



Case Number:	Cause 2212 of 2012
Date Delivered:	15 Apr 2016
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Mathews Nderi Nduma
Citation:	Samuel Chege Gitau & 283 Others v Attorney General [2016] eKLR
Advocates:	-
Case Summary:	<p>Court awards compensation for torture claims relating to the 1982 coup d'état.</p> <p>Samuel Chege Gitau & 283 others v Attorney General</p> <p>Cause 2212 of 2012</p> <p>Employment and Labour Relations Court at Milimani Nairobi</p> <p>Mathews N Nduma, J</p> <p>April 15, 2016</p> <p>Reported by Beryl A Ikamari</p> <p>Brief facts</p> <p>The Claimants were commissioned officers and</p>

servicemen of the Kenya Air Force within the Kenya Armed Forces and they had served for a number of years when their services were terminated on diverse dates. They stated that after the attempted coup d'état of 1st August, 1982, they were kept in prison custody without trial for months. They also averred that while in prison they were tortured, beaten, stripped naked and sustained permanent physical injuries. Additionally, they claimed to have been subjected to trials or court martial in which they were subjected to biased treatment, tortured to confess, not accorded legal representation or advice and decisions were made against them without being given an opportunity to defend themselves. In their dismissal from service, they lost all their dues and terminal benefits including pension, gratuity and unpaid salaries.

The Claimants stated that their fundamental rights and freedoms had been violated and sought various remedies include declarations, award of damages and also terminal dues. The dues sought included the payment of full current salary, privileges and benefits.

In response, the Respondent averred that the Claim was time barred both with respect to terminal dues under the employment contracts and for the tortious claim for injuries suffered. The Respondents cited provisions of the Public Authorities Limitation Act to support the averment. The Respondent also stated that the Claimants had not pleaded any specific violation of the Bill of Rights but they made general statements that certain alleged facts were contrary to the Constitution. The Respondent also averred that the Claimants failed to prove particulars relating to allegations of torture and servitude.

In particular, the Respondent stated that the Claimants were not wrongfully terminated from service but they were subjected to a disciplinary process as related to the coup. According to the Respondent, under section 3 of the Armed Forces Act any commander in any Command of the Armed Forces could legally participate in summary trial of officers and servicemen below him/her and who qualified to be under his/her command. Furthermore, the Respondents stated that the

High Court could not venture into interrogating the Court Martial and Summary trials process when it was not hearing an appeal or review from the Court Martial or Summary trial decisions.

Issues

1. Whether the Claimants were lawfully removed from service at the Kenya Air Force.
2. Whether the Claimants had established that there had been violations of their fundamental rights and freedoms.

Constitutional Law-*fundamental rights and freedoms-right to a fair trial, right to liberty, freedom from torture, cruel, inhuman and degrading treatment- disciplinary action relating to the 1982 coup d'état- allegations of detention without trial, unfairness/bias in trials, torture, inhuman and degrading treatment before discharge from service-Constitution of Kenya (repealed), sections 72, 74 & 77.*

Employment Law-*unfair dismissal from service-dismissal from the Kenya Air Force-disciplinary action relating to the 1982 coup d'état -allegations of dismissal without following due process and without paying terminal dues and benefits-allegations of detention without trial, unfairness/bias in trials, torture, inhuman and degrading treatment before discharge from service-whether the dismissal from service was lawful.*

Held

1. The Claimants instituted the suit by way of a Plaint on February 21, 1995. They successfully sought leave for extension of time within which to institute the suit. The issue of limitation was determined in a prior application wherein it was decided that the claim was not purely one relating to torts and contract but it related to

jurisdiction and violations of statutory safeguards for employees of the armed forces. The claim also related to constitutional law and administrative law.

2. The High Court and Court of Appeal had already entertained suits filed many years after the failed coup d'état. It would be discriminatory to deny the Claimants access to justice given that they were under similar circumstances to the Claimants in the other suit, except that they filed a civil suit as opposed to a Constitutional Petition.
3. The Claimant's oral testimony revealed that after the attempted coup by the Kenya Air Force, the Kenya Air Force was suppressed by the Kenya Army and the Claimants were rounded up and subjected to severe punishment by the Kenya Army. That punishment included;
 - a. Being subjected to severe beating with all manner of weapons including gun butts after being stripped naked.
 - b. Travelling for relatively long distances on their knees while being subjected to severe beatings.
 - c. Being put in overcrowded military trucks and given severe beatings and taken to Kamiti Maximum Security Prison.
 - d. Being subjected to severe beatings as they were offloaded from the trucks and taken to various cells.
 - e. Being confined in filthy cells, some in solitary confinement, and some having to share cells with insane inmates.
 - f. Being denied food and water for prolonged periods while in the cells and when given food, they got some foodstuff that was unfit for human consumption.
 - g. Being subjected to prolonged investigation by Army officers and in the process, being subjected to torture including being put in water logged cells for periods of between 3 to 10 days.
 - h. Not being allowed to receive visitors including relatives and legal representatives.
 - i. Being kept incommunicado for about 8 months at Naivasha and Kamiti Maximum

Prisons.

- j. Being confined in a cell with very powerful bulbs for 24 hours a day which led to mental anguish and hallucinations.
- k. Being forced to confess to crimes they had not committed under the guise of a promise to be released and/or after succumbing to immense pressure.
- l. Being sentenced to various imprisonment terms without following due military process.
- m. Being released and sent home without payment of salary, terminal benefits or pension.

4. The Respondent did not adduce oral or documentary evidence to contradict the evidence offered by witnesses on the punishment suffered by Kenya Air Force servicemen. The Respondents only called one witness from the Department of Defence who had no personal knowledge of the claims except that he kept records at the Department of Defence. That witness confirmed that Kenya Air Force soldiers including the Claimants were arrested and confined at Kamiti and Naivasha Maximum prisons. He also confirmed that they were released and their employment contracts were terminated without them being paid benefits or pension.

5. The evidence showed that on 12th August 1982, the Kenya Air Force was disbanded and replaced by an entity known as 82 Air Force. The servicemen and officers in the Kenya Air Force were not taken up by the new entity and their employment contracts were terminated. The Claimants were among the affected officers and servicemen.

6. The Claimants suffered torture and degrading treatment, wrongful arrest and wrongful imprisonment/confinement for prolonged periods. They were imprisoned for varying periods without a fair hearing by a Court Martial in violation of section 72(1), 72(3), 74(1), 77(1) & 77(2) of the repealed Constitution of Kenya.

7. The Respondents did not offer a reasonable explanation for the prolonged

	<p>confinement of the Claimants before their discharge. They did not offer an explanation for the fact that the Claimants were sent home or brought before a Court Martial or summarily tried without following the law.</p> <p>8. On a balance of probabilities, the Claimants proved their allegations of torture, inhuman and degrading treatment. The evidence of the Claimants was that they were subjected to torture, inhuman and degrading treatment at Eastleigh Air Base, Nanyuki Air Base and at Kamiti and Naivasha Maximum Prison. No witnesses were called to refute those claims.</p> <p><i>Petition allowed. (The Claimants were awarded Kshs. 1, 000, 000/= each for wrongful imprisonment, torture, inhuman and degrading treatment and violation of their rights to a fair hearing. The Claimants were also granted other remedies including declarations on violations of their rights but they were not reinstated back to service.)</i></p>
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MILIMANI NAIROBI**

CAUSE 2212 OF 2012

SAMUEL CHEGE GITAU & 283 OTHERS..... CLAIMANTS

VERSUS

THE ATTORNEY GENERAL..... RESPONDENT

JUDGMENT

1. This suit was instituted via Plaint dated 21/02/1995 which was later amended on the 19th of September 2000, re-amended on the 4th of June 2004 and further amended on the 24th of June 2005.

