



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 13 OF 2013

MAJOR (RTD) EZRA IMAANA KAIBUTAPETITIONER

-VERSUS-

HON. ATTORNEY GENERAL & FOUR OTHERSRESPONDENTS

Mr. Chelanga for Petitioner.

Ms. Anne Kamande for the Respondents.

JUDGMENT

The petition was initially Petition No. 176 of 2012, now Industrial Court Petition No. 13 of 2013 dated 26th April, 2013.

The Honourable the Attorney General represents all the Respondents and has filed a replying affidavit sworn by *Lt. Col. Paul Mwangemi Kindochimu* dated 23rd November, 2013.

Facts of the suit.

The Petitioner was a Commissioned Officer of the Kenya Defence Forces, the Kenya Army Command Service in the rank of a Major.

On or about 30th June, 2007, while on service at Gakong Training Camp in Turkana County, the Petitioner was summoned by the 4th Respondent Major *General P.J. Opiyo* and instructed to make copies of relevant pages of the Armed Forces Review Board Report Serial Number 45 from June, 2007 on salaries and remunerations of the Armed Forces (hereinafter "*The Report*") which was meant for the Deputy Army Commander.

The Petitioner complied with the directive and made the relevant copies. Apparently, the 4th Respondent had no authority from the Deputy Army Commander to order or instruct anybody to make copies of the Report.

Later on the same day the Petitioner was summoned by the then Deputy Army Commander, one *Major General Mutuwii* who was in the company of the 4th Respondent.

The Deputy Army Commander asked whether the Petitioner had photocopied the Report. The

Petitioner told him that he had done so pursuant to instructions of the 4th Respondent.

The 4th Respondent denied instructing the Petitioner to photocopy the Report stating that he had required the Petitioner to reproduce the 300 copies in handwriting.

The 4th Respondent then ordered the Petitioner to be returned to his unit and be charged with the offence of prejudice of good order and service discipline by photocopying a secret document.

The Petitioner was also charged with another count of the offence of prejudice of good order and service discipline by lying to the Deputy Army Commander.

The Petitioner had been trained and vetted to handle secret documents and in any event was of the rank of a Major and accordingly authorized to handle secret documents in accordance with the Armed Forces Standing Orders.

The Report in any event was not a secret document as the same had been dispatched generally to the various Kenya Army formations and full content thereof was already published by the Kenyan print and electronic media in the consumption of the general public.

It is the Petitioner's case that the charges he faced were trumped up by the 4th Respondent to justify himself before the Deputy Army Commander.

The Petitioner was to appear before the Respondent **Brigadier B. Biwott** for summary disposal of the charges.

The Petitioner however raised preliminary issues before appearing before the 5th Respondent to wit;

- i. *The Petitioner wished to call the 5th Respondent as his witness and therefore the Respondent could not hear the matter as he was privy to the issues for determination;*
- ii. *That the Petitioner had two other witnesses he intended to call in his defence; and*
- iii. *The 4th Respondent who was the complainant and the sole witness in one of the charges and an interested party in the case was the GoC of Western Command and therefore, it was in the interest of justice and fair play that the matter be heard by an Appropriate Superior Authority from another formation of the Kenya Army.*

The 5th Respondent declined to be the Petitioner's witness, denied the Petitioner his right to call the three witnesses and proceeded to deal with the case.

The Petitioner further requested to cross-examine the prosecution's witnesses or the 5th Respondent to seek clarification on some of the evidence but was refused opportunity.

The 5th Respondent dealt with the charges summarily, found the Petitioner guilty of the offences and awarded two months of loss of seniority in each count.

The Petitioner sought to review the decision of the 5th Respondent on 21st November, 2007 but received no response.

On or about 20th November, 2007, the 4th Respondent constituted himself as a reviewing authority without according the Petitioner an opportunity to be heard, reviewed the said awards of the 5th defendant to the loss and prejudice of the Petitioner by *inter alia*, recommending to the 2nd Respondent that the Petitioner's commission be terminated forthwith.

The 2nd Respondent agreed with the recommendations by the 4th Respondent and terminated the Petitioner's commission.

