remove into the High Court do issue and quash the decision made by the Respondents vide their communication dated 29<sup>th</sup> January 2013 classifying retirement age by ranks.
  4. The Notice of Motion Application filed simultaneously with the Petition seeking interim relief pending the hearing and determination of the Petition was compromised by the parties.
  5. The basis of the petition is as follows;

On 29<sup>th</sup> January 2013, Respondents who include The Cabinet Secretary, Ministry of Defence (1<sup>st</sup> Respondent), The Chief of The Kenya Defence Forces (2<sup>nd</sup> Respondent), The Principal Secretary, Ministry of Defence (3<sup>rd</sup> Respondent), The Commander, Kenya Army (4<sup>th</sup> Respondent), The Commander, Kenya Airforce, (5<sup>th</sup> Respondent), The commander, Kenya Navy (6<sup>th</sup> Respondent and The Attorney General of The Republic of Kenya (7<sup>th</sup> Respondent) who form the Defence Council of the Kenya Defence Force formulated and communicated Regulation classifying retirement age by ranks as follows;

- i. WOI - 58 years
- ii. WOII - 57 years
- iii. SSGT - 55 years
- iv. SGT - 54 years
- v. CPL / L'CPL - 52 years
- vi. SPTE/PTE - 48years

6. That, this classification is meant to accord higher ranks more years in service than the lower ranks who earn less.
7. That the said classification is unlawful and unconstitutional and is contrary to Articles 27, 47 and 50 of the Constitution.
8. That the regulation has no legal or constitutional basis and violates the Petitioner's right of fair and equal treatment before the law and fair access to justice.
9. That Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and in terms of 47(2) if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action. That no such written reasons have been given to the Petitioner.
10. That in terms of Article 47(3) this Court has a right to review administrative action that violates or threatens to violate the right or fundamental freedom of a person.
11. Furthermore, in terms of Article 2(2) of the Constitution, no person may exercise state authority unlawfully or unconstitutionally. That the Defence council in formulating the said Regulation classifying retirement age by ranks is an act in excess of their powers.
12. That Section 242 of the Kenya Defence Forces Act of 2012, clearly stipulates that the regular force will consist of persons between the age of eighteen years to sixty two years. The Respondents by purporting to classify the same as above amounts to discrimination which is unconstitutional.
13. That the prayers sought in the Petition should be granted as prayed.

### **Replying Affidavit**

14. A replying Affidavit sworn by Lieutenant Colonel Joseph Kosen, staff officer I records at the Ministry of Defence Headquarters on 19<sup>th</sup> February 2015 and filed on 25<sup>th</sup> February 2015 responds to the Petition as follows:

The Petitioner was a senior non-commissioned officer in the rank of Acting Sergeant with the Kenya Defence Forces.

That the Petitioner was discharged on 30<sup>th</sup> June 2013 having attained the mandatory retirement age of 54

years. The discharge instruction was produced and marked “JK1”.

That the Petitioner was due to retire on 30<sup>th</sup> June 2012, upon attaining the then mandatory retirement age of 53 years as per the certificate of service produced and marked ‘KK2’. The Army Commander had however approved an extension of one year of service beyond the mandatory retirement age which revised the Applicant’s retirement date to 30<sup>th</sup> June 2013 as per annex ‘JK3’.

15. On 20<sup>th</sup> December 2012, the Defence Council reviewed the then existing retirement age under the Terms and Conditions of service for service members to 54 years for sergeants as per annex ‘JK4’. The Petitioner who by then was already enjoying the revised retirement age of 54 years was not affected and his retirement date of 30<sup>th</sup> June 2013 was unaffected.

16. That Section 243(1) of the Kenya Defence Forces Act stipulates the minimum and maximum age for service. The Section permits the Defence Council to prescribe the terms and conditions of service in the regular force which the Petitioner was a member.

17. That therefore, the prescription by the Defence Council of the new mandatory retirement age is lawful and within the law and the Petition ought to be dismissed accordingly for lack of any merit.

#### 18. Issues

- i. Was the action by the Defence Council classifying members retirement as per their ranks unlawful or unconstitutional?
- ii. If the answer to (i) above is in the affirmative, what remedy if any is available to the Petitioner.

#### Issue (i)

- i. The burden of determining unlawfulness or unconstitutionality of conduct by a public officer is on the Petitioner. The Court proceeds on the basis that the action is lawful and constitutional. A reading and interpretation of Articles 241(5), (6) & 7 of the Constitution together with Section 243, 304 and 305 of the Kenya Defence Forces Act of 2012, give the Defence Council the Constitutional and statutory powers to make regulations for “*better carrying out the provisions and purposes of the Kenya Defence forces Act, 2012 and generally for the good government of the Defence Forces*”.

19. Under Article 241(c) of the Constitution is established the Kenya Defence Forces.

In terms of Article 241(7), the Council;

- a. Is responsible for overall policy control and supervision of the Kenya Defence Forces; and
- b. Performs any other functions prescribed by National Legislation.

In terms of Section 30(1) of the Kenya Defence Forces Act, 2012, the Defence Council has the statutory duty of making regulations as aforesaid.

20. In the case of **Alphonse Mwageni Munga & 10 others Vs. Africa Safari Club [2008] eKLR J. G. Nyamu and R.P.V. Wendoh JJ** stated:

*“that [much as emphasis mine] the Constitution is the supreme law of the land ..... it has to be read together with other laws made by Parliament and should not be construed as to be disruptive of the other laws in the administration of justice.”*

21. The Petitioner has failed to demonstrate in which way the regulations promulgated by the Defence Council pursuant to Articles 241 of the Constitution as read with Section 243, 304 and 305 of the Kenya Defence Forces Act, 2012 violated Articles 2(2) 27, 47 and 50 of the Constitution.

22. Retirement age of different cadre in the Armed Forces is to be lawfully determined by the Defence Council provided the cadre is between the minimum age of 18 years and a maximum age of 62

years.

23. It would however be in furtherance of the objectives of Article 47(2) of the Constitution to provide justification to the various cadre upon recruitment and during opportune times during service, for the provision of different retirement age for soldiers in different ranks. If no such justification exists to meet the requirements under Article 24(2) a – b of the Constitution, then the Council should reconsider the classification in the light of the Constitution.

This would be in furtherance of good and transparent governance of the Armed forces in line with the express words and spirit of the Constitution.

24. The Petition lacks merit and the same is dismissed with no order as to costs.

**Dated and Delivered at Nairobi this 25<sup>th</sup> day of September 2015**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**