2. The suit was filed as a civil suit before the High Court at Nairobi and it severally proceeded as a civil suit before various judges of the High Court however, Justice Odunga on the 30th of August 2012 transferred the suit to the industrial Court stating that the matters involved were within the realm of this court as established via Article 162(2) of the Constitution of Kenya 2010.

The Claim

3. The basis of the claim is set out in the further re-amended plaint dated 24th June 2005 more specifically in paragraphs 3 to 10 as reproduced below:

3. The Claimants aver that at all material times they were conscripted enlisted and or commissioned officers and/ or servicemen of the Kenya Air force within the Kenya Armed Forces between 14th May 1964 and 30th March 1983 which is the period spanning up to 19 years of distinguished service.

3A. The Claimants were at all material times to this suit enlisted in the Kenya Air force as officers and service men.

4. The Claimants aver that on diverse dates between 1.08.1982 and 30.03.1983 the commanding officer of an authority known as the "82 Air Force" purported to dismiss discharge and/or terminate the Claimant services with loss of all their dues, terminal benefits – pension, gratuity and unpaid salaries.

4A. The Claimants were wrongfully discharged from the Kenya Air Force with loss of all benefits/ dues on diverse dates after the coup d'état of 1st 08.1982 and are aggrieved as their respective discharges were in contravention of the Armed Forces Act and the Armed Forces Standing Orders made there under.

5. The Claimants aver that their dismissal, discharge and or termination were wrongful for want of jurisdiction because the Claimants were neither in the service nor had they contracted services with the

said “**82 Air Force**” as the Claimants were enlisted and/or recruited officers and servicemen of the Kenya Air Force from 14/05/1964 to date.

6. The Claimants aver that the commanding officer of the said “82 Air force” had no power or jurisdiction to discipline, dismiss, discharge, terminate and or take any enforceable action against the officers and servicemen contracted for service by the Kenya Air force (herein known as KAF) as constituted by the Armed Forces Act Cap 199 of the laws of Kenya now repealed.

7. The Claimants aver that on or around 25.08.1982 the Kenya Armed Forces reinstated the Kenya Air force which is the legal authority as by law established hereby replacing the illegal authority as held by the High Court and with which they had lawful contracts of service without considering the fate of the Claimants rights/claims herein and / or outstanding salaries and benefits.

9. The Claimants aver that after the attempted Coup D’état of 1st August, 1982 the Claimants were between 1.08.82 and 30.03.83 wrongfully confined and kept in prison custody without trial for 8 months and were released without being charged and/or pardoned and hence their confinement was wrongful and false imprisonment as the Claimants were not in any way implicated and or involved in the said coup d’état and the Claimants claim general damages’ for wrongful arrest, false imprisonment and loss of earnings to date.

9A. The Claimants aver that most of them were subjected to trials and/or court martial which was not fair as they were subjected to biased treatment, tortured to confess, not accorded legal representation or advise and the decisions were made against them without being given an opportunity to defend themselves.

10. The Claimants aver that while in prison custody at Kamiti and Naivasha, the Claimants were tortured, beaten, stripped naked and sustained permanent physical injuries. And the Claimants claim general damages for pain and suffering.

4. In summary, it is the Claimant’s case that their fundamental rights were violated and that the “82 Air Force” was an illegal outfit that usurped the role of the Kenya Air force and proceeded to commit illegalities against them.

5. The Claimants pray for:

- a. Full retirement benefits
- b. A declaration that the Claimants were members of the Kenya Air force and are still in the Kenya Air force and have never been members of “82 Air force”
- c. Terminal Benefits

- d. A declaration that the Claimants were under the commanding officer of the Kenya Air force and not the Commanding Officer of the so called "82 Air force".
- e. General Damages
- f. A declaration that the Claimant suffered in the hands of illegal authority called "82 Air Force" which had no authority to retire, dismiss, or terminate their services as they were contracted by the Kenya Air force which at no time dismissed them.
- g. Aggravated damages for wrongful imprisonment, confinement, trumped up arrest, torture e.t.c.
- h. Payment of full current salary, privileges and benefits in respect of each Claimants rank and or higher ranks from the date of discharge and/or termination until the date of retirement of each officer.
- i. Terminal and/or severance benefits from the date each Claimant was enlisted until retirement.
- j. Full pension, terminal allowance and other further allowances each Claimant is entitled.

Summary of the Evidence

Several servicemen and officers testified on behalf of all the Claimants as follows;

CW1 – Moses Njiriri Mburu – Claimant No. 110

6. He stated that he is 55 years of age. He studied upto form 4 and on 3.3.1978 he was enlisted in the military. He trained at Lanet Armed Forces Training Institute for six (6) months. He qualified and was posted to Eastleigh airbase as a junior private. He was further trained in the catering section and became a grade 1 cook thereafter posted to Nanyuki air base.

7. On 1st August, 1982, he was at his house outside the barracks where he lived with his wife and child. He was at home because on 31.7.1982 he had participated in the Armed Forces athletics competition and he had been given seven (7) days off duty. He heard over the radio that the military had overthrown the government. He stated that it was the first time he had heard of the coup attempt.

8. At around 9.30 am on the same day he states that he went outside and started discussing what had happened with his neighbours when a Land rover stopped and told them to go to the camp. They were taken to the Armoury given arms, ordered to report to his station at the Sergeant's mess. At about 2pm a siren went on and CW1 together with others left the mess and went outside. Kenya Army officers came and surrounded them fired shots in the air, ordered them to drop their arms, raise their hands and lie down on the ground.

9. Thereafter, they were taken to the field where they were ordered to kneel down for about 2 hours and then they were told to move on their knees for a distance of about 300 metres while being hit with gun butts. After moving for 200metres the clothes got torn, he started bleeding and he refused to move anymore. He was beaten ruthlessly with gun butts on his right ear and back. To date he cannot hear well and he suffers from back pains. The major ordered the beatings to stop and they were locked in the hangers.

10. The Claimant continued to state that all his personal effects were taken away and they were denied food for three days. They were not given beddings and they slept on a concrete floor which was very cold. Five Kenya Army officers came to interrogate them on the 4th day and he was asked to say what he knew about the Coup but he said he knew nothing. He was then told to report to work at the Sergeant's mess where he continued to work until 15.8.1982 when he was to be transferred to Eastleigh but he was taken to Kamiti prison instead. While there he was whipped, stripped naked and locked up with eight other people in a cell which would normally hold 2-3 people. The cells had no beddings so he slept on a concrete floor together with his cell mates. They used buckets for call of nature which they emptied in the morning. CW1 states that they were fed every three days but were not given drinking water.

11. After ten (10) days in prison the Claimant together with 30 others were transported to Naivasha Prison in a lorry where CW1 found his other colleagues from Nanyuki and stayed there until September. He was called and interrogated about the Coup and he denied knowledge of it. The officers interrogating him did not believe him and they put him in a room with water reaching his knees which water contained human waste for nine days and while in there he did not get any food or water.

12. The Claimant further states that the Kenya Army officers continued with the interrogation and when he did not admit he was taken back to a solitary room for two days and then back to the room with water where he stayed for four (4) days. The Claimant alleges that he was thereafter taken to Naivasha upto 19.10.1982 then back to Kamiti Prison. On 22.10.1982 he was taken to Langata Court martial where he was charged with participating in the coup, he pleaded not guilty but he was found guilty immediately and sentenced to 6 years in prison. He was taken to Shimo la Tewa to serve his prison term and after serving for 3 years he was given a remission of 3 years.

13. He also states that he lost everything he left in the camp including his certificates which were confiscated and he has not recovered them to date. He was employed by Midland hotel where he worked for three days and was dismissed. He has not been able to secure another job to date.

14. After coming back from Shimo la Tewa he found his wife had left with the children and gone back to her parents. The army took all their personal belongings and his wife was violated in the process. The Claimant has since remarried. He stated that he served in the armed forces for 4 years 152 days and by then he was a senior private.

15. In Cross examination CW1 admitted that he never appealed the decision of the Court martial and neither did he refer the matter to the review board. He further stated that after sentencing he stayed 1 ½ years before anyone knew where he was so even if he wanted to appeal he was out of time. He also admitted that once one is found guilty of misconduct in the army they would be discharged without any benefits. CW1 denied that the Commander of the coup ate at his mess and that he had seen him on the material day.

CW2 – Charles Kamande Kanari

16. He stated that he was 62 years old and he had enlisted in the military on 2.7.1974 at 22 years old. He trained at Lanet Military College for 6 months and graduated as a junior private and was thereafter posted to Eastleigh airbase Nairobi. At Eastleigh he was trained at Airfield Respondent Unit for 6 months and thereafter he became a private.

17. On 30.7.1982 CW2 states that he was at the A.S.K show in Nyeri where he had gone to help his sister in law who had a stand there. He spent the night in Nyeri town and on 31.7.1982 he went to the show ground again till evening when he went back to his hotel for the night. On 1.8.1982 he left the hotel going to the showground but outside the hotel he found people talking in whispers and upon asking what was going on he was told that the government of Kenya had been overthrown by the military. Shortly thereafter he states that he heard an announcement over the radio to the effect that he together with all other Military personnel report back to base.

18. On reaching the base, he found the gate open with soldiers walking everywhere. He proceeded to the billet where he was advised to go to the armory which he did but he did not get any arms so he went to the officer's mess. At around 4 o'clock the same day Kenya Army officers started shooting in the air telling people to raise their hands and surrender. The Claimant states that he surrendered, knelt down and he together with others were ordered to walk on their knees on a tarmac surface for a distance of about 600 yards. After about one hundred yards the Claimant's knees started bleeding and he could not move anymore.

19. The Claimant continued to give evidence and stated that Army officers came hitting them with gun butts and the Claimant was hit on his cheek and he lost teeth. As a result he bled profusely and had to be rushed to the dispensary by Ambulance. He received stiches and was taken back to the barracks where he was stripped naked, locked in room where they slept without beddings and they were neither given food nor water.

20. From the barracks they were taken to Kamiti prison where himself and 17 others were locked up in a cell without any beddings. They were denied toilet facilities save for a bucket which they would use for the said purpose. The Claimant was denied medical attention while in Kamiti and his fellow inmates are the ones who pulled out the stiches. They stayed in Kamiti for 3 months.

21. From Kamiti they were transferred to Naivasha prison where they were locked up in similar conditions. The Claimant was then taken for interrogation where he was given a statement to sign but he refused. He was subsequently locked up in a pitch dark room with ankle deep smelly water for 4 days and denied food and water.

22. The Claimant further avers that he was taken back to the interrogators who gave him a statement to sign failing which he would be locked up again until he dies. The Claimant refused to sign but this time he was locked up in a normal cell together with others. On 5.12.82 they were taken to Langata barracks where charges were read to him but he refused to plead stating that he did not understand the charges. He was taken out and brought back after some time and different charges were read to him but he still did not admit to the charges. He was jailed for 6 months and he served his term at Shimo la Tewa prison in an underground cell upto June 1983. The Claimant states that at the time of discharge he was a Corporal earning about Kshs. 1,600/=

23. CW2 states that he lost his certificates and his wife and child were harassed by the army officers while they were being chased out of the barracks. He states that he also lost his household furniture, clothes, radio cassette player and motorbike. He was given a discharge book showing that he had been discharged on 1.8.1982 as his services were no longer required. He got a job in a hotel where he worked for 1 ½ years before he left due to harassment from the police. He has not been able to secure another job todate.

24. The Claimant seeks for his salary from 1982, pension, to be returned to his status, restoration of his medals and honour, to be cleared with the Armed Forces as per the law and general damages for

suffering, torture before imprisonment and unlawful detention for 8 months.

25. In cross examination CW2 stated that his commanding officer was Captain Karimi and that he remained in Laikipia until the day of the Coup. He was off duty the day before the Coup and he was to return to work on Monday 2.8.1982. He also stated that he was charged with arming himself with a sub-machine gun which he denied. He further stated that he could not have ordered the soldiers in the mess to disarm because he did not know who had issued the Orders.

CW3 – Josphat Kiriungi Mwangi

26. He stated that he was in the Force and his service No. was 023721 having enlisted on 29.10.74. He was trained at Lanet Forces Training College for 6 months and graduated as a private whereupon he was deployed to Langata 7th KA for 1 ½ years and then to Gilgil where he served for 2 ½ years and then transferred to Embakasi.

27. The Claimant avers that on 31.7.1982 he reported off duty because on 30.7.1982 he was on night duty. He spent the night in town and on 1.8.1982 he heard sounds outside and upon inquiry he was told that government had been overthrown. He immediately reported to the nearest military station which was at Eastleigh Airbase. He states that he did not try to get to Embakasi because he had heard rumours that the Military was killing people and he was afraid.

28. There was an air raid but when the Claimant together with other soldiers surrendered and hoisted a white flag they were not bombed. The army came surrounded them, ordered them to strip naked, beat them up and confiscated his personal items. While they were lying on the ground they were hit with gun butts all over their bodies and the Claimant states that he still bears a gun butt scar on his head.

29. The Claimant further stated that Army officers formed a corridor where they were to pass as they boarded a lorry to take them to Kamiti. As they passed the human corridor they were being beaten as they made their way to the lorry where they were packed one on top of another. At Kamiti, himself and 60 others were locked up in a 15 x 15 cell which remain lit through the night and as a result they could not sleep.

30. It is the Claimant's evidence that he was finally called by army officers for interrogation and upon being asked to explain the events of 1.8.1982, he denied participation and having prior knowledge of the coup attempt. He was graded yellow and taken back to the cells where he was locked up for two weeks before being transferred to Naivasha prison.

31. After about a week in Naivasha, he was called for interrogation again but denied participation in the attempted coup and was subsequently locked up in a water logged room for 4 days. He was denied food and water forcing him to take the dirty smelly water below his knees for survival.

32. He was called for interrogation again but this time he could not move because his legs were rotten and swollen and he had to be carried to the interrogation room. He again denied participation in the coup which led to him being taken back to the water logged room for another 3 days. He stayed at Naivasha for 2 months before being moved to Kamiti medium prison where he stayed until 1983 when he was taken before an army captain who had a statement for him to sign but he refused to do so leading to his being locked up once again in a solitary room. He was called again to the room where the captain was,

ordered to sign the statement without reading it and he eventually signed it under duress and he claims that to date he does not know what the contents of that statement were.

33. On 13.1.1983 he was taken to the Court martial and charges were read to him but he refused to plead. The Court sentenced him to 3 years imprisonment and was taken to Kodiaga GK prison to serve his term. He appealed against sentence which was reduced to 2 years which he served upto 10.1.1985.

34. At Kodiaga prison, the Claimant states that life was bad as he was seriously beaten by prison warders leading to his admission at Russia Hospital in Kisumu. He was placed in segregation with other crazy prisoners who would splash feces on his face. He was at the hospital for a week and the whole period he was in hospital he was in handcuffs.

35. The Claimant further states that he was discharged on 1.8.1982 before the Court martial and that he was 28 at the time of his arrest. He managed to get employment at a security company where he worked for 1 year but he lost that job after they realized he was an ex air force soldier. He has not been able to secure another job to date.

36. He lost his personal items, academic certificates which he has not been able to recover to date and his family was harassed. That the torture and treatment given to him and his colleagues violated all the military law and the constitution of Kenya. In cross examination he denied participation or having prior knowledge of the attempted coup.

CW4 – Kelvin Okeyo Ogutu I.D. No. 9195100

37. He states that he joined the force on 14.9.1976, trained at Lanet for 8 weeks and graduated as a junior private thereafter he was posted to Eastleigh where he received further training as an air craft technician. He was thereafter posted to Nanyuki in 1977. He advanced in radar fitters training in the United Kingdom and posted to Kenya Armed Forces Nanyuki as a Senior Private.