It is the Petitioner's case that the actions of the Respondents violated;

- a. *His right to a trial before an independent and impartial tribunal contrary to Article 50 (1) of the Constitution of Kenya 2010.*
- b. *His right to a fair trial which includes the right –*
 - i. *to be presumed innocent until the contrary is proved;*
 - ii. *to have adequate time and facilities to prepare defence;*
 - iii. *to adduce and challenge evidence;*
 - iv. *if convicted to appeal cross examine the respondent's witnesses and opportunity to call his own witnesses;*
 - v. *not to be judged by an interested party during the initial hearing and especially during the review, which was conducted by the complainant himself.*

In the circumstances, the Petitioner submits that his termination was a gross violation of constitutional right to fair labour practices contrary to **Article 41** of the Constitution; was arbitrary, illegal, disproportionate and unfair enforcement of illegal practices to the detriment of the Petitioner.

Furthermore, the Petitioner's right to equal protection and benefit of the law as enshrined under **Article 27** of the Constitution was violated. To this extend, the provisions of **Armed Forces Act, Cap 199** of the Laws of Kenya and the Rules thereunder, were misapplied to his loss and detriment.

As a result of the 4th Respondent's seniority and patent discrimination, no action was taken against him and instead he was used to unjustly punish the Petitioner notwithstanding that he is the one who had given the Petitioner instructions to photocopy the report.

The conduct of the 4th and 5th Respondents amounted to abuse of public office cumulatively culminating to infringement of the Petitioner's constitutional right.

The Petitioner further alleges that his right to fair administrative action protected under **Article 47** of the Constitution was violated grossly by the combined conduct of the 5th, 4th and 2nd Respondents.

The Petitioner prays that;

1. *A declaration be issued to declare that the Petitioner's right to fair hearing, as guaranteed by Article 50 of the constitution has been contravened by the Respondents,*
2. *A declaration be issued to declare that under Article 27 and 28 of the Constitution, the Petitioner's right to equality before the law and fair treatment enjoins the Respondents to protect and respect the petitioner's rights to fair hearing and the Petitioner's right to equal benefit and protection of the law has been infringed;*
3. *A declaration be issued to declare that there is contravened by the Respondents of the Petitioner's right to fair administrative action as guaranteed by Article 47 of the Constitution;*
4. *Declaration that the summary proceedings before and awards by the 5th Respondent are unconstitutional, illegal and therefore a nullity;*

5. *Declaration that the 4th Respondent's reviewing authority is unconstitutional, illegal and therefore the decision and recommendation contained in the letter dated 29th November, 2007 is null and void ab initio;*
6. *The court to uphold the Petitioner's right under Articles 27, 28, 47 and 50 and issue an order of certiorari by bringing to this court and quashing the decision of the 5th and 2nd Respondents;*
7. *The Honourable court be pleased to order the Respondents jointly and severally to pay damages to the Petitioner for the violation of his rights and freedoms under Articles 27, 28, 47 and 50;*
8. *The Honourable court be pleased to order the respondents jointly and severally to compensate the Petitioner the sum of money at the rate of Kshs.127,000/= per month with interest for the unexpired period he would have served as a Major from 22nd February, 2008 as loss of benefit of career;*
9. *Damages for misfeasance in public office; and*
10. *Costs of the petition.*

In his replying affidavit, Ltd. Col. Paul Mwangemi Kindochimu states that he is a military officer and he is the Staff Officer at the Defence Headquarters and the one in-charge of all military personal records.

That he is conversant with this case and was the express authority from the 2nd, 3rd, 4th and 5th Respondents to swear this affidavit.

He denies that the Respondents violated or threatened any of the Petitioner's rights and/or freedoms as alleged.

The 4th Respondent denies ever giving any authority to the Petitioner to make copies of the classified document in question and thus the allegations by the Petitioner have no basis.

That the publication in the Standard Newspaper of 23rd July, 2007 appeared much later after the incident involving the Petitioner who is suspected of having leaked the information to the press.

That the Petitioner failed to exercise the right to cross examine prosecution witnesses and call witnesses of his choice and therefore cannot fault the Respondents.

That sufficient notice was given to the Petitioner prior to the hearing and at no one point was the hearing deferred.

