



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 891 OF 2012**

**SYLVANUS OTIENO ODIAGA.....CLAIMANT**

VERSUS

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**AWARD**

**Introduction**

1. Sylvanus Otieno Odiaga, the Claimant in this case was a commissioned officer with the Kenya Army. He sued the Hon. Attorney General of the Republic of Kenya on behalf of the Ministry of State for Defence, initially by way of a plaint dated 28<sup>th</sup> September 2009 which was amended to a statement of claim on 12<sup>th</sup> October 2012. The Claimant seeks relief for unlawful termination of his commission.
2. The Attorney General filed a response to the Claimant's amended statement of claim on 15<sup>th</sup> December 2012 and the matter was heard between 22<sup>nd</sup> July 2013 and 24<sup>th</sup> March 2014. The Claimant testified on his own behalf and Lieutenant Daniel Mutunga Mutua testified for the Respondent.

**The Claimant's Case**

3. The Claimant was commissioned as Lieutenant II in the Kenya Army on 27<sup>th</sup> March 1981. Pursuant to his commissioning, the Claimant served the Kenya Army in various capacities culminating with his appointment as a Commanding Officer in the Armed Forces Ordinance Depot in June 2006. As Commanding Officer in the Ordinance Depot, the Claimant oversaw procurement, supplies and stores management.
4. The Claimant told the Court that in July 2006, he was given a special assignment to oversee logistics related to the first Army Day. In order to carry out this assignment, he was required to spend time in Lanet, Nakuru although his regular station was in Kahawa Garrison. In order for him to attend to the special assignment at Lanet, the Claimant had delegated some of his duties at Kahawa to other officers and when he came back in August 2006, he realised that some actions relating to his duties at Kahawa had been undertaken without his authority.
5. According to the Claimant, some of the actions undertaken in his absence caused him to be charged with eight (8) counts related to disobedience to standing orders contrary to Section 30(1) of the Armed Forces Act (now repealed). Consequently, in March 2007 the Claimant was served with a charge sheet containing the following charges:

- i. That on 11<sup>th</sup> August 2006 while employed as the Comd KAOC and being the Authority to Incur Expenditure (AIE) holder he incurred an expenditure under vote item No. 2211015 in respect of 1500 cartons of tinned pineapple vide Local Purchase Order (LPO) No. 017758 in favour of M/s Pisu & Co. Limited prematurely and without authority;
- ii. That on 11<sup>th</sup> August 2006 he incurred an expenditure under vote item No. 2211015 in respect of 2500 tins of cooking fat by raising LPO No. 017757 in favour of M/s Pisu & Co. Limited which was an over expenditure on the commodity for the half year 2006/07;
- iii. That on 15<sup>th</sup> August 2006 he incurred an expenditure under vote item No. 2211015 in respect of 1800 bags of sugar by requisitioning the same vide LPO No. 0177575 in favour of M/s Pisu & Co. Limited which was an over requisition and beyond the recommended quantity of 2000 bags of sugar for the half year F/Y 2006/07;
- iv. That on 27<sup>th</sup> July 2006 he incurred an expenditure under vote item No. 2211015 in respect of 1574 bags of rice by endorsing LPO No. 0177564 in favour of M/s Pisu & Co. Limited which was done prematurely and without authority;
- v. That on 11<sup>th</sup> August 2006 he incurred an expenditure under vote item No. 2211015 in respect of 4000 bags of rice worth Kshs. 9,000,000 by raising LPO No. 0177579 and 0177580 in favour of M/s Pisu & Co. Limited by requisitioning for the same beyond 4250 bags of rice for the half F/Y 2006/07;
- vi. That on 14<sup>th</sup> August 2006 he incurred an expenditure under vote item No. 2211015 in respect of 3000 Kgs of margarine by requisitioning for the same vide LPO No. 0177581 and 0177582 in favour of M/s Pisu & Co. Limited which was an over requisition and beyond the recommended 3000 kgs for the half F/Y 2006/07;
- vii. That on 27<sup>th</sup> July 2006 he incurred an expenditure under vote item No. 2211015 in respect of 1500 cartons of tinned pineapple by raising Local Purchase Order No. 0177553 in favour of M/s Pisu & Co. Limited prematurely and without authority;
- viii. That on 15<sup>th</sup> August 2006 he incurred an expenditure under vote item No. 2211015 in respect of 4000 cartons of tinned pineapple worth Kshs. 5,336,000 vide LPO No. 0177585 and 0177584 in favour of M/s Pisu & Co. Limited which was way above the recommended quantity of 118 cartons of tinned pineapple for the half F/Y 2006/07.

