



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

PETITION NO 49 OF 2012

FORMERLY CONSTITUTIONAL APPLICATION NO 228 OF 2008

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70-83 OF THE CONSTITUTION OF KENYA

ESTATE OF CPT KARIUKI KINGARU MUREBU (DCD).....SVC NO 020788

WOI GEORGE NGUGI GITAU.....SVC NO 020725/101825

FLAVIAN KABUTHI (Suing as the Administrator of the Estate of

WOI PHILIP NGUI KABUTHI)SVC NO 020750

ALICE MUOKI (Suing as the Administrator of the Estate of

SSGT GEORGE MUOKI)SVC NO 20733

SGT JORAM GATHU BORO.....SVC NO 020989/101853

SGT LEONARD REPHO NGURE.....SVC NO 021555/101889

CPL FRANCIS MBERERE NJIHIA.....SVC NO 021233

CPL JOHNSON MAKUNGU MUVEA.....SVC NO 022271

ESTATE OF SSGT GEORGE MBURU.....SVC NO 020739 PETITIONERS

VS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. This Petition is brought by and on behalf of one Commissioned Officer and eight Servicemen of the defunct Kenya Air Force, four of whom are now deceased. For purposes of this judgment, the Commissioned Officer and the eight Servicemen will be referred to as 'men uniform' while the persons in whose names the Petition has been brought will be referred to as

'Petitioners'.

2. In the early hours of 1st August 1982, an unfortunate event took place in Kenya; there was an attempted military coup which was attributed to some soldiers of the Air Force where the men in uniform were in active service at the time. The coup was neutralised by soldiers from the Kenya Army and a crack down on the suspected architects and executors of the failed coup was set in motion. The men in uniform were all arrested, detained at various prisons within the country and eventually discharged from the Armed Forces.

3. The Petition was initially filed in the High Court as Constitutional Application No 228 of 2008 and was transferred to this Court by an order made by **Majanja J** on 8th November 2012. The pleadings were amended two times following the deaths of two of the men in uniform. In spite of due service and notice, the Respondent did not file any reply and did not attend the hearing.

The Petition

4. Captain Kariuki Kingaru Murebu (now deceased) was enlisted as an Airman on 2nd July 1974 and was granted a short term commission on 18th July 1974 in the rank of Lieutenant II in the Air Force. He rose through the ranks to Senior Captain on 8th November 1980.

5. Sometime in the beginning of July 1982, Murebu who was based at Nanyuki Air Base informed his wife, Anne Wanjiru Murebu that he was traveling to Wajir for duty. By the time the coup took place, he had not returned to his regular base at Nanyuki. In December 1982, Wanjiru got word from her husband that he was held in confinement by the authorities. In the same month, Wanjiru and her children were evicted from the Air Base.

6. Murebu was detained for seven months until March 1983 when he was released. He was discharged from the Air Force on 31st August 1983 on the ground that his services were no longer required. In 1989, he was diagnosed with diabetes and cancer and on 20th October 1996, he passed away.

7. WO I George Ngugi Gitau was enlisted in the Kenya Air Force on 29th November 1965 as a Clerk General. He later qualified as a Grade 1 Tradesman and rose through the ranks from Corporal to Warrant Officer I. Gitau lived in the Senior Non Commissioned Officer's mess at Eastleigh Air Force Station. He took his annual leave effective 25th July 1982 and traveled to his rural home. While at home, he received news over the radio on 1st August 1982 that a military coup had taken place. Later in the day he received update news that the coup had been crushed and on 2nd August 1982, all Kenya Air Force Personnel on leave were recalled.

8. On 4th August 1982, Gitau together with his colleagues Sergeant Joram Boro and Corporal David Kairie who were also on leave presented themselves to their local Chief who escorted them to Githunguri Police Station from where they were escorted by armed policemen to the Special Branch Headquarters, Kiambu District. They were thereafter confined at Kiambu Police Station where they found other colleagues. On the same day armed Army Personnel arrived from Kahawa Garrison and having ordered them to strip naked loaded them into a lorry. They were driven to Kahawa Garrison and later to Athi River Prison.

9. After five weeks at Athi River, Gitau was taken to Kamiti Maximum Security Prison and after two weeks, he was transferred to Kamiti Medium Security Prison where he stayed for two months. Following screening and interrogation, he was taken to Naivasha Maximum Security Prison in November 1982 and after further interrogation at Naivasha he was taken back to Kahawa Garrison from where he was released on 7th February 1983. He was paid one month's salary and after three months, he was paid a lump sum of Kshs. 31,246.90 and a monthly sum of Kshs.

624.95 which was progressively increased to Kshs. 2,000 as at the time of filing this Petition.

10. WO I Philip Ngui Kabuthi was enlisted in the Kenya Air Force on 29th November 1965. He rose through the ranks from Corporal to WOI. Though based at Nanyuki Air Base Kabuthi's family was accommodated at Eastleigh Air Force Station. On 31st July 1982, Kabuthi left Nanyuki to visit his family at Eastleigh and on 1st August 1982, while at Eastleigh, he was escorted by a group of armed junior servicemen to the armoury where he was handed a gun. In the confusion, he managed to sneak back to his house.

11. Following an announcement that all Kenya Air Force soldiers report to the nearest police station, he reported to the Office Commanding Station, Muthaiga Police Station on 2nd August 1982 who handed him over to an Army soldier. Kabuthi alongside other Airmen were put in an Army truck and taken to Kahawa Army Barrack where he was stripped naked and made to record a statement.

12. He was later taken to Kamiti Maximum Security Prison alongside many other Airmen. On being interrogated by a military panel, Kabuthi stated that he had no prior knowledge of the coup nor did he participate in it. In October 1982, he was moved to Naivasha Maximum Security Prison where he underwent further interrogation. He recorded a statement under caution in preparation for appearance before a Court Martial for the offence of failure to suppress a mutiny.

13. In January 1983, he was transferred to Kamiti Maximum Security Prison and the following day he was taken to Lang'ata Barracks to face a Court Martial. He had no prior notice of his appearance before a Court Martial and had no opportunity to prepare his defence. He was charged with the offence of failure to suppress a mutiny and upon pleading not guilty was taken back to Kamiti Maximum Security Prison presumably to await the hearing of his case.

14. On 14th March 1983, Kabuthi appeared before an Army Lieutenant Colonel who notified him that he had been adjudged guilty of the offence of failure to suppress a mutiny. He was therefore dismissed from the Armed Forces with loss of all benefits. He was issued with a certificate of dismissal which was later replaced with a certificate of discharge. Kabuthi passed away on 21st January 2011.

15. Senior Sergeant George Mutiso Muoki was enlisted in the Air Force on 20th November 1965 and was thereafter trained as an Aircraft Technician. On 31st July 1982, Muoki came from Nanyuki to Eastleigh Air Base where he lived with his family. He left home on 1st August 1982 and did not return. On 4th October 1982, his wife, Alice Nundu Muoki learnt from a neighbour's radio that he had been jailed for 12 years. His sentence was reduced to nine years on appeal. He was released in 1987 after serving over 4 years. While in prison Muoki developed high blood pressure and diabetes. His condition deteriorated to the point of incapacity and on 21st March 2010 he passed away.

16. Sergeant Joram Gathu Boro was enlisted as a Serviceman on 9th August 1976. He was promoted to the rank of Corporal in 1978 and by 1982 he had attained the rank of Sergeant. By the time of the attempted coup on 1st August 1982, he was stationed at the Eastleigh Kenya Air Force Station but he lived off the Station.

17. On 5th July 1982, Boro proceeded on annual leave which was to end on 4th August 1982. He first heard about the coup on Voice of Kenya Radio Station on 1st August 1982 at 6.30am while in his rural home. Having heard an announcement on the evening of 2nd August 1982 recalling all Air Force Personnel who were on leave he reported to his local Chief who escorted him and his colleagues to Githunguri Police Station from where they were escorted to the Special Branch Headquarters, Kiambu District.

18. At 12.00 Noon on the same day, having been ordered to strip naked and having been beaten by Army soldiers, Boro and other Airmen were transported in an Army truck to Kahawa Garrison and later to Athi River Prison. After five weeks, he was transferred to Kamiti Maximum Security Prison where he stayed for two weeks before being moved to Kamiti Medium Security Prison where he stayed for eight weeks after which he was moved to Naivasha Maximum Security Prison. On 5th February 1983, he was moved back to Kahawa Garrison from where he was released.

19. Boro was issued with a certificate discharging him from the Armed Forces on the ground that his services were no longer required. He was paid one month's salary at discharge and later his salary for the five months he had been detained. He is currently on monthly pension of Kshs. 2,300.

20. Sergeant Leonard Ngure was enlisted in the Kenya Air Force on 29th March 1973 as a Radio Technician Trainee. He rose through the ranks from Junior Private to Sergeant in 1978. Ngure was based at Eastleigh Air Force Station. On 31st July 1982, he left his base and proceeded to his elder brother's house in Buru Buru Phase III. He later went to Kariobangi South Estate where he and his younger brother had rented a house. He learnt of the coup through the radio on 1st August 1982 and on 2nd August 1982, he walked to the Eastleigh Air Force Station where he was ordered to strip naked. He and his colleagues were transported in an Army lorry to Kamiti Maximum Security Prison. Ngure was later transferred to Kamiti Medium Security Prison.