That the Petitioner had no power to choose his trial panel as the Armed forces Act Cap 199, (now repealed) provided for trial by a Superior Authority as was the case herein.

That the 4th Respondent recommended the termination of the Petitioner's commission as an administrative process in his capacity as the General Officer Commanding (Western Command). That there was no ill-motive behind the 4th Respondent's action.

That the termination of the Petitioner's commission was informed by his general record of indiscipline and was not pegged on the immediate disciplinary case preceding his termination of commission as alleged.

That the Petitioner as per Annexure IL 9 of the petition had five (5) disciplinary cases between 1983 and 2007 and was found guilty on all occasions.

That termination of a commission is purely an administrative issue as envisaged under **Section 17** of the Armed Forces Act. The 4th Respondent or the Kenya Defence therefore had no obligation to consult the Petitioner before carrying out the administrative exercise.

That the petition be dismissed with costs.

Issue for determination.

- i. Is the termination of an officer purely an administrative issue in respect of which no hearing or consultation should be done before it is meted out?
- ii. Were the rights of the Petitioner under Articles 27, 28, 47 and 50 of the constitution violated?
- iii. Is the Petitioner entitled to the remedies sought?

Issue I

In the case of **Duncan Otene Waga v. Hon. Attorney General [2012] e KLR**, Justice D.S. Majanja ruled that the present Constitution of Kenya 2010, cannot be applied retrospectively with respect to acts or omissions that occurred prior to its promulgation.

The matters the subject of this petition occurred in the year 2007 prior to the promulgation of the Constitution of Kenya 2010.

This matter is to be determined therefore in terms of the former constitution and in particular **Section 74**.

Section 74 (1) of the old constitution provided, “*No person shall be subject to torture or to inhuman or degrading punishment or other treatment.”*”

The equivalent of this provision in the current Bill of rights is **Article 28** on Human Dignity which reads:

“Every person has inherent dignity and the right to have that dignity respected and protected.”

The equivalent of **Article 27** and **50** of the Constitution of Kenya 2010 is **Section 77** titled “*Provisions to secure protection of law*” **Section 77** accords a person who is charged with a criminal offence the right to a fair hearing by firstly being presumed innocent until proved guilty, facilitated to prepare his defence including being allowed a representative of choice, adequate time to bring his own witnesses and to cross-examine the witnesses testifying against him and to testify personally in his defence.

Most importantly, the person must be heard by an independent and impartial tribunal.

In the matter of **Republic vs. Chief Justice of Kenya & 6 others Ex parte Ole Keiwua KLR [2010]**, the court accepted as correct the following statement of law from **Central Medical Council v. Sparkman (1943) 2 All ER 337**;

“If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential of justice. The decision must be declared to be no decision.”

The facts presented by the Petitioner on the manner in which he was treated by his immediate superiors have not been countered by the Respondent in the answering affidavit.

The Petitioner was given instructions to photocopy a document recommending salaries to military officers by the 4th Respondent.

He went ahead and did the same.

It came to pass that the 5th Respondent did not approve and/or was not consulted by the 4th Respondent prior to giving the Petitioner those instructions.

The 5th Respondent confronted the Petitioner on the matter in the presence of the 4th Respondent.

The 4th Respondent did not own up to having given instructions to the Petitioner but later, when the Petitioner told the 5th Respondent that indeed it was the 4th Respondent who had requested the photocopies, the 4th Respondent responded by admitting that he had only authorized the Petitioner to copy the essential parts of a very voluminous report in his handwriting but not to photocopy the same.

The 5th Respondent was angered by the fact that some pages of the report had fallen off (but glued back) during the photocopying.

The salient features of the salary review were later published in a local daily newspaper.

Apparently a disciplinary action for the offence of photocopying a secret document and another offence was commenced against the Petitioner presided over by one Biwott, an interested party who the Petitioner wanted to call as a witness and the Petitioner was refused to call any of the three (3) witnesses he intended to call including the 4th Respondent. He was found guilty and punishment meted on him.

He applied for review of the conviction which was now heard and determined by the 4th Respondent who went ahead to mete out a more severe sentence of de-commissioning and dismissal. Effectively the 4th Respondent became an accuser, prosecutor and judge in his own court, contrary to the cardinal tenets of natural justice i.e *nemo judexi* – *causa sua* and *audi alteram partem*.

This conduct even under our very deficient constitution (now repealed) was part of the common law of this country and was and still remains a corner stone of our administration of justice.

Subjecting the Petitioner to this process was an affront to his dignity as a human being; was degrading to his person as a senior officer of the Armed Forces and amounted to a denial of justice by persons from whom he expected equal and just treatment before the law. The provisions of the Armed Forces Act Cap 199 of the Laws of Kenya do not sanction the conduct of the Respondent.

The provisions of **Section 74 (1)** and **77** of the old constitution is sufficient to vindicate the rights of the Petitioner in this case. He was subjected to inhuman, and degrading treatment without any justification to warrant derogation from the Petitioner's right to human and fair treatment in terms of **Section 74 (2)** of the said constitution; which allowed such derogation to the extent that the law in question authorizes it.

The conduct by the Respondent was not justified by any evidence before the court or by provisions of any law presented to the court in this matter.

The court therefore finds that **Section 74** and **77** of the former constitution provided the Petitioner with protection against violation of his right to a fair hearing and protection of his human dignity which rights are embodied in the right to fair treatment at the workplace which right was grossly violated by the 2nd, 3rd, 4th and 5th Respondents herein.

Going by the principles set out in **Associated Provincial Picture House Ltd v Wednesbury**

Corporation (1948) IKB 223 the conduct by the Respondents was unreasonable and done in bad faith to warrant this court to interfere with it on merit. The facts as hereinbefore presented speak for themselves and present a picture of grave injustice against the Petitioner.

In the case of **Marete v Attorney General** [1987] KLR while interpreting **Sections 74** and **84** of the erstwhile constitution justice Shield J stated:

“The constitution of this Republic is not a toothless bull dog nor is it a collection of pious platitudes. It has teeth and in particular these are found in section 84. Both section 74 and 84 are similar to the provisions of other Common Wealth constitutions. It might be thought that the newly independent states who in their constitution enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those who wield power.”

The judge went on to say;

“I find the contravention of any of the protective provisions of the constitution by the State is prohibited and that the High Court of Kenya is empowered to award redress to any person who suffered because of the contravention by the state of these provisions.”

The judge went on to award damages to the Applicant, a technical assistant in the Ministry of Agriculture and Livestock Development who had worked for the Ministry for thirteen (13) years upon making a declaration that the suspension of Applicant from January, 1983 to August, 1985 on grounds that he was a threat to State Authority was unlawful; and being subjected to torture and inhuman and degrading treatment by the ministry.

The Claimant was awarded Kshs.179,000/= which included loss of wages, severance pay and general damages for pain and suffering. Same was payable with interest at court rate from 2nd August, 1985.

Remedy

In the present case, the court is inclined to uphold the Petitioner’s right under **Section 74, 77** and **84** of the erstwhile constitution and declare the termination of the Applicant’s commission unlawful and null and void *ab initio* as the same was a gross violation of his right to a fair hearing and human dignity. Furthermore the court upholds the Petitioner’s right under **Article 74, 77** and **84** of the erstwhile constitution and hereby issue an order of *certiorari* by bringing to this court and quashing the decision of the 2nd Respondent of 22nd February, 2008 terminating the Petitioner’s commission.

I would then proceed to award the Petitioner compensation for unlawful and unfair termination in the sum of Kshs.127,000/= per month for 10 months in the sum of Kshs.1,270,000/=; this is in terms of **Section 49** of the Employment Act 2007.

The court further awards the Claimant general damages for the pain and suffering inflicted on him including loss of his commission and loss of career advancement in the military in the sum of Kshs.7million.

The 2nd and 3rd Respondents are further directed to treat the Petitioner as if he had retired from the military service with effect from 22nd February, 2008 and cause his benefits to be computed and paid in terms of the relevant military rules.

Finally the 2nd and 3rd Respondents are to preserve all the rights and honour of the Petitioner as a retired officer of the military.

Dated and delivered at Nairobi this 29th day of November, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE