



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 37 OF 2012

JULIUS OGUTU CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The Petitioner is a former soldier of the Kenya Defence Forces having served for 32 years and 8 months from 1979 when he was recruited to 1st April 2011 when his services were terminated.

2. He had risen through the ranks to the position of Warrant Officer II and was in charge of Military stores at Kahawa Barracks at the time of dismissal earning a gross salary of Kshs.69,086/= as per the payslip produced. The dismissal followed allegations that he was in custody of stolen barbed wire, which he testified belonged to **Corporal Owino** who had given the same to him to keep in safe custody at his work station.

3. He testified that it was customary for him to store personal effects of fellow soldiers in the Army store which they would collect upon checking-off from duty.

He further told the Court that it was his simple duty to take custody of effects given to him and that there were military police officers at the gate to verify any issues regarding any items being brought to the Barracks. That the barbed wires given to him by Cpl. Owino had passed through the military police without any issue and therefore he had no reason to suspect that the same was stolen.

4. The Petitioner told the Court that he was summoned by the Commanding Officer concerning the wire he had stored for Cpl. Owino. That charges were preferred against him the following day and he was dismissed from service on the spot.

The Petitioner told the Court that the process leading to his dismissal was wrongful, prejudicial and unfair and the reason for the dismissal was not valid.

5. The Petitioner further told the Court that the Commanding Officer retained his National Identity Card and Passport upon the dismissal to date and has consequently not been able to secure alternative employment.

6. The Petitioner and his family lived in the Barracks and were evicted immediately upon the

dismissal.

7. The Petitioner states that at the time of dismissal, he would have been entitled to a monthly pension of Kshs.33,000/= and a lumpsum benefit of Kshs.2,500,000/=.

8. The Petitioner also states that he was entitled to a certificate of discharge, which he did not get and travelling allowance of Kshs.95,000/= at his rank as per the Pay Review Book that was in use at the time.

9. That his three (3) sons who were at Nanyuki High School had to leave the school immediately and the experience was especially traumatic to his family.

10. The Petitioner states that the action by the Respondent was malicious, unlawful and without any due regard to his long service. At the time of dismissal, he was 56 years old and should in the worst have been retired and discharged honourably from service.

That there was no evidence whatsoever, that he was involved in the theft of barbed wire from Brigade Engineers Stores and therefore he was sacked for no just cause.

11. The Petitioner alleges that the conduct of the Respondent has subjected him to indignity, curtailed his freedom of movement and right to seek alternative employment and therefore claims damages.

12. In particular his right under **Article 28, 39(1), 47(1) and 50(1)** of the **Constitution of Kenya** were violated and was subjected to unfair labour practices contrary to **Article 41** of the **Constitution**.

13. That he was denied three (3) months terminal allowance and long service good conduct medal to which he was otherwise entitled to after every 16 years of service.

14. The Petitioner prays the Court to;

- i. declare that the Petitioner was wrongfully and unfairly dismissed from the Kenya Defence Forces and that he be reinstated in his rank of Warrant II;
- ii. in the alternative, the Petitioner be;
 - a. paid lumpsum pension for the 32 years and 8 months service that the Petitioner had served the country in the sum of Kshs.2,500,000/=;
 - b. be awarded long service good conduct medal;
 - c. paid leave allowance equivalent to three (3) months' salary;
 - d. paid monthly salary in the sum of Kshs.33,000/= per month;
 - e. awarded damages for wrongful dismissal including damages for loss of promotion and future earnings;
 - f. awarded costs of the suit.

15. The Petitioner, duly served the notice of intention to sue to the Attorney General but the Respondent did not offer to settle the matter out of Court hence the filing of the suit on 26th September 2012.

The Petition is supported by a verifying Affidavit of the Petitioner sworn on 12th September 2012.

Statement of Defence

16. The Respondent did not file any statement of defence in this matter and therefore the averments in the Petition and the sworn testimony by the Petitioner remains wholly uncontroverted.

Furthermore, inspite of the Court granting leave to the Respondent to file final submissions in the matter, the Respondent opted not to file any.

17. Accordingly, the Court finds that all the material assertions by the Petitioner have been proven on a balance of probability.

The Court therefore finds the following;

- i. that the Petitioner having served the Respondent for thirty two (32) years and 8 months was unlawfully and unfairly dismissed from his employment by the Commander Kenya Army on 1st April 2011;
- ii. that the said dismissal of the Petitioner from service was not for a valid and justifiable reason and the same was conducted in terms of unfair procedure contrary to the subsisting **Armed Forces Act, Cap. 199** of the **Laws of Kenya** (now repealed);
- iii. that the said dismissal of the Petitioner violated his rights under **Articles 28, 39(1) 41(1), 47(1) and 50(1)** of the **Constitution of Kenya, 2010**;
- iv. that the failure by the Commander of Kenya Army to pay the Petitioner any terminal benefits upon dismissal was unlawful, unfair and malicious taking into account all the circumstances of the case;
- v. that there is no evidence whatsoever that the Petitioner committed any misconduct and / or offence prescribed by the Armed Forces and therefore he is entitled to a certificate of good conduct having served the Forces for a long period of thirty two (32) years and eight (8) months;
- vi. that the abrupt eviction of the Petitioner with his wife and children from the married quarters without notice subjected him to indignity and gross violation of his rights and in itself was unfair labour practice contrary to **Articles 28 and 41** of the **Constitution** and the Petitioner is entitled to damages / compensation for not only the unlawful and unfair termination of employment but for the undignified way in which himself and the family were treated.

18. In the final analysis the Court upholds the prayers by the Claimant and;

1. declares that the dismissal of the Petitioner from service was unlawful and unfair and the same violated his constitutional and statutory rights enumerated in this judgment;
2. that the dismissal of the Petitioner from service is deemed to be a normal retirement from service and orders the Respondent to;
 - a. pay the Petitioner a monthly pension of Kshs.33,000/= with effect from the date of dismissal being the 1st April 2011 to the date the same will lawfully cease to be due and payable: The arrear monthly pension is to be paid as a lumpsum with immediate effect.
 - b. pay the Petitioner a lumpsum portion of the pension in the sum of Kshs.2,500,000/= being pension for thirty two (32) years and eight (8) months.
3. pay the Petitioner terminal leave allowance equivalent to three (3) months' salary in the sum of Kshs.207,258/=;
4. that items 2(a) & (b) and 3 above be paid with interest at Court rates from 1st April 2011 till payment in full;
5. that due to the gravity of the indignity accorded the Petitioner and his family, including loss of housing and schooling opportunity of the Petitioner's children, the withholding of the Certificate of long service, Identity card and Passport, with the result that the Petitioner was unable to secure any alternative job todate, the Court awards the Petitioner damages equivalent to the maximum compensation under **Section 49** of the **Employment Act**, being 12 months' salary in the sum of Kshs.829,032/=;
6. provide the Petitioner with long service good conduct medal and return to the Petitioner his National Identity Card and Passport within 30 days from the date of this judgment;
7. pay to the Petitioner costs of this suit.

Dated and Delivered at Nairobi this 1st day of October, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE