



**Wafubwa v Attorney General & 3 others (Petition E427 of 2020)
[2024] KEHC 7762 (KLR) (Constitutional and Human Rights) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E427 OF 2020

EC MWITA, J

JUNE 28, 2024

BETWEEN

CAPT JAMMIES N WAFUBWA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

THE NATIONAL TREASURY 2ND RESPONDENT

KENYA DEFENCE FORCES 3RD RESPONDENT

THE NATIONAL ASSEMBLY 4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioner filed a petition against the respondents seeking 8 orders plus costs. The respondents filed responses and preliminary objection(s) dated 29th June 2021 and 1st October 2021. The court heard the preliminary objection(s), and in a ruling delivered on 17th March 2023, the court, (Thande J), upheld the preliminary objections, with the result that prayers (iv), (v), (vi) and (viii) sought in the petition were struck out with costs. This left 4 prayers, namely prayers (i), (ii), (ii) and (vii) for consideration,

The Petition

2. The petitioner averred that On 22nd May 1978, he was recruited in the Armed Forces of Kenya as a cadet and was retired on 22nd May 1993 at the rank of Captain. The petitioner protested his retirement through HCCC No. 674 of 1993 (Captain J. M. Wafubwa v The Attorney General [2001] eKLR) which was dismissed. He lodged an appeal at the Court of Appeal (Civil Appeal No. 278 of 2003 -J N Wafubwa v Attorney General & 2 others, but the appeal was also dismissed.



3. The petitioner stated that he conducted private investigations which revealed that the state had concealed the Armed Forces Acts, namely; The Kenya Regiment (Territorial Force) Act Cap 200; The Kenya Armed Forces (Pension and Gratuities) Act Cap 201; The Kenya Armed Forces Cantonment Act Cap 203; The Kenya Armed Forces National Service Act Cap 206 and The Armed Forces (Pensions and Gratuities) (Officers and Servicemen) Regulations, 1980 (Legal Notice No. 61 of 1980).
4. The petitioner stated that he requested for formal documents that were used to retire him. Those documents were eventually released by the National Treasury in 2014, after several applications to the High Court.
5. The petitioner asserted that, the Armed Forces form 67 was correct but Armed Forces forms 129 and 041 were erroneous and illegal in that they did not provide for the requirements of transfer of a member of the military. The petitioner raised this issue with the Cabinet Secretary of the Defence. The Cabinet Secretary acknowledged that the petitioner was retired on grounds of age after the assessment had been duly done. The petitioner then petitioned Parliament to correct the illegal retirement but the petition was never tabled before the floor of the house.
6. It is the petitioner's case that his retirement was supposed to be governed by section 227 of the Armed Forces Act, Cap 199 (repealed). The petitioner stated that the Defence Council that purported to retire him, could only transfer but not retire a military officer/member. And that upon transfer, only the President who, after making an opinion of qualification, could block his deployment to public service.
7. The petitioner argued that the notice of retirement dated 24th September 1992 could only have been issued after the National Treasury had obtained the opinion from the President on his qualification and after performing his services under The Kenya Armed Forces National Service Act.
8. The petitioner posited that rules 34 and 35 of the Armed Forces (Pensions and Gratuities) (Officers and Servicemen) Regulations, 1980, varied the regulations from transfer to retirement. This denied him and other members of the 3rd respondent their salaries, allowances and promotions as reservists.
9. The petitioner maintained that he had been denied an opportunity to present his grievances to the appeals tribunal to adjudicate on his legal rights as the tribunal had not been set up by the Cabinet Secretary of Finance/Treasury.
10. The petitioner thus filed a petition dated 5th December 2020 and amended on 30th September 2022, seeking the following reliefs:
 - i. A declaration that the State misled the National Assembly in repealing the Armed Forces Act Cap 199 (Rev. 1980) to achieve a total concealment of the Armed Forces Act which provide for the compensation to members of the Military upon removal from service.
 - ii. An order Repealing the Defence Forces Act, 2012 and reinstating the Armed Forces Act, Cap 199.
 - iii. An Order restraining the State and its agents from issuing and ordering the deployment of the military personnel until the National Assembly regularises the Military laws with Public laws.
 - iv. struck out
 - v. Struck out
 - vi. Struck out



- vii. An order against the 1st respondent to make public and freely circulate the concealed Acts in particular Cap 206 to legalise the deployment of the military in to the public sphere.
- viii. Struck out
- ix. Costs

1st and 2nd respondent's response

- 11. The 1st & 2nd respondents did not file responses or submissions to the amended petition. They associate themselves with submissions by the KDF and the National Assembly.