6. On 5<sup>th</sup> March 2007, the Claimant appeared before the Appropriate Superior Authority being the Commander-Kahawa Garrison and was acquitted of the 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> charges while being convicted of the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 8<sup>th</sup> charges. On account of the 2<sup>nd</sup> and 3<sup>rd</sup> charges, the Claimant was fined four days pay each and for the 5<sup>th</sup> and 8<sup>th</sup> charges he was awarded loss of three months seniority in rank.

7. The Claimant states that contrary to the Armed Forces Act, the Garrison Commander, Kahawa Garrison notified him on 5<sup>th</sup> March 2007 that besides the awards already granted against the Claimant, the Commander would recommend the termination of the Claimant's commission.

8. Notification of the termination of the Claimant's commission was effected by letter dated 23<sup>rd</sup> May 2007 signed by Brigadier G.O Kihlangwa for the Chief of General Staff. This letter was however neither addressed nor copied to the Claimant. Being dissatisfied with the findings of the Appropriate Superior Authority, the Claimant preferred an appeal which was not considered. For some reason, the Claimant ended up being retired on pension effective September 2007.

9. The Claimant avers that the termination of his commission was in breach of his terms and

conditions of service and was actuated by malice on the part of the Garrison Commander. He claims the following:

- a. A declaration that his removal from employment with the Kenya Army Regular Force as a Commissioned Officer was unlawful, null and void;
- b. A declaration that the criminal proceedings against the Claimant held before the Appropriate Superior Authority and all consequential processes were unprocedural, unlawful and malicious;
- c. Damages for unlawful termination of employment;
- d. Costs and interest

### **The Respondent's Case**

10. In its response to the amended statement of claim, the Respondent states that the termination of the Claimant's commission was procedural and in accordance with the terms of his employment. It is the Respondent's case that the proceedings conducted by the Appropriate Superior Authority against the Claimant were conducted within the law and the Claimant was given a fair hearing. The Respondent denies the particulars of breach and malice contained in the statement of claim.

### **Findings and Determination**

11. The issues for determination in this case are as follows:
- a. Whether the Claimant's retirement was procedural and lawful;
  - b. Whether the criminal proceedings against the Claimant were procedural and lawful;
  - c. Whether the Claimant is entitled to the reliefs sought.

### **The Claimant's Retirement**

12. The Claimant's retirement date was in contention. While the date of retirement reflected on his payslip was September 2007, the Claimant's national identity card and birth certificate showed that he was born in December 1959. Given his official documents of birth and registration, the Court finds that the Claimant's retirement date could not have been earlier than December 2007 when he attained the age 48 years.

13. Further, the Claimant testified that prior to the criminal proceedings conducted against him, he had applied for and had been granted an extension of service by two years pushing his retirement date to December 2009. In support of this contention, the Claimant produced a document titled *Grant of Extension of Service (Level Two)-Officers*. According to this document the Claimant had applied for extension of service up to 14<sup>th</sup> December 2009. The Claimant's application was recommended by Col. JNO Musimba as Commanding Officer and Brig HW Khisa as Formation Commander.

14. Page two of this document, which the Court was informed would contain recommendation by the Service Commander and approval or rejection of the extension of service by the Defence Council, was however missing. The Claimant told the Court that he had no access to this part of the document and the Respondent's witness, Lieutenant Daniel Mutunga Mutua confirmed in cross examination that once the matter was referred to the Service Commander and the Defence Council, the Claimant had no role to play.

15. The Respondent did not produce any evidence to show either approval or rejection of the

Claimant's application for extension of service and the Court found it difficult to believe that Defence Headquarters where Lieutenant Mutua works as Staff Officer II in charge of records did not have custody of such a crucial document.

16. In employment matters, a specific burden is placed on the employer to produce documents in its possession to aid the just determination of disputes. Unlike in ordinary civil matters, it is not enough for a respondent to simply put a claimant to strict proof. Lieutenant Mutua produced a blank document to show that the document produced by the Claimant was incomplete. However, the Court found no evidential value in the blank document and drew the conclusion that the Respondent had deliberately concealed this part of evidence.

17. Consequently and in the absence of any evidence to the contrary, the Court finds on a balance of probability that the Claimant's application for extension of service was approved and that therefore the Claimant would have retired on 14<sup>th</sup> December 2009. For the foregoing reasons, I find that the Claimant's retirement in September 2007 was unprocedural and unlawful.

### **Criminal Proceedings Against the Claimant**

18. The Claimant claims that the criminal proceedings conducted against him were unprocedural and unlawful. In his final submissions filed on 12<sup>th</sup> May 2014, he submits that given his rank of Lieutenant Colonel, his commission could only be terminated by the President as provided under Section 171(3) of the Armed Forces Act. This provision is reiterated in Clause 2(f)(3) of Chapter 4 of the Armed Forces Standing Orders and in Clause 88 of Part V of the Terms and Conditions of Service for the Kenya Armed Forces.

