



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 401OF 2013

DAVID WANYONYI.....CLAIMANT

-VERSUS-

HON. ATTORNEY GENERAL.....1ST RESPONDENT

CHIEF OF DEFENCE FORCES.....2ND RESPONDENT

ARMY COMMANDER KENYA ARMY.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th October, 2014)

JUDGMENT

The claimant filed the memorandum of claim on 14.11.2013 through Simiyu & Company Advocates. The claimant prayed for:

- a. Damages for wrongful dismissal as set out in the memorandum of claim.
- b. Reinstatement back in the Kenya Defence Forces.
- c. The costs of the suit.
- d. Such other orders as the honourable court may deem fit.

The memorandum of defence was filed on 17.02.2014 and the amended memorandum of defence on 27.06.2014 through Kiprotich Kirui, litigation Counsel, for Attorney General. The respondents prayed that the claimant's suit be dismissed with costs.

The court has taken into account the evidence, the pleadings and the submissions on record. The facts and circumstances of the case are clear and are as follows.

The claimant was employed by the Government of Kenya as an army officer since sometimes in 1997. The claimant served and was promoted through the ranks and at termination on 24.04.2014 he held the rank of a Sergeant on account of failing to report to his commanding officer that he had been erroneously paid allowances amounting to Kshs. 348, 492.00 meant for soldiers deployed to Somalia under the Amison Mission.

The respondents undertook investigations and it was established that the claimant had received the allowances but he was not entitled to the same. The claimant was interviewed during the investigations and it was found out that he had not been deployed for the Amison Mission and he was the officer deployed to the Joint Warfare Centre pay office. The claimant was responsible for verification of the unit personnel and in case of anomalies he was required to inform the administration officer but he failed to do so with respect to the erroneous payments he was receiving. In the circumstances, the claimant was charged and found guilty of conduct to prejudice of good order and discipline contrary to section 121 of the Kenya Defence Forces Act and in particular for failing to report the erroneous drawings of Amison allowances amounting to Kshs. 348, 492.00.

To urge his case the claimant stated that he did not allocate the allowances to himself. Further, since Kenyan soldiers had been deployed to Somalia, the payment of allowances to the claimant for him meant that time had come for his deployment to Somalia and returning or reporting about the payment, according to the claimant, would amount to an act of cowardice inconsistent with a courageous ready to go at battle zone officer and serve his country as a strong fearless soldier.

The respondent's witness (RW) was Major Joseph Kosen, a military officer deployed as staff officer in charge of staff records at the defence headquarters. He testified that the claimant received erroneous allowances from October 2012 to January 2013 and he failed to report the error. RW testified that other staff that had noted the error and notified were still in service and the erroneously paid sums were being recovered from such officers on monthly basis. The only reason that led to the claimant's dismissal without payment of the pension benefits was because the claimant failed to notify the error.

The court has considered the evidence. It is clear that the erroneous payment of the allowances affected many officers all of whom were retained in the service except the claimant. Section 5(2) of the Employment Act 2007 required the respondents to promote equal opportunity in employment and to strive to eliminate discrimination in any employment policy or practice. In the present case, the court finds that it was discriminatory for the claimant to be dismissed without pension benefits while the officers in similar circumstances were retained in the service subject to refunding the erroneously paid dues. The court further finds that such punishment as imposed against the claimant was excessive and not proportionate to the misconduct especially that the claimant like others in the same circumstances had not given to himself the allowance. In the opinion of the court, it would be just, proportionate and sufficient measure for the employer to impose recovery of the money erroneously paid to an employee rather than dismiss the employee with loss of all terminal benefits especially where the employee did not in any specific manner initiate the erroneous payment. The court has taken into account that at dismissal, the recovery of the erroneous payment from the claimant had commenced so that the dismissal amounted to double or excessive punishment.

RW conceded that the claimant was entitled to be paid the 17 days worked and not paid.

In conclusion, judgment is entered for the claimant against the respondents for:

- a. The respondents to pay the claimant for the 17 days worked and not paid for.
- b. The respondents to re-engage the claimant in the service of the Kenya Defence Forces at the rank of Sergeant and the due prevailing pay and other benefits and to assign the claimant duties with effect from 1.11.2014; and the period between the date of dismissal 17.05.2013 to the date of re-engagement 1.11.2014 be treated as leave without pay for the purpose of pension so that there shall be no break in the claimant's service.
- c. In alternative to (b) above, the claimant is retired from the service of the Kenya Defence Forces with effect from the date of the dismissal 17.05.2013 with full pension benefits payable by 1.12.2014 in default interest at court rates to be payable thereon from 17.05.2013 till full payment.
- d. The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday, 17th October, 2014.

BYRAM ONGAYA

JUDGE