3rd respondent's response

- 12. The 3rd respondent opposed the amended petition through grounds of opposition. The 3rd respondent contended that the petition contravened the position in *Anarita Karimi Njeru v Republic* [1979] eKLR, and that the issues raised and the prayers sought were non-justiciable.

4th respondent's response

- 13. The National Assembly, (the 4th respondent), opposed the amended petition through grounds of opposition. The 4th respondent contended that the amended petition is res judicata. According to the 4th respondent, the issues raised and sought in the petition were similar to those in HCCC No. 1993, and Civil Appeal No. 27 of 2002, *Captain v General Mohamud Mohamed & another* and ought to have been raised in those cases.
- 14. The 4th respondent asserted that the orders sought in the amended petition and violates its constitutional and statutory mandate. Further that the subject matter of the amended petition are disputes of a civil nature as they do not disclose any violation of *the Constitution* and or the petitioner's fundamental rights and freedoms.
- 15. It is the 4th respondent's case that, the petitioner is a vexatious litigant who has filed multiple cases on the same issues, thus he should be penalized with costs.
- 16. The 4th respondent maintained that the petitioner had failed to demonstrate that the laws enacted by Parliament were unconstitutional; public interest militated against the grant of the reliefs sought and the petitioner had not explained the reason for the delay in challenging the impugned statutes.

Petitioner's submissions

- 17. The petitioner filed written submissions and supplementary submissions. He argued that the respondents' actions violated his constitutional rights guaranteed under articles 10, 20, 21, 28, 35, 43 and 47 of *the Constitution* and section 4 of the Fair Administrative Actions Act.
- 18. In support of the argument for the repeal of the *Kenya Defence Forces Act* and the reinstatement of the Armed Forces Act and the Kenya Regiment (Territorial Force) Act, the petitioner argued that, unlike the Armed Forces Act, the command structure in the *Kenya Defence Forces Act* is devolved from the President to the Chief of Defence Forces to the Service Commanders, the Cabinet Secretary, Defence and the Defence Council. The implication of such devolution is that the transfer to the reserve, payment of disablements pension, payment of permanent pensions to the widows and families, are at the discretion of those in the command.



19. The petitioner argued that unlike the Armed Forces Act, the [Kenya Defence Forces Act](#) has no provision for legal enforcement of fundamental rights. It does not provide for the necessary checks and balances, or an appeal by any member who is being illegally removed from employment, or is illegally retired. It does not also have any legal command structure for the reserves.
20. The petitioner took the view, the Armed Forces Act was designed to eliminate internal violence and contain corruption by providing checks and balances through the Judiciary; account and protect itself against manipulation by allowing a vote for cash from the 4th respondent for paying the physically disabled members only and protect service members and officers from politicians, and to be self-sustaining financially.

3rd respondent's submissions

21. The 3rd respondent submitted through written submissions, that the petitioner had not stated with precision the constitutional rights violated and how they had been violated, or the injury he suffered from such violations; that the issues raised are disguised as constitutional issues and, as such do not invoke the jurisdiction of this court. Reliance was placed on the decisions in *Anarita Karimi Njeru v Republic* (supra); *Mumo Matemba v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR.
22. Relying on the decision in *Anthony Miano & others v Attorney General & others* [2021] eKLR, the 3rd respondent argued that the issues in the amended petition were related to and connected with the remnant prayers in the petition and are non-justiciable.
23. Concerning prayer 1, the 3rd respondent argued that the relief is untenable since the [Kenya Defence Forces Act](#) was enacted by Parliament pursuant to the mandate conferred by article 261(1) of [the Constitution](#). The constitutionality of the [Kenya Defence Forces Act](#) had not been challenged.
24. Regarding prayer 2, the 3rd respondent asserted that it is only Parliament that can repeal a legislation. The court can only, upon challenge to a provision or legislation, declare it unconstitutional.
25. As for prayer 3, the 3rd respondent contended that the deployment of the Defence Forces may only be challenged if it is successfully demonstrated that such deployment was inconsistent with [the Constitution](#), or the [Kenya Defence Forces Act](#). The petitioner had not adduced evidence to support this prayer. It was further argued that it was unclear what deployment the petitioner sought to stop. For that reason, granting such a prayer would be an affront to the provisions of article 241(3) of [the Constitution](#) as read with sections 8, 12, 13, 16, 17 and 20 of the [Kenya Defence Forces Act](#).
26. With regard to prayer 7, the 3rd respondent argued that the [Kenya Defence Forces Act](#) has adequate provisions on the functions, organization and administration of the Kenya Defence Forces. If there was any deficit, the petitioner was at liberty to make recommendations to the 4th respondent either through a petition or memorandum for consideration.
27. According to the 3rd respondent, the court would be required to examine the alleged concealed Acts and analyze them against the existing legislations and statutory instruments that govern the functions, organization and administration of the Kenya Defence Forces. And in so doing, ascertain if there were any gaps in the prevailing laws and if the concealed laws could fill them.
28. Further, the alleged concealed Acts had not been placed before the court, thus it is Parliament that can handle the issue. The 3rd respondent urged that the petition be dismissed with costs.



4th respondent's submissions

29. The 4th respondent relied on the decisions in *Anarita Karimi Njeru v The Republic* (supra); *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and *Dr. Rev. Timothy Njoya v Attorney General & another* [2014] eKLR, to argue that the petitioner had failed to furnish the court with evidence in support of his claim. It was, therefore, difficult to know what to respond to.
30. According to the 4th respondent, while the petitioner sought an order repealing the *Kenya Defence Forces Act*, Legal Notice No. 61 of 1980 and the Military Veterans Act 2022 and reinstating the Armed Forces Act, he had failed to provide particulars of unconstitutionality in the *Kenya Defence Forces Act*.
31. The 4th respondent argued that by dint of article 94(5) of *the Constitution*, only Parliament has power to make provision having the force of law in Kenya, thus the impugned statutes have the force of law and until the contrary is proved. They are also presumed to be constitutional. The 4th respondent relied on *Ndyanabo v Attorney General* [2001] E.A to support this argument. According to the 4th respondent, granting the orders sought would offend the doctrine of separation of powers.
32. Regarding prayer 2, the 4th respondent argued that this court has no powers to repeal an Act of Parliament, or order reinstatement of a repealed law. As for prayer 1, the same is untenable as by dint of articles 94(1) and 95(3) of *the Constitution*. The National assembly is the organ vested with the legislative authority and by dint of article 94(5) of *the Constitution*, no person or body, other than Parliament has the power to make provision having force of law in Kenya, except under authority conferred by *the Constitution* of by legislation.
33. The 4th respondent contended that the petitioner had not challenged the process of enactment of the legislation, such as public participation. According to the 4th respondent, prayer 3 is untenable and contrary to public interest. The petitioner had not complained of any infringement, or violation of *the Constitution* in any deployment exercise. Reliance was placed on *Ibrahim Swaleh v Speaker, County Assembly of Embu & 2 others* [2015] eKLR.
34. The 4th respondent again relied on *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* [2017] eKLR, to urge the court to dismiss the petition and order the petitioner to pay costs.

Petitioner's submissions in rejoinder

35. The petitioner, in a rejoinder, responded that articles 238, 239, 27 (1), 40, 240, 241, 242 of *the Constitution* and section 7 (1) and (2) of the Sixth Schedule to *the Constitution* were violated as a result of the repeal of the Armed Forces Act through the enactment of the *Kenya Defence Forces Act*.
36. The petitioner maintained that he was seeking the repeal of the Act and reinstatement by the court of the repealed Act to avoid the country being placed in a precarious state. According to the petitioner, the Armed Forces Act and The Kenya Regiment (Territorial Force) are valid Acts enacted by the 4th respondent (National Assembly). As such the court's order is to reinstate them to their original valid state and the 4th respondent will only be left to amend the Kenya Armed Forces (Pension and Gratuities) Act; the Kenya Armed Forces Cantonment Act and the Kenya Armed Forces National Service Act, to complete the structure of the Armed Forces Act.
37. The petitioner took the view, that contrary to the respondents' contention that he had not met the threshold in the *Anarita Karimi Njeru* case, he argued that he had demonstrated how his rights were infringed as a result of the respondents' actions of misleading the 4th respondent.



Determination

38. I have considered the petition, responses and arguments by parties. I have also considered the decisions relied on. The petitioner had initially sought more than 8 reliefs. However, half of them were struck out leaving only 4 for consideration and determination by this court. The prayers struck out, were based on claims of violations of his rights and fundamental freedoms.
39. In the remaining prayers, the petitioner sought; a declaration that the National Assembly was misled in repealing the Armed Forces Act, Cap 199. This he argued, was to achieve a total concealment of that Act which provided for compensation to members of the military upon their removal from service.
40. Again, the petitioner sought an order of this court repealing the *Kenya Defence Forces Act*, and reinstating the repealed Armed Forces Act. Further, the petitioner sought an order restraining the State and its agents from deploying military personnel until the National Assembly regularised the military laws with public laws.
41. The petitioner also sought an order directing the Attorney General to make public and freely circulate the concealed Acts, in particular, Cap 206 to legalise the deployment of the military in to the public sphere.
42. A glance at those reliefs, leaves no doubt that they attack the decision of the National Assembly to repeal the Armed Forces Act, and replacing it with the *Kenya Defence Forces Act*. The petitioner does not seem to agree with that decision to repeal the Armed Forces Act and other laws. The petitioner also seems to believe that this court can direct reinstatement of the repealed Armed Forces Act in the manner pleaded in his petition.
43. The people of Kenya adopted the 2010 Constitution which changed the governance structure in this country. The change introduced some new institutions while others were renamed, such as from Armed forces to Kenya Defence Forces.
44. Article 239, established National Security Organs which include Kenya Defence Forces and their primary objectives. Article 239(6) required Parliament to enact legislation to provide for the functions, organisation and administration of the national security organs. On the other hand, article 241 (1) established the Kenya Defence Forces, its composition command, structure and responsibilities.
45. To comply with the directive in article 239(6), Parliament enacted the *Kenya Defence Forces Act* to provide for the functions, organisation and administration of the Kenya Defence Forces as demanded by *the Constitution*. That being the case, the petitioner's argument that repeal of the Armed Forces Act was for purposes of concealment, cannot be correct, since the National Assembly was responding to the constitutional dictates.
46. To challenge the enactment of the *Kenya Defence Forces Act*, the petitioner had to show that the process leading to its enactment did not comply with the constitutional requirements. However, a reading of the prayers in the amended petition shows that they do not raise any constitutional failures during the enactment of the *Kenya Defence Forces Act*. The petitioner did not also show that the *Kenya Defence Forces Act* or its provisions violate *the Constitution* and if so, which provision is violated and in what manner, if at all.
47. A party who claims violation of *the Constitution* or fundamental rights and freedoms, must clearly state the provisions violated or the rights infringed and the manner of such violation or infringement. In this respect, the petitioner had a duty to prove his case regarding the infirmities to the required standard of a balance of probabilities.



48. In *Phillips & others v National Director of Public Prosecutions* [2005] ZACC 15; 2006(1) SA 505(CC), the Constitutional Court of South Africa stated that a constitutional challenge should be explicit, with due notice to all affected; a requirement that ensures all interested parties have an opportunity to make representations and lead the relevant evidence, if necessary.
49. This position was reinforced by the Supreme Court in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (at paragraph 349), that the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement, plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
50. The petitioner bore the burden to prove that the Kenya Defence Forces Act, or the process leading to its enactment, violated *the Constitution* or fundamental rights and freedoms to the requisite standard of proof, which is on a balance of probabilities, since such claims are by nature, civil causes. (*Deynes Muriithi & 4 others v Law Society of Kenya & another*, SC Application No 12 of 2015; [2016] eKLR.)
51. The petitioner further sought an order restraining the State and its agents from deploying the military personnel until the National Assembly regularised military laws with public laws. The military administration, command and deployment is done in accordance with *the Constitution* and the *Kenya Defence Forces Act*. This court cannot interfere in administration matters within the Kenya Defence Forces unless it is done in contravention of *the Constitution* and the law to call on this court to intervene. In such a scenario, a petitioner has to clearly show that such deployment contravenes *the Constitution* and the law, and how.
52. In a constitutional petition brought under article 22, this court has mandate under article 23(1) as read with article 165(3) to determine (b) whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (d) (i) whether any law is inconsistent with, or in contravention of, *the Constitution*; and (ii) whether anything said to be done under the authority of *the Constitution* or of any law, is inconsistent with, or in contravention of, *the Constitution*.
53. The petitioner had a duty to demonstrate that the actions complained of fell within the ambit of article 22 as read with article 165(3)(b) and or (d)(i)(ii) for this court to come in. As already stated, the petitioner did not show any reason either under article 22 or article 165(3)(b), or (d)(i) and (ii) that would make this court summon its jurisdiction to make an order restraining deployment of the Kenya Defence forces.
54. The petition again sought an order directing the Attorney General to make public and freely circulate the “concealed” Acts, in particular, The Kenya Armed Forces National Service Act Cap 206 to legalise the deployment of the military in to the public sphere. It is not clear why the petitioner wanted the Attorney General to make public the laws he (petitioner) argues were concealed (repealed). This is because once laws are enacted and assented to, they are published in the Kenya Gazette, thus become public documents. They are available for anyone who wants to access them. The petitioner did show that those laws could prevent deployment of the military under *the Constitution* and the *Kenya Defence Forces Act*.

Conclusion

55. In the circumstances of this petition, this court is unable to agree with the petitioner that the remaining prayers in his amended petition, were for granting taking into account their framing and intention. Having considered the amended petition and arguments by parties, I am not persuaded that the petitioner has made out a case for grant of the prayers sought.



Disposal

56. The amended petition fails and is dismissed. Costs being discretionary, I make no order on costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2024

E C MWITA

JUDGE