38. On 31.7.1982 he was in Githurai where he was living with his wife and child. On 1.8.1982 he had an announcement on radio that Government was in the hands of the Armed Forces and all soldiers must report back to work. He states that he immediately started making his way to Kahawa Garrison but before he could reach an Army Lorry came and they were ordered to get in. They were taken to Eastleigh Airbase where he stayed until evening when Kenya Army soldiers came and surrounded the camp shooting indiscriminately so he hid in a trench until the next day when he came out to go and submit himself to those in authority. He was captured by army men, ordered to raise his hands, searched, beaten up, his clothes torn, stripped down to his inner wear, forced to kneel down and crawl for a distance of about 500 yards. He was then led to the holding area.

39. The Claimant further states that he was beaten so much until he passed out for an unknown period of time. When he came to life, he was taken to a holding cell of about 12 x 12 feet in size where he was held together with 140 others for about an hour. They were then taken to Kamiti in an old lorry where they fitted all the 140 of them and on reaching Kamiti prison they were mercilessly beaten. They were then ushered in a bigger cell where 200 of them were squeezed and hardly had room to move. They were denied food, water, beddings and toilet facilities.

40. On 3.8.1982, the Claimant states that people were moved but he stayed in that cell for 3 weeks in

his inner wear. He was taken before an Army officer for interrogation but was only asked one question and then put in a lorry wearing only a shirt and a torn trouser to be taken to Naivasha prison. At Naivasha they were received by a line of soldiers on both sides who beat them as they made their way to the cells.

41. The cells in Naivasha were bigger, fitting around 20 people however they were not given any beddings and had to sleep on the cold concrete floor. He stayed in the cell at Naivasha until October 1983. They were held incommunicado for about 80 days. The Claimant further states that he eventually volunteered for interrogation and he was taken to a dark cell where three army soldiers pounced on him and beat him mercilessly and a bucket of cold water was poured on him and the cell was closed.

42. The soldiers later came back to the cell and threatened him stating that if he wanted to see his wife and daughter again he needed to cooperate with them. He was later taken for interrogation before a panel of officers in civilian clothing. He was asked about himself and in the midst of telling them he was told that he was wasting their time and taken to a water logged cell with water reaching just below the knees where he was locked for 3 days. The water was dirty and smelly and he could not tell what else was in the water. He was not given any food and he was told that he was to live like a fish.

43. On the third day he was taken back to the interrogators who threatened him saying that if he ever wanted to see his family again he better cooperate. As a result of the said threats he signed a confession that had been handed to him without even reading it.

44. He was then taken to a holding cell until 22.10.83 when he was taken to Langata Barracks to the Court martial where charges of participating in the mutiny were read to him. He asked to be represented but was told to shut up and was sentenced to 6 years in prison. He served his sentence at Shimo la Tewa prison. He never had the benefit of seeing the charge sheet or the proceedings thereafter.

45. The Claimant also avers that he left prison on 21.8.1986 after serving only 4 years. He found his family had moved to another location and has not seen them to date. He also lost his personal belongings. He was sent a discharge from service book which was sent to him before he left prison stating that he had been discharged on 1.8.1982 signed by D.O.D personnel. This was irregular because it is usually given upon clearance with all departments including a medical check up. He did not appear before his commanding officer for interrogation neither was he interrogated by any KAF officers. The entire treatment was contrary to the armed Forces laws and regulations.

46. He seeks for his name to be cleared, damages for unlawful imprisonment, torture, compensation for loss of income, a good discharge certificate, a good recommendation, retirement package, salary from 1982 to date and compensation for deteriorated health.

47. During cross-examination he stated that on getting to Eastleigh Airbase he was issued with a broken self-loading rifle whose issuance was not recorded. He returned the gun to the armoury and went to hide until the next day because of all the harassment conducted by the Army. He admitted that the fact of his wife being used to coerce him to confess was not in his witness statement filed in Court but that this was because the statement did not contain each and every detail of what he went through. He reiterated that his treatment after 1.8.1982 while in the hands of the Army was unlawful and unfair.

CW5 – Major Josphat Nathan Irungu

48. He stated that he joined Kenya Airforce on 14.5.1965 and trained at Central Bank as a Clerk General. He was posted to the only unit of Kenya Airforce at Eastleigh.

49. On 1.8.1982 he was at his house at the Department of Defence when he heard commotion. At first he thought it was jubilant people who were coming from games but he was later informed that it was a result of shooting everywhere by Army personnel. He tried leaving the camp but he was barred at the gate by marauding soldiers forcing him to go to the officers' mess.

50. The Claimant states that a Board from the Army came and started interrogating them. The chairman of the Board was familiar to the Claimant because he had sent a candidate to him for interview who failed to qualify because he could not speak English and this made the chairman very unhappy. He was taken to Kamiti together with other soldiers where he did not undergo any interrogation but stayed for two days before being taken to Naivasha. At Kamiti they were more than 50 people in a cell leaving no space to sit or lie down and they were denied food for 27 days before being transferred to Naivasha.

51. At Naivasha where he stayed for more than a month, he was put in a room which was cold and was not provided with a blanket. He was called for interrogation by CID officers where he was asked about his role in the coup but he denied participation and stated that he never used to interact with Air Force officers. The Officers then told him that he had not been involved in the coup and that he would be reinstated back to work but they never returned after that day. After a month a major came to him with a statement for him to sign as a condition precedent to his release but he refused to sign.

52. The Claimant states that he was released on 1.3.1983 and that he was never cautioned, never told his mistake or court martialled. He was thereafter given a certificate of discharge as he was sent home. He avers that he was never given terminal dues neither was he paid salary for the 8 months he was in Naivasha. He prays for the Kenya Air Force to terminate him now since the 1982 Air Force never existed in law. He also prays for damages and to be honourably retired as a commanding officer.

53. In cross examination he denied knowledge of the coup and supporting a mutiny. He also stated that he had an issue with one officer in charge of interrogation so as a result he was not given a fair hearing. He blames the Air Force for dismissing him without cause.

CW6 – George Ndambuki Makosi – Warrant Officer I

54. He stated that he currently lives in Lukenya carrying out peasant farming for his daily living. He joined Kenya Armed Forces on 18.11.1966 and was taken to Kiganjo College for training and upon graduation he was posted to Eastleigh Airbase.

55. On 1.8.1982 the Claimant stated that he was at Eastleigh where he was living at the time when he was woken up by commotion and he was arrested with many others without cause by Army soldiers. After arrest they were taken to one area guarded by Army soldiers, stripped naked before they were carried off in a land Rover to Kahawa Garrison where they were beaten ruthlessly with whips and gun butts and then taken to Kamiti Prison in a very horrified state, all the while they were not informed of the offence they had committed. At Kamiti they were beaten again and again and put in a 10 x 10 cell which was to hold 30 of the arrested soldiers. They slept on a very cold concrete floor while naked and were not provided with beddings. They were at Kamiti for 10 days.

56. The Claimant further averred that an interrogation was done by Army officers on failure to prevent a mutiny which led to him being given a red card and then taken away. They were then taken to Naivasha on 11.8.82 where they were received with kicks and blows. He sustained a gash on the head but did not receive any treatment. The cell was dark, had no ventilation, no beddings and the floor was rough concrete. Food was very little, dirty and mixed with sand. People fell ill with diarrhoea as a result but were not afforded medical attention. The Claimant states that he suffered immense cold which has led to health problems and to date he cannot stand properly.

57. He also states that his family was not aware of his whereabouts. He requested to see his lawyer and doctor but his requests were denied. He was taken for interrogation before police officers which according to him was wrong because the proper person to question him was his commanding officer. He was asked about his role in the attempted coup but denied even having knowledge of it. After interrogation he was taken to Kamiti and then to Kahawa garrison where he was released on 15.3.1983. He was given fare to go home and ordered to never go near any Armed Forces base. He was never charged in any Court of law. When he received his discharge Certificate it read "bad conduct" and he was not given discharge benefits. He demanded for another certificate of discharge and he was issued another stating that he had been discharged because his services were no longer required. His wife and 4 children suffered as a result of rough treatment by the Army soldiers as they were kicked out of his married quarters. His property and personal effects were also destroyed in the process.

58. The Claimant states that he has not been able to secure a job to date as his certificates were all destroyed and therefore prays for damages, his retirement benefits in full and to be retired honourably.

59. In cross examination, he denied participation in the attempted coup and neither did he have prior knowledge of it. He also stated that he was not given a fair hearing and was not guilty of any offence since he was never produced in any Court of law.

CW7 – Major Frederick Allan Wachira

60. CW5 currently resides in Nairobi where he runs a small shop. He trained as an air traffic controller and was employed by East African Community as an Air Traffic controller. He states that KAF advertised for air traffic controllers, he applied and was enlisted on 11.1.1971 whereupon he served for 3 months then taken to the United Kingdom for cadet training. He attended several courses over the years such that at the time of discharge he had risen through the ranks and was a major. He had served for 12 years and 63 days.

61. In June 1982, he was informed by one Major Macharia that a military coup was being planned by servicemen and that the matter was being investigated by military intelligence but he was cautioned not to leak this information to anyone below the rank of a commanding officer since investigations were in the early stages.

62. On 31st July at 11p.m. he was sleeping in his married quarters where he stayed with his wife and 3 children when he got information from a Major Kiarie who had also received information from one

Lieutenant Wambua that there were plans to overthrow the government that night and that he had tried to report the matter to the Colonel but he did not find him so he decided to report the matter to the Claimant since he was in the next senior most office. The Claimant rang the intelligence officer and asked him to verify the information and was told that the matter was with special branch at Nanyuki police station.

63. The Claimant alleges that he proceeded to the officer's mess to interrogate Lieutenant Wambua further and upon confirmation from the said officer the Claimant ordered for his arrest to buy him time to take the information to the police station. He gave Orders at the gate that they were to remain closed until he came back.

64. He further alleges that he came back to the camp and found that the said Lieutenant Wambua had disappeared. They trailed him to a room where there was a meeting with other soldiers who were all placed under arrest. He sent Major Kiarie to the Guard room for reinforcement who never returned. On following up he found out that the servicemen had already armed themselves and arrested Major Kiarie. The Claimant was now very cautious and remained out of sight and when he got an opportunity he jumped over the fence. He notice trucks dropping sergeants and officers but he could not tell on what mission they were on. He walked for 6 kilometres to the police station and tried to report the matter but was informed that there was already an announcement that the Government of Kenya had been overthrown and the police had been directed to remain as civilians. At this point the Claimant states that he realized that he was fighting a losing battle.

65. He also states that he rang D.O.D and narrated the story and he was informed that everything was under control and that the matter was being treated as a mutiny and not a coup. On 2.8.1982 he was locked up in the Guard room following the orders of an Army officer. He was not provided with food or water until the next day. He was taken for interrogation and thereafter he was given a white card then ordered to remain in the mess with 20-30 other Air Force officers where they were heavily guarded by Army men. After about a week they put him in a lorry and he was taken to Kamiti prison.

66. At Kamiti the Claimant states that they experienced all sorts of torturous treatment including being denied food, squatting and being hit on the head with clubs and being locked up in narrow cells. They were there for two days and later taken to another room with 200 servicemen where the lights were constantly on and toilet facilities were not provided save for a bucket to be used for call of nature. Beddings were not provided and they were fed raw ugali with water and labelled state guests. After two months he was transferred to Naivasha prison where they were locked up 4 officers in a cell stark naked. After 3 weeks at Naivasha interrogation began and thereafter he was taken to solitary confinement. He was taken back for interrogation and he denied participation in the attempted coup. He was made to write down his version of events and during that week he was taken to a different cell then to a regular cell where they were locked up 4 people in a cell.

67. On 14.3.1983 he was taken to Kahawa Garrison together with others and were given fare to go home. He was never taken to any Court of law and was imprisoned without trial, without cause. He was not given terminal benefits by the Air Force despite requesting for them and he was met with a response that he lost his benefits when he was discharged.

68. He was later employed by the Ministry of transport where he worked for 3 years and opted to retire due to frustrations. He got another sales job in Mombasa where he worked upto 1996 and came back to Nairobi and joined his family. He states that his family suffered while in the hands of the Army and his health deteriorated as a result of the incarceration under very harsh conditions. He therefore seeks for salary of the 7 ½ months he was in prison before being discharged, pension, gratuity, general damages

for wrongful termination and torture and any other payments deemed necessary. In cross examination he admitted having had prior knowledge of the coup and he reported to the appropriate authorities and did his best to avert the coup albeit unsuccessfully.

PW8 – Titus Njiru Michael Macharia

69. He states that he worked for Kenya Air Force and his Service Number was 021181 having enlisted on 20.1.1970 and was terminated on 22.8.1983 and by then he was a senior sergeant. On 1.8.1982 he was in his house at Eastleigh Section 7 when he heard an announcement over the radio that the government had been overthrown by the armed forces. He dressed up and reported to the nearest base which in his case was Eastleigh Airbase.

70. He immediately reported to the guard room but there was such confusion he could not tell what was happening. He then proceeded to the armoury to get a gun but did not find any so he proceeded to the sergeant's mess where he found other soldiers. At around 2pm of the same day Army officers came to the mess, ordered them to strip naked and put their clothes in front of them. The soldiers went through their clothes and took all their money and any other valuable thing they found there. They were then locked up in 10 x 12 rooms and each room held about 100 soldiers where they stayed upto about 6pm.

71. Prison Vehicles from Kamiti came to the Sergeants' mess and they were removed from the rooms and ordered to head to the Vehicles. They made their way to the vehicles through a human corridor of soldiers who hit them and beat them with gun butts and made them walk on their knees for about 30 feet. On arrival at Kamiti they were forced to remove the inner wears and yet the soldiers were of different ages which according to the Claimant was very degrading.

72. They were then ordered to put back their under wears and then taken to a prison cell where they were locked up together with mad people. The Claimant states he was the only officer in the cell which was very cold and beddings were not provided. He stayed in that cell for two weeks and during that period he suffered anxiety, confusion and hopelessness. They were then moved to a bigger cell and interrogations started to be conducted by Army men. The Claimant was interrogated and given a green card and ordered to speak the truth and he said he was telling the truth. They repeated the interrogation for 3 days with the purpose of coercing by torturing them in order for them to confess to participation in the coup. The Claimant was thereafter taken to Kamiti medium prison where he was locked up upto mid-October when they were transferred to Naivasha maximum prison up to 22.3.1983.

73. While in prison his testicles started swelling and when he tried to ask for medical attention he was denied. The swelling continued and became worse and it persisted until 27.8.2014 when he underwent surgery at Kikuyu to remove the swelling. They were taken from Naivasha to Kamiti to remove prison clothes then dropped at Kahawa where he was given fare to go home and advised to collect benefits from the DCs office. He later went to the DCs office and received Kshs. 23,000/= which he did not understand how it was tabulated. He was ordered to report to his area chief regularly and never to leave the area without the chief's authority.

74. The Claimant states that he was arrested on 1.8.1982 upto 22.3.1983, was never charged with any offence, never tried before any Court, imprisoned unlawfully in civilian jails without a trial for 8 months, held incommunicado, tortured for no reason, discharged without cause and lost all his property in his quarters upon arrest. He seeks compensation for the foregoing atrocities committed against him.

75. He further states that as at the time of discharge his salary was Kshs. 2,200 per month and that he was retired and not discharged so he was not given any discharge certificate. In cross examination, he stated that he did not know anything about the coup until he heard an announcement over the radio on 1.8.1982. He further stated that after termination he got employment from 1993-1996 and thereafter he has been selling jua kali furniture.

