

## PETER M. KARIUKI v ATTORNEY GENERAL [2011] eKLR



### REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

### Petition 403 of 2006

#### REPUBLIC OF KENYA

#### IN THE HIGH COURT OF KENYA

#### AT NAIROBI

#### PETITION NO. 403 OF 2006

PETER M. KARIUKI ..... PETITIONER

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

#### RULING

The petitioner was the Commander of the Kenya Air Force before the attempted *coup* in 1982. He was serving in the rank of Major General since 14<sup>th</sup> May, 1981. Subsequent to the attempted *coup* the petitioner was relieved of his duties as the Commander of the Kenya Air Force and shortly thereafter arrested. He was locked up in solitary confinement at Kamiti Maximum Security Prison for some time and then transferred to Naivasha Maximum Security Prison and again locked up in solitary confinement for 147 days until January 10<sup>th</sup> 1983. He alleged that the conditions in the said prisons were harsh, brutal and most inhumane and amounted to torture and extreme violation of his fundamental rights.

On 10<sup>th</sup> January, 1983 the petitioner was charged in a Court Marshal for the offence of failing to prevent mutiny contrary to **Section 26(a)** of the **Armed Forces Act**. He alleged that his trial was a travesty of justice. The particulars thereof are contained in his lengthy petition. On 18<sup>th</sup> January, 1983 the Court Marshal convicted the petitioner and sentenced him to four years' imprisonment. He was also dismissed from the Armed Forces without any benefits.

Upon release from prison, having served the full sentence without any remission, the petitioner instituted these proceedings. In the petition the petitioner seeks several declarations and other reliefs including:

**“(a) A declaration that the petitioner’s rights to his security of person and the protection of law guaranteed under Section 70(a) of the repealed Constitution was breached and a miscarriage of justice had occurred thereby making the trial a nullity.**

**(b) A declaration that the petitioner is entitled to damages as redress in respect of each of the above rights that were breached in relation to him.”**

On 15<sup>th</sup> March, 2007 the following orders were made by consent:

- (i) **The Attorney-General to file and serve a response to the petition within 14 days from the aforesaid date.**
- (ii) **The petitioner to respond thereto within seven (7) days after service.**
- (iii) **Thereafter parties to file and exchange skeleton arguments and lists of authorities, if any, on or before 16<sup>th</sup> April, 2007.**
- (iv) **Upon expiry of the periods indicated above the matter to be set down for directions.**
- (v) **Liberty to apply.**

The petitioner filed his submissions and list of authorities on 15<sup>th</sup> June, 2010. On 14<sup>th</sup> July, 2010 counsel for the parties appeared before Gacheche J. and recorded the following orders:

**“By consent, leave be and is hereby granted to the**

**respondent to file and serve their submissions and list of authorities within fourteen days. This matter be mentioned before the Chief Justice for purposes of constituting a bench to hear the same.”**

It is instructive to note that the respondent did not file any replying affidavit in terms of the orders made on 15<sup>th</sup> March, 2010.

On 18<sup>th</sup> October, 2010 the matter was listed before the Chief Justice for directions. The Chief Justice nominated Musinga J. to preside over the hearing of the petition on 9<sup>th</sup> November, 2010. Before the said hearing date the petitioner’s advocate applied for issue of witness summons to the Personnel Officer, Department of Defence, through the Attorney-General’s chambers. The Personnel Officer was required to attend court to produce documents and give evidence on behalf of the Attorney-General on the hearing date. He was specifically required to bring the following documents relating to the petitioner, whose Force Number was given as 027008:

- 1. Employment records.**
- 2. Payment vouchers and/or slips.**
- 3. Current salary records for officers of similar rank i.e. Major General.**

Come the said hearing date, **Mr. Imanyara** together with **Miss Ligunya** for the petitioner and **Mr. Onyiso** for the respondent recorded the following consent orders:

**“1. The matter to proceed on the basis of the affidavits filed, subject to calling of the Records Officer, if he will not have filed his affidavit within the next fourteen (14) days, limited to the salary details of the petitioner at the time he left service.**

**2. The respondent do file his submissions within seven (7) days from the date of filing the affidavit of the Records Officer.**

**3. Thereafter counsel to attend court on 8<sup>th</sup> December, 2010 at 2.30 p.m. for purposes of highlighting the submissions and thereafter set a date for ruling.”**

It appears that the matter was not listed on 8<sup>th</sup> December, 2010. The matter however came up for mention on 4<sup>th</sup> February, 2011 when it was agreed by consent that the petitioner do highlight his submissions on 23<sup>rd</sup> March, 2011. However, on 7<sup>th</sup> February, 2011 the Attorney-General filed his skeleton submissions wherein he refuted the petitioner’s claims and urged that the petition be dismissed with costs.

When counsel for the parties appeared before this court on 23<sup>rd</sup> March, 2011 Mr. Onyiso for the respondent apologized for the late filing of the respondent’s submissions saying that the delay was caused by the non-availability of the Records Officer for sometime. It was agreed by consent that the petitioner was to testify under oath regarding his earnings and expected damages and thereafter parties would file submissions on the issue of quantum of damages. The petitioner was sworn and commenced his testimony. He stated, *inter alia*, that upon his appointment as Major General his basic salary was Kshs.249,229/=. He however stated that he did not have any of his pay slips because his office was bombed in 1982 during the attempted *coup*. The file that contained his personal documents including employment records and pay slips was in that office and as a result he lost all of them.

On its own motion and in the interest of justice, the court directed that before the petitioner gives any further evidence, pursuant to the orders made on 9<sup>th</sup> November, 2010, witness summons do issue to compel the Records Officer, Department of Defence, to appear before the court on 17<sup>th</sup> May, 2011 and produce documentary evidence as to the salary and allowances of the petitioner from 14<sup>th</sup> May, 1981 up to the date of his dismissal, 19<sup>th</sup> January 1983. The Records Officer was also ordered to produce documentary evidence of salaries and allowances payable to Armed Forces officers of the rank of Major General from 1983 to date. The court further directed that if for any reason the Records Officer will not be able to attend court on the aforesaid date he should swear an affidavit disclosing all the aforesaid information. The affidavit was to be filed and served at least seven (7) days before 17<sup>th</sup> May, 2011. The witness summons was to be served through Mr. Onyiso, Senior Litigation Officer, who is on record for the respondent.

The court pointed out that the said orders were made pursuant to the provisions of **Article 35(1)** of the **Constitution of Kenya**. The same provides as hereunder:

**“(1) Every citizen has a right of access to -**  
**(a) information held by the state; and**

**(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”**

Witness summons were issued as directed and on 11<sup>th</sup> May, 2011 the same were served by Mr. Onyiso to the Department of Defence headquarters at Nairobi. Service was effected upon one Major Ngatia of the Legal Services branch, Department of Defence.

On 17<sup>th</sup> May, 2011 Mr. Onyiso told the court that the Records Officer had travelled to Eldoret for a passing out parade and prayed for one week’s adjournment to enable the officer file an appropriate affidavit in compliance with

the court orders. Mr. Imanyara for the petitioner did not oppose the application. The court adjourned the matter to 20<sup>th</sup> June, 2011. Attendance of the Records Officer was dispensed with in lieu of an affidavit that was ordered to be filed within fourteen (14) days from 17<sup>th</sup> May, 2011.

On 16<sup>th</sup> June, 2011 Lieutenant Colonel **Sebastian Njirithia Lekaunye**, a Staff Officer 1, Records, at the Ministry of State for Defence filed an affidavit. He stated as follows:

**“3. That as part of my duties, I am engaged in the management and record keeping at the Ministry of State for Defence headquarters and thus conversant with the issues herein.**

**4. That the State Counsel seized of this matter has explained to me the content of the petition filed on the 21<sup>st</sup> July, 2006 and the order issued by this honorable court on 17<sup>th</sup> May, 2011.**

**5. That I have studied the personal records of the Ex-Maj. General Peter M. Kariuki and avers that as per the 1980 Report on pay and allowances for the personnel of the Armed Forces the monthly entitlement to the petitioner was Kshs.12,278.30/=. Annexed herewith and marked “SNL1” are copies of the relevant pages of the Report on the Armed Forces pay and allowances of 1980.**

**6. That I am further advised by the state counsel seized of the matter that this honorable court has in addition called for documentary evidence of salaries and allowances of Major Generals from 1983 to date.**

**7. That there is no standard salary and allowance for senior officers of the rank of Major Generals as they vary depending on one’s deployment, time and location and in the circumstances am unable to compute such salaries and allowances.**

**8. That save for the matters the sources whereof I have specifically disclosed, the matters deposed to hereinabove are true to the best of my knowledge, belief and information.”**

On 20<sup>th</sup> June, 2011 Mr. Muite who held brief for Mr. Imanyara told the court that the information provided by the aforesaid Records Officer in his affidavit was insufficient and did not comply with the orders made by the court on 23<sup>rd</sup> March, 2011 and 17<sup>th</sup> May, 2011. The affidavit had not been filed within the fourteen (14) days period as ordered. The report annexed to the affidavit was for pay and allowances payable in 1980 whereas what was required was information regarding salaries and allowances for the petitioner from 14<sup>th</sup> May, 1981 upto the date of his dismissal as well as salaries and allowances of Major Generals from 1983 to date.

Mr. Onyiso requested for an adjournment for fourteen days to enable him file a further affidavit containing all the required information.

The court made the following orders:

**“The respondent should file a further affidavit disclosing the salaries and allowances of Major Generals from 1983 to date as ordered by this court on 23/3/2011. That should be done within the next 14 days from the date hereof. Further mention on 7/7/2011.”**

No further affidavit was filed by the respondent as ordered. In view of the non-compliance with the court order on the part of the Records Officer, Mr. Imanyara urged the court to issue a warrant of arrest against the Chief of General Staff.