21. In November 1982, he was transferred to Naivasha Maximum Security Prison and on 8th February 1983, he was moved to Kahawa Garrison from where he was discharged from the Armed Forces. He was paid one month's salary on discharge and was later paid Kshs. 28,201.80 being military gratuity. On 21st September 1983, he was issued with a certificate of discharge dated 21st April 1983.

22. Corporal Francis Mberere Njihia was enlisted in the Kenya Air Force on 2nd July 1974. After military training he was posted to Kenya Air Force Eastleigh Station where he worked as a Clerk. He was promoted to the rank of Corporal in 1976. Although he had accommodation at the Barracks, he lived with his family in a rented house at Kiambu.

23. On 30th July 1982, he left the Eastleigh Air Force Station and proceeded to his house in Kiambu. He first heard about the coup on radio on 1st August 1982 and on 2nd August 1982, he presented himself at Muthaiga Police Station where he was locked up together with three of his colleagues. More Servicemen joined them and on the following day they were all transported in an Army truck to Lang'ata Barracks from where they were transferred to Kamiti Maximum Security Prison the following day.

24. Towards the end of August 1982, Ngure was moved to Naivasha Maximum Security Prison. While at Naivasha, he was taken before an interrogation panel of persons in plain clothes. He told his interrogators that he knew nothing about the coup since he was at home at the material time. He was then ordered to strip naked and was thrown into a water logged cell overnight which caused his health to deteriorate to a point he could not support himself. Ngure stayed at Naivasha for six months before being moved back to Kamiti Maximum Security Prison from where he was discharged from the Armed Forces. He was not paid anything.

25. Corporal Johnson Makungu Muvea was enlisted in the Kenya Air Force as an Airman on 14th September 1976 and was based at Eastleigh Air Force Station. He was promoted to the rank of Senior Private and later in 1981 to the rank of Corporal. Though married, he was accommodated at the bachelor's quarters at Eastleigh owing to a shortage of married quarters. His family stayed at his rural home in Masinga, Machakos District. On 31st July 1982, Muvea was at his base in Eastleigh. He learnt of the coup in the morning of 1st August 1982. When the Army

soldiers came to the base, Muvea and his colleagues were ordered to strip naked. They were locked up at Eastleigh and later transferred to Kamiti Maximum Security Prison and later to Naivasha Maximum Security Prison.

26. At Naivasha, Muvea was asked to sign a prepared statement implicating himself in the coup attempt, which he declined to do. He was thereafter stripped naked and put in a water logged cell over night causing him severe ill health. In early March 1983, he was moved to Kamiti Medium Security Prison where he stayed for two weeks and on 14th March 1983, he was transferred to Kahawa Barracks from where he was dismissed from the Armed Forces.

27. Senior Sergeant George Mburu was enlisted in the Kenya Air Force on 29th November 1965. He was based at the Nanyuki Air Base.

28. On the night of 31st July/1st August 1982, some men came to his house where he lived with his family. They ordered him to put on his uniform and to accompany them. His wife, Irene Wairimu Mburu was notified that her husband had been taken to King'ong'o Prison in Nyeri and later to Naivasha Maximum Security Prison. After three weeks the family was asked to leave the Air Base. Mburu was released in March 1983. He later developed high blood pressure and died on 3rd June 1995 at the age of 49 years.

29. The Petitioners seek the following prayers:

- a. A declaration that the arrest, detention and torture of the men in uniform by the Respondent violated their constitutional rights and freedoms;
- b. A declaration that the removal of the men in uniform from the Kenya Air Force service and the Armed Forces was unconstitutional and violated their constitutional rights and freedoms;
- c. A declaration that the dismissal and discharge of the men in uniform from the Kenya Air Force Service and the Armed Forces was unlawful and unconstitutional;
- d. A declaration that the failure to pay them their dues and an appropriate pension is unconstitutional;
- e. A declaration that the men in uniform are entitled to clearance of their names and service with the Kenya Air Force;
- f. A declaration that the men in uniform are entitled to general damages for the said violations;
- g. An order that the men in uniform are entitled to the payments set out in the document annexed to the Petition as quantum;
- h. An order that the Petitioners be paid the costs of this Petition;
- i. Any other reliefs the Court may deem just to grant.

Findings and Determination

30. From the pleadings and submissions filed in Court I have distilled the following issues for determination:

- a. Whether the arrest, detention and discharge of the men in uniform was a violation of their rights under the retired Constitution and the repealed Armed Forces Act;
- b. Whether the Petitioners are entitled to the reliefs sought.

The Arrest, Detention and Discharge

31. From the affidavits sworn in support of this Petition, which have not been controverted by the Respondent, it emerges that soon after the coup was neutralised the men in uniform were rounded up from their various places of duty or from their homes and confined in different prisons within the country for up to seven months. The reason given for their eventual discharge was that their services were no longer required. They were discharged straight from the prisons in which they were held and were not allowed to go back to their bases to collect their personal belongings.

32. The Petitioners submit that the men in uniform were subjected to inhumane and degrading treatment in that they were unlawfully detained, subjected to torture and their right to personal liberty was violated. They were held in congested cells without basic amenities, were beaten and denied medical attention. It is further submitted that they were deprived of their property and proprietary rights. They were labeled 'rebels' and their careers and reputation were irreversibly ruined. Further, their right to employment with the Respondent was violated resulting to deprivation of the human right to earn a living.

33. The acts complained of by the Petitioners took place when the retired Constitution was in force. Section 72 of that Constitution provided for protection of the right to personal freedom and limited the period over which a person may be held in custody to 14 days for capital offences and 24 hours for other offences.

34. Further, the provision required that a person who is arrested or detained be informed as soon as reasonably practicable in a language he understands the reason for his arrest or detention. Additionally, Section 74 provided for protection from inhuman treatment and outlawed torture and inhuman or degrading treatment. Section 77 provided for the right to fair trial within a reasonable time.

35. The men in uniform were not only citizens to whom the Constitution applied but were also covered by the Armed Forces Act by virtue of their employment. 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...[was] the Armed Forces Act (Cap.199)”

36. Section 72 of the Armed Forces Act required that investigations into allegations against officers under arrest be conducted without unnecessary delay and proceedings taken to deal with the allegations. In default the officers were to be released. From the evidence presented before the Court, the men in uniform were detained for periods of up to seven months without trial and majority of them were discharged without ever appearing for trial.

37. Only two of the men in uniform; WO I Philip Ngui Kabuthi and Senior Sergeant George Mutiso Muoki actually appeared before a Court Martial. Both faced the charge of failure to suppress a mutiny contrary to Section 26 of the Armed Forces Act. Kabuthi pleaded not guilty and was finally dismissed without ever being heard.

38. Muoki is said to have pleaded guilty but the record of his trial was not presented to the Court and the circumstances under which his plea was taken were not disclosed to the Court. Indeed his wife, Alice Nundu Muoki deponed that she only learnt of her husband's conviction through the press.

39. Against the backdrop of extended confinement in various prisons and allegations of torture which were consistently made by the men in uniform, the Court could not rule out coercion in securing Muoki's plea of guilt. In **Peter M. Kariuki Vs Attorney General (Civil Appeal No 79 of 2012)**, the Court of Appeal held that refusal by the Court Martial to allow time to the Appellant to prepare for his trial amounted to ***“capricious exercise of discretion”***

40 In the case of *Sylvanus Otieno Odiaga Vs Attorney General [2014] eKLR* this Court rendered itself as follows:

“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.”

41. Granted that the attempted coup was a serious threat to the Nation, those entrusted with pursuing the perpetrators were under a duty to observe the rules of natural justice. As we require our disciplined forces to protect the Nation, we must guard their rights jealously.

42. From the evidence presented by the Petitioners in this case which was not challenged by the Respondent, the Court finds that the rights of the men in uniform under the Constitution and the Armed Forces Act were violated.

Reliefs

43. Having found in favour of the Petitioners I now proceed to make the following declarations:

- a. That the arrest, detention and torture of the men in uniform by the Respondent was unconstitutional and unlawful;
- b. That their removal, dismissal and discharge from the Kenya Air Force service and the Armed Forces was unconstitutional and unlawful.

44. The Petitioners submitted a detailed quantum of the claims by and on behalf of each of the men uniform. However being unable to find a basis of the Petitioners' tabulations, the Court proceeds to award a global figure of Kshs. 8,000,000 (read eight million Kenya Shillings) to each of the Petitioners being general damages for the violations of the rights and freedoms of the men in uniform aforementioned.

45. The Respondent will meet the costs of this Petition.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF OCTOBER 2014

LINNET NDOLO

JUDGE

Appearance:

Mrs. Madahana the Petitioners

No appearance for the Respondent