76. The Claimants closed their case after putting up 8 witnesses who established the pattern of arrest, torture and imprisonment. Thereafter they closed their case.

Submissions by the Claimants.

The Claimants in their submissions state the following.

77. That their arrests were brutal and inhuman as they were beaten up, stripped naked in public, held incommunicado in filthy overcrowded cells, with some in the same block as insane or death row prisoners or in solitary confinement. They were denied basic needs i.e. food, water, sleep, medical attention and subjected to brutal ceaseless interrogations. They were also deprived of access to their property and proprietary rights as they were hurriedly bundled to prison without being given access to their personal effects which included vital certificates and testimonials.

78. This they argue was in violation of Section 70 (a) which provided for the right to life, liberty, security of the person and the protection of the law and Section 74 which provided for protection against inhumane treatment and outlawed torture and/ or inhuman degrading treatment of the now repealed constitution of the Republic of Kenya 1969

79. They further argue that in addition to losing their certificates, the labelling of the Claimants as rebels negatively affected their careers and reputation making it inherently difficult for them to secure gainful employment depriving them of their right to employment.

80. They submit that the disbandment of the Kenya Air Force and subsequent creation of the 82 Air Force was illegal and the said illegal entity had no authority to purport to dismiss and or discharge servicemen and officers contracted by the Kenya Air force.

81. The Claimants also argue that the Kenya Air force Personnel who were said to have been sacked by the Defense Council and the Commander of the 82 Air force hold that decision as a nullity as the Commander was a legally non-existent entity who did not have powers to terminate, dismiss the said personnel as they belonged to the Kenya Air force the legitimate and lawful entity recognized under the Constitution and the Armed Forces Act, Cap 199 (now repealed).

82. The Claimants further submit that the summary trial conducted by the Defense Council was not legitimate as the 82 Air Force Commander had carried with him the illegality of the 82 Air Force which was not one of the three services enshrined by the Armed Forces Act. Moreover, the commanding officer should have also disclosed to the accused the offense he was faced with, and investigations ought to have been concluded pertaining to the accused and the names of those witnesses embedded in the summary sheet whose charge sheet should have equally been attached thereto. The accused would then verify the charge sheet, seeking out any anomalies. As none of the above was done, they submit that they were denied the right to a fair hearing and condemned unheard contrary to the rules of Natural

Justice.

83. The Claimants submit that the primary statute dealing with the employment of disciplined forces under which they fall was the Armed Forces Act Cap 199 now repealed however, the actual terms and conditions of service were not contained in public document but reference has been made to a document in the case of **Lt. Col Benjamin Muema vs AG [2006] eKLR** termed as the “Terms and Conditions of Employment in the Armed Forces where counsel had relied on paragraph 90 which stated that retirement benefits ought not to be granted to officers for any other reason other than “misconduct”. It was further argued that in this case, the court stated that damages payable to Claimants must be calculated on contractual period of three months’ notice. Such an argument however is in contradiction to the principle well established in case law that a position of employment underpinned in statute law is a protected position the incidents of which do not flow from mere contract, the terms of the statute must be adhered to in terminating the service of an employee.

84. The case law referred to is **Eric V 1 Makokha and Others vs Lawrence Sagini and 2others Civil Application No 20 of 1994; Guton vs London Borough of Richmond upon Thames [1980] all E.R 577; Ronald Muge Cherogony vs. The chief of General Staff of the Armed Forces of Kenya and 2 Others; Misc. Cause No 671 of 1999; Vine vs National Dock Labor Board [1956] All E.R 939**. The Claimants urges the court to be persuaded by these precedents and pay them their appropriate dues.

85. The Claimants make reference to already concluded cases of the same nature where the courts found in favor of the Claimants and awarded general damages for suffering endured in the work place. **The cases are Petition No 13 of 2013 Major Rtd Ezra Imaan Laibuta** where the court awarded Kshs. 127,000.00 with interest per month for the period he would have served as a Major from 22nd February 2008 as loss of benefits of career and a further award of Kshs.7,000,000.00 as general damages for pain and suffering in the work place.

86. Secondly in **Civil Appeal No 79 of 2012 Major general P. M Kariuki** was awarded salary arrears and allowances of Kshs. 22,965,460.00 being his basic salary and allowances from 1983 to 2006 at the rate of Kshs. 79,741.00 per month based on the current salary for the period between the time he was relieved of his command duties at the Kenya Air force and when the decree of the High Court was made in 2006. This case also set aside his conviction and sentence, restored him to his rank and medals thereby clearing him of wrong doing.

87. The Claimants submit that this Honourable Court has jurisdiction to award damages and that the damages are within the court’s judicial discretion. The atrocities meted against the Claimant by Respondents entitle them to the damages sought.

88. The Claimants also urge the court to declare that the “82 Air Force” had no power and jurisdiction to discipline, dismiss, discharge, terminate and or take any enforceable action against officers and servicemen contracted for service by the Kenya Air force as contributed by the Armed Forces Act, Cap 199 of the Laws of Kenya (now repealed).

89. They further urge the court to declare that the failure to pay them their salary and allowances and an appropriate pension was unconstitutional; and that the said Claimants be referred back to duty by the Kenya Air force failing which a legal framework for discharge be determined by this Honourable Court.

90. As to the payment of terminal dues, salary arrears, retirement benefits and pensions, the Claimants submit that they are entitled to the said reliefs, and no denial was put forward in the defense that the Claimants were not serving in the force. Moreover, as they were denied the right to fair trial the

Claimants urge the court to restore their respective ranks, benefits, honours and decorations and be honourably retired having rendered service to the country.

91. In closing the Claimants urge the court to look at its own decision in the case of **Major (RTD) Ezra Maana Laibuta vs The Hon Attorney General Petition No 13 of 2013** at page 10 where it was observed that “most importantly, the person must be heard by an independent and impartial tribunal. In support of this position, the decision in **R vs Chief Justice of Kenya & 6 others Ex Parte Ole Keiwua KLR [2010]** was cited where the court observed as correct the statement of law from **Central Medical Council vs Sparkmen [1943] 2 All ER 337** that:

92. **“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 essentials of justice. The decision must be declared no decision.”**

93. They urge the court to declare that the decision to dismiss them was null and void.

94. It is their final submission that they humbly request the Honourable Court to award as they prayed.

The Respondent Case.

95. The Respondent filed a Response dated 27th November 200, and it has since undergone amendments, in line with those of the plaint which have led to the filing of the latest further Amended Response dated 28th January 2014 and filed in court on the 29th of January 2014.

96. The Respondent denies the Claimants allegations thereby placing on the Claimants the burden of proving the allegations in the plaint. They respond that:

a. The suit by the Claimant is time barred;

b. The termination of the Claimants employment in the Armed Forces was on account of their involvement in the 1982 coup for which they were found culpable after undergoing fair hearing by either court martial or summary trial

c. That at no time was the Kenya Air force as established by the Armed Forces Act Cap 199 replaced by the 82 Air force or any other entity.

d. The Claimants' detention was to facilitate investigations into their roles in the 1982 coup and in prevailing circumstances justified;

e. The Respondent has denied that the Claimants right to liberty was violated, that the Claimants were held in slavery or servitude; and that the Claimants were tortured and treated in inhumane and degrading manner.

cs. The Respondent put up one witness:

RW1 – Nicholas Mutuku Mulinge

98. Stated that he was based at the Respondent Headquarters (DOD) working as the Staff Officer II and his duty was to maintain records for the officers in the Respondent forces. He gave evidence on the structure of the Armed Forces who are classified as servicemen and officers. According to RW1 servicemen start as recruits, upon completion of basic military training one becomes a private, then to corporal, to Sergeant, Senior Sergeant, Warrant officer II and last rank of servicemen is Warrant Officer I.