Mr. Onyiso opposed that application saying that the court had not made any orders as against the Chief of General Staff and therefore there was no basis of issuing a warrant of arrest against him. Mr. Onyiso further prayed for variation of the court orders requiring the Records Officer to produce records of salaries and allowances of the petitioner and Major Generals generally. He said that the information sought is not within the possession of the Personnel Officer and that the best people to give the desired information are members of the Armed Forces Pay Review Board. He added that it was difficult for Lieutenant Colonel Sebastian Lekaunye to get the required information.

Mr. Onyiso further told the court that under the Military Code of Service and Conduct the aforesaid Records Officer cannot seek from his seniors personal information like their salaries and allowances. That is confidential and personal information.

In response, Mr. Imanyara stated that the application for variation of the orders made by this court is misguided because the Defence Forces are a creature of the law and are subject to the jurisdiction of this court. He further pointed out that the information sought is not personal. It is public information under Article 35 of the Constitution. He further submitted that the application for variation of the orders cannot be made orally and from the bar without any proper basis. He urged the court to order the issue of a warrant of arrest as prayed.

The court record as summarized hereinabove clearly demonstrates that the respondent has not been diligent in complying with orders made by this court. Right from 15<sup>th</sup> March, 2007 when the first consent orders were recorded before Nyamu J. (as he then was) to date, the respondent has severally failed to comply with various court

orders. It appears to me that the respondent intends to frustrate the hearing and determination of this petition. To date no replying affidavit to the petitioner's petition and lengthy affidavit has been filed.

The petition discloses weighty issues of law. Very serious averments were made by the petitioner against many senior persons in the Government and the Armed Forces. The petitioner also gave detailed particulars of breach of his constitutional rights, right from his arrest, trial and imprisonment at Kamiti and Naivasha Maximum Security Prisons.

Apart from the various declarations which he sought, the petitioner also prayed for damages for breach of his constitutional rights as well as restoration to his work, benefits, bonus and decorations.

By failing to file a replying affidavit in time or at all the respondent waved his right to challenge the petitioner's factual depositions. In any event, it was agreed by consent that the matter would proceed on the basis of the petitioner's affidavit on record but subject to calling the Records Officer to testify on various issues aforesaid. Alternatively, the said officer was to file an appropriate affidavit within a given period of time. Those orders were made by consent and have not been varied to date. It is trite law that a consent order may only be set aside or varied by consent or where it is shown that in recording the consent there was fraud, collusion or for any other reason which would enable the court to set aside an agreement. See **BROOKE BOND LIEBIG (T) LTD v MALLYA [1975] EA 266**. No proper basis has been laid for seeking to vary the consent orders on 9<sup>th</sup> November, 2010 and other consent orders on record.

**Article 2(1)** of the **Constitution of Kenya, 2010** states as follows:

**"This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."**

Our Defence Forces are subject to the Constitution. **Article 3** of the **Constitution** states that every person has an obligation to respect, uphold and defend the Constitution. **Article 10** of the **Constitution** stipulates national values and principles of governance that bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. These national values and principles include the rule of law, human rights, good governance, integrity, transparency and accountability.

The petitioner herein has alleged that his fundamental rights under the Constitution were violated and has sought various declaratory orders as well as damages as pleaded in his petition. To enable him pursue that claim he requires some information that is held by the Department of Defence. **Article 35** of the **Constitution** which I cited earlier on grants him the right to access that information. The Department of Defence is under an obligation to avail the desired information to the petitioner and this court has made specific orders to that effect. It is completely unacceptable for the Attorney-General to insinuate that the records regarding salaries and allowances of the petitioner and Major Generals is confidential information that cannot be disclosed to the petitioner or to the court. Records regarding salaries and benefits payable to public officers cannot be classified as private or confidential. There is no reason why the Records Officer cannot avail the information as directed by this court.

As regards the petitioner's application for a warrant of arrest against the Chief of General Staff, I agree with Mr. Onyiso that the orders made by this court regarding disclosure of information in respect of salaries and allowances of the petitioner and Major Generals was directed to the Records Officer and not the Chief of General Staff. It is the Records Officer who ordinarily or in the course of his duty keeps such records. I will not therefore order issuance of a warrant of arrest against the Chief of General Staff as there is no basis for so ordering. Instead I order that **Lieutenant Colonel Sebastian Njirithia Lekaunye** do appear before this court on a date to be agreed upon by counsel for purposes of testifying and/or producing documentary evidence in respect of the salaries and allowances of Major Generals from 1983 to date as earlier ordered by this court. If the said officer fails to appear and produce the said information he will be in contempt of court and shall be liable to be punished in accordance with the law.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2011.**

**D. MUSINGA**  
**JUDGE**

**In the presence of:**

**Nazi - Court Clerk**

**Mr. Paul Muite for Mr. Imanyara for the Petitioner**

**Mr. Onyiso for the Respondent**



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