19. In view of the foregoing provisions, the Claimant submits that the termination of his commission by approval of the Defence Council was unprocedural and unlawful since the Defence Council could only sanction termination of commission of officers up to the rank of Major as provided under Section 171(2) of the Armed Forces Act.

20. Moreover, Section 5(5) of the Act requires that acts and instructions of the Defence Council be communicated under the hand of the Secretary to the Council. By letter dated 26<sup>th</sup> April 2007, Lt Gen ASK Njoroge recommended to the Chief of General Staff that the Claimant's commission be terminated on the strength of findings of guilt on four charges of flaunting procurement regulations. The Claimant told the Court that he did not receive a copy of this letter.

21. According to the documents availed to the Court, the awards issued against the Claimant on 5<sup>th</sup> March 2007 were duly confirmed by the Commander on 6<sup>th</sup> April 2007 and Lieutenant Mutua told the Court that the sentences were duly served. The Court was therefore unable to understand the basis of the further sentence of termination of commission meted against the Claimant. It seems to me that the actions by the Claimant's superiors at Army Headquarters amounted to double jeopardy flying right in the face of the principles of fair play.

22. The Claimant further submits that the Abstract of Evidence was prepared contrary to Rule 9 of the Armed Forces Rules of Procedure which requires that the Abstract be prepared by the commanding officer or any other officer on the direction of the commanding officer.

23. Additionally, under Section 79 of the Armed Forces Act as read together with Regulation 11 of the Armed Forces (Summary Jurisdiction) Regulations an officer of the rank of Brigadier or General Officer shall not be the Appropriate Superior Authority for purposes of a case dealt with summarily in which the accused is at the rank of Lieutenant Colonel and above.

24. In the Claimant's case, the Abstract was prepared by Col. LL Muluvi on the instructions of Brigadier H. W. Khisa. The Claimant contends that Brigadier Khisa was not his commanding officer as defined under Section 2(1) of the Armed Forces Act as read together with Regulation 3

of the Armed Forces (General) Regulations and Regulation 3 of the Armed Forces (Summary Jurisdiction) Regulations.

25. These provisions define a commanding officer as the prescribed officer with powers of command. My understanding is that a commanding officer is not just any superior officer but one with direct command over the officer being tried. From the evidence adduced in Court, the Claimant's commanding officer was Lt Gen ASK Njoroge and not Brigadier Khisa. I therefore agree with the Claimant that neither Brigadier Khisa nor Col. LL Muluvi had the legal mandate to try the Claimant.

26. The Claimant challenges the summary procedure employed in his case as there is no written evidence that he had agreed that the witnesses against him should not give oral evidence as required under Rule 19(b) of the Armed Forces Rules of Procedure. Moreover, there was no evidence that the Claimant was given the opportunity to elect to be tried by a court martial as provided under Section 81(5) of the Armed Forces Act.

27. Section 3(2) of the Employment Act, 2007 excludes application of the Act to the disciplined forces since the respective forces are governed by their own specific legislation. For the Armed Forces, there is now the Kenya Defence Forces Act, 2012 which repealed and replaced the Armed Forces Act. However, at the time the Claimant's commission was terminated, the Armed Forces Act was operational. Indeed as held by **Ojwang J** ( as he then was) in the case of **Lt. Col. Benjamin Muema Vs Attorney General & 2 Others [2006] eKLR:**

*“The centrepiece of military law in Kenya....is the Armed Forces Act (Cap.199)”*

28. A perusal of the Armed Forces Act reveals elaborate safeguards in handling disciplinary cases against officers. In my view, these safeguards serve an important purpose in assuring the Armed Forces who perform a crucial national duty that their rights under the Constitution and under statute will be respected and upheld. It is therefore not open to any superior officer within the Armed Forces to throw these safeguards by the way side.

## **Reliefs**

29. In handling, the Claimant's case, his superiors appear to have set out to break every rule in the book and this Court exists to correct such wrongs. The Court therefore finds in favour of the Claimant and makes the following orders:

- a. The criminal proceedings conducted against the Claimant and all consequential processes and orders are hereby set aside;
- b. The Claimant is awarded the sum of Kshs. 5,000,000 (read Kenya Shillings Five Million) being damages for unlawful termination of commission;
- c. The Respondent shall pay the costs of this case;
- d. The award amount shall attract interest at court rates from the date hereof until payment in full.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Ms. Nungo for the Claimant

Mr. Maina for the Respondent