99. Officers on the other hand rank from 2nd Lieutenant, to lieutenant, captain, major, lieutenant, colonel, colonel brigadier, major general, lieutenant General, General then the President. That one becomes an officer after they are commissioned by the president.

100. He went on to state that retirement ages for the different ranks differ. Officers retirement ages were said to be as follows:

Captain - 39 years; Major – 44 years; Lieutenant Colonel – 48 years; Colonel – 50 years; Brigadier – 52 years; Major General – 55 years; Lieutenant General – 58 years; General and above – 62 years

That this was the true position as at 1982.

101. Servicemen are retired as follows:-

Privates and Corporals – 45 years; Sergeants and senior sergeants – 48 years; Warrant Officer II – 52 years; Warrant Officer I – 55years

This was also the position as at 1982.

102. RW1 led evidence to the effect that offences in the Armed Forces Act include looting public property, mutiny, failure to suppress a mutiny and desertion. These offences according to the Act may warrant a Court Martial. That on 1.8.1982 there was an attempted coup by the Kenya Air Force which was suppressed by Kenya Army. The KAF soldiers were all arrested, screened and those who took part were charged and taken to military camps and remand prisons. Screening process involved carrying out investigations, sorting out those who had committed the offence. Those found without offence were taken to the barracks and those who had committed the offence were court martialed.

103. Offences in the Armed Forces are either summarily tried by the Commanding Officer or Court Martial depending on the offence. If a person is found not guilty he is taken back to work and if guilty they are punished or dismissed. The Respondent relied on reports of the Committee appointed to review Court Martial findings and sentences in the trial of KAF personnel which report was filed in Court. The

report was done at the end of the trials. The Committee recommended that the Chief of General Staff accepts the findings and confirm sentences were reduced as per the report.

104. RW1 also gave evidence of removal from the Armed Forces which may be by way of termination of commission, resignation, medical retirement and retirement. Servicemen are discharged from service when their services are no longer required or dismissed by a Court martial upon conviction.

105. He also states that if a soldier is sentenced in a civil jail, all benefits are forfeited. In cross examination he stated that he had attended Clerks training school in Kabete where he qualified in updating records. He admitted that he only had records for 23 Claimants out of the 284 and that he was unable to get records of the other Claimants. That the other records were not available as Court Martial records are only kept for 6 years.

106. He also admitted that the Claimants were detained in civilian prisons but were detained there due to lack of space in military guard rooms. He stated that an officer should be taken to Court within 5 days failing which a report has to be done outlining the reasons why but in the instant case they were held for more than 8 days and there is no report on record.

107. The witness further stated that being taken to court martial in torn clothes, being locked in small water logged rooms, being denied food, sleeping on cold concrete without beddings and being denied food was against the law. He also stated that the way the Claimants were arrested, beaten with gun butts and whips, being stripped naked and being kicked was unprocedural.

108. He also admitted not seeing any evidence of medical records for the check up the Claimants should have undergone before discharge. He also did not get any records for trials and he had no reason why only 23 records could be found and why the others got destroyed. In cross examination by the advocate of the 17th Claimant the witness admitted that the Respondent wrote a letter stating that the Claimant never participated in the coup but he still did not have any records for the 17th Claimant. He also did not have any evidence to show that the 17th Claimant was charged in any Court of law. He also admitted to not knowing who 82 Air Force was because they did not form part of the Armed Forces.

109. The witness also admitted that screening does not include torture and being subjected to cruel and inhumane conditions. The Respondent prays that the suit by the Claimant be dismissed with costs.

Submissions by the Respondent

110. The Respondent submits that the reliefs sought by the Claimant fall within contractual and tortious claims and are subject to the Public Authorities Limitation Act Cap 39 as the actions occurred on diverse dates between 1.08.1982 and 30.03.1983.

111. The act provides in Section 3 that:

a. No proceedings founded on tort shall be brought against the Government or Local Authority after the end of twelve months from the date on which the cause of action accrued.

b. No proceedings founded on contract shall be brought against the Government or Local Authority

after the end of three years from the date on which the cause of action accrued.

dh. The Respondent submit that the suit was initially filed on the 21st of February 1995 at the High Court Civil Division with 24 Claimants, the first 22 Claimants had on the 02.02.1995 filed an application for leave to file suit out of time under section 27, 28, 29, 30, and 43 of the Limitation of Actions Cap 22 of the Laws of Kenya an indication that they knew the suit was time barred.

di. Further the Respondent submit that on application seeking leave to file suit out of time the reasons advanced were that the Kenya Air force had been disbanded and as such they could not pursue their claim. However the Respondent submit that Section 5 of the Public Authorities Limitations Act provides for extension of time only in the case of disability which is defined under Section 2(2) of the Limitation of Actions Act Cap 22 to be a person who is a minor or of unsound mind. They submit that this definition has been adopted in Askah Mogendi & Ano vs Shem Magara [2012]eKLR and Matheka Kitute vs Kenya Railways Corporation [2015]eKLR.

dj. They further submit that the reason advanced by the Claimants No 1 – 21 in the application for leave to file suit out of time that the Kenya Air Force had been disbanded does not qualify as disability on the part of Claimant No. 1 – 21. They further state that their filing out of time was due to difficulties of the government regime at the time, but the Respondent states that this reasoning was just but an afterthought and ought not to be entertained by this court. This they submit is because the defense of limitation is statutory and cannot be taken away except by a Claimant strictly placing himself/herself within the exceptions provided for by the law. The Respondent submit that the Claimant failed even at cross examination to properly explain the reason as to why the suit was filed out of time. They ask the court to rely on the case of Askah Mogendi & Ano vs Shem Magara [2012] eKLR where Odunga J quoted extensively from the decision in Gathoni vs Kenya Cooperative Creameries Ltd [1992] KLR 104 where Potter J stated that the law of limitation of actions is intended to protect Respondent against unreasonable delay in the bringing of suits against them, consequently the Respondent submits that the claim herein is time barred and should be struck out.

dk. The original complaints indicated that the Claimant had been granted leave to file suit out of time by Aluoch J, however, the order was not served with the Complaint and the Respondent submit that it is evident from the attached application for the extension of time that the order was only in respect of Claimants No 1 – 21, who were the named Applicants and not all the original 24 Claimants. It was therefore up to the Claimants to prove the existence of such an order by production of a copy which was not done and accordingly as was held in Thuranira Karauri vs Ncheche [1997] eKLR the defense of limitation raised by the Respondent of the defense stood and the Claim was dismissed.

dl. The Respondent further submits that Claimants No 22 – 284 did not seek leave to file suit out of time and without doubt they are not suited and cannot maintain any claim on account of tortious and contractual claims as they are time barred.

dm. Moreover, the Respondent submits that extension of time to file suit does not apply to contractual claims. That this was the position in Askah Mogendi & Ano vs Shem Magara [2012] eKLR (supra) where Odunga J at page 5 paragraph 1 stated that extension of time applies only to claims made in tort and even those claims must be in respect of personal injuries arising from negligence, nuisance or breach of duty (whether duty exists by virtue of a contract or of a written law or independently of a contract or written law.) The Honorable Judge also quoted from the decision of the Court of Appeal in the

case of **Mary Osundwa vs Nzoia Sugar Company Ltd Civil Appeal No. 244 of 2000** where the court held: **“Section 27 (1) of the Limitation of Action Act clearly lays down that in order to extend time for filing a suit, the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the Claimant as a result of the tort”**

dn. The Respondent submit that the Claim for terminal and severance benefits can therefore not be granted as these claims arise from employment contracts. The cause of action on these claims arose between 1.08.1982 and 30.03. 1983 and filing which was in 1995, was not filed within the mandatory 3 years required by Section 3(2) of the Public Authorities Limitations Act and is time barred.

Were the Claimants unlawfully terminated and or discharged from the Kenya Air force and are they entitled to any compensation thereof"

119. The Respondent submit that the Claimants having been members of the Kenya Air Force, had a duty to defend the Republic, support of civil power and maintenance of order, their participation in the coup went against this duty and was the greatest offence and betrayal. In their evidence before court, the Claimants' witnesses admitted either to having been charged for offences related to the 1982 coup before Court Martials established under Section 84 of the Armed Forces Act and being found guilty; or having been summarily tried by commanders of the Armed Forces as provided in Section 78 (1) Cap 199. Moreover, they do not allege wrongful or unfair dismissal from the Kenya Armed Forces but, that they were subjected to disciplinary process before officers who were not members of the Kenya Air force. This the Respondent submit was a great misinterpretation of the laws as Section 3 of the Armed Forces Act states that any commander in any Command of the Armed Forces could legally participate in summary trial of officers and servicemen below him/her and who qualify to be under his/her command.

120. The Respondent submit that the court ought not to venture into interrogating the Court Martial and Summary trials process when it is obvious that the Court is not hearing an appeal nor review from the Court Martial or Summary trial decisions. As these processes are lawfully provided for in the laws of Kenya it lies that an appeal from their decision should be through Judicial Review. Moreover, Section 86(4) of the former Constitution did allow for derogation of the Claimants rights to fair hearing under Section 77 and thus no claim can be maintained by the Claimants on the lack or otherwise of fair hearing. This was held in Noah **Kibet Sigilai vs Attorney General [2014] e KLR**.

121. Further, the Claimants also failed to distinguish between those Claimants who had been court martialed and those who had been taken through a summary trial, the rules that are applicable to either group is different hence there is no basis upon which the Court can determine the question of liability as between the Claimants and the Respondent and as such the suit ought to be dismissed.

122. The Claimants argue that the terminations and dismissal from the Armed Forces was by an entity called the 82 Air Force and not the Kenya Air Force who was their employer. The Respondent submits that this argument was found incorrect by the High Court and is a misinterpretation of the Armed Forces Act. Their certificates of service clearly indicate that they were in service of the Kenya Armed Forces and not the Kenya Air Force. They had been deployed to the Kenya Air force and it was just their employer by virtue of section 3 (1) of the Armed Forces Act, but the Air Force was at all material times a command within the Kenya Armed Forces.

123. The Claimants have also relied on a document titled 'Forty years of Service' which at page 109 of the submissions filed by Rumba Kinuthia & Co Advocates is to the effect that Justice Akilano Akiwumi on 13th April 1993 observed in a ruling that "82 Air Force" did not exist in law as Kenya Air Force had not been deleted from the Armed Forces Act Cap 199. The Respondents submit that in the same document, it is reported that the contention was later rejected by Bosire J and Mwera J during the hearing of the main application where the court observed that the Armed Forces Act recognized Kenya Air Force and that the 82 Air Force was just a nickname for the Service and its officers were officers of the Armed Forces of Kenya. It is therefore their submission that the Claimants termination and dismissal from the Kenya Armed Forces was by the Kenya Air Force hence lawful and in accordance with the governing law.

124. The reliefs that the Claimants seek from the court arising from the unlawful termination and dismissal are

- a. Terminal and or severance benefits;
- b. General Damages;
- c. Payment of full current salary, privileges and benefits in respect of each Claimants rank and or higher rank from the date of discharge/ termination until the date of retirement of each officer;
- d. Full pension

125. These claims are special and should be particularly pleaded and strictly proved. This is because they should be calculated with precision and need to be particularized as required by law. In **Rev. Francis Muchee Nthiga vs Bishop N Waweru, Jairus J** upheld the decision of the subordinate court dismissing a suit for outstanding salary in lieu of notice, terminal and employment benefits on account of failure by the Claimants to specifically plead and particularize what would have been special damages as required by the law. It is evident from the plaint that the Claimants did not specifically plead the particulars of their claims in respect to terminal benefits, salary and pension. The Claimants did not also prove these claims and indeed in the testimony of the Claimant's witnesses, no evidence in the nature of pay slips was adduced. Therefore it is the Respondent's submission that the Claimants have failed to prove their claims for terminal benefits, salary and pensions.

126. The Respondent also submit that the claim for general damages is not merited as it is trite law that general damages are not awarded in claims for breach of contract. It the case of **Henry Njenga vs Shell Chemicals Co. Eastern Africa [2001] eKLR** the court cited with approval the case of **Joseph Ungadi Kadera vs Ebby Kangisha Kavai (Persoon representative of Ephraim Kavai (Deceased) Kisumu Civil Appeal No. 239 of 1997** unreported where the Court of Appeal held there can be general damages for breach of contract.

Can the Claimants seek compensation for alleged violation of their fundamental rights and freedoms"

127. The Respondent submit the suit herein was filed as a civil suit with private claims and the Claimants have failed to prove such claims. The Claimants have not prayed for compensation for alleged violation of fundamental rights and freedoms which is a matter within the realm of public law. The Claimants have not pleaded any specific violation of the bill of rights save for general statements that certain alleged facts were contrary to the constitution. The Respondents therefore submit that general statements on alleged breaches do not convert the suits by the Claimants from one that is private in nature to a public one.

128. Moreover, the purpose of pleadings is to give fair notice to the other parties in a suit on the nature of a partys claim so as to avoid litigation by surprise. The Claimants cannot purport to treat their suit as a constitutional case and they cannot purport to seek compensation for alleged violation of fundamental rights and freedoms since, firstly the suit was filed as a normal suit under private law and no relief for alleged constitutional violation is sought.

129. It is therefore the Respondents submission, that the Claimants suit is not a constitutional claim. However, should the court find that it raises constitutional issues requiring redress, the Respondent submit that no compensation can legally be awarded by the courts.

130. This they submit is because the Claimants' have not pleaded any specific constitutional rights which the Respondent violated and the manner of the violations. This they submit is contrary to the principles established in case of **Anarita Karimi Njeru vs Republic No (1) [1979] 1 KLR 154** and recently confirmed by Court of Appeal in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** where it was held that the Petition did not meet the threshold established in *Anarita Karimi Njeru* when the Claimant had pleaded the specific Articles of the Constitution but had failed to provide particulars of the allegations and the manner of infringement.

131. The Claimants have also failed to plead prayers for compensation of alleged violation of fundamental rights and freedoms and as such no damages can be legally awarded by the court. This was the finding in **Peris Wanjiru Gaita vs Grace Wanjiru Mbugua [2010]eKLR** where the Court of Appeal held that a party is bound by its prayers and the Court cannot properly grant any other order without being seen as having descended into the arena of litigation.

132. Moreover, the Respondents submit that the Claimants cannot allege any violation of their right to liberty under Section 72 of the 1963 Constitution as such right was not available to members of the Armed Forces under disciplinary proceedings. In **Noah Kibet Sigilai vs The Attorney General[2014] eKLR** Majanja J at paragraph 11 and 12 stated that:

11. Since it is not in dispute that the Claimant was in the armed forces as at the time and subjected to military discipline, by reason of section 86(4) of the former Constitution, the only claim the Petitioner makes for violation of his fundamental rights is in respect to contravention of sections 71, 73, and 74 of the former constitution.

12. The gravamen of the Claimants' claim is that he was arrested and kept in custody for longer

than is necessary and was tortured. The claim for unlawful detention which falls under Section 72 of the former constitution is excluded from consideration as is any claim arising from the manner in which his trial was conducted under Section 77 of former Constitution.

133. The Respondent also submit that the Claimants have failed to prove that they were held in slavery and servitude. The pleaded circumstances fail to reveal any exercise of the right of ownership of the Claimants as per the definition of slavery and servitude and accordingly the court should find such claims unmerited.

134. It is also stated that the Claimants allegations at paragraph 48 that their treatment constituted inhumane treatment, the Respondent submits that this allegations is false and incorrect. Inhumane treatment is also not equivalent to torture. Under the Convention against Torture an act will amount to torture when it constitutes acute suffering; it is inflicted for purposes of obtaining information or confession, punishing the persons, intimidating the persons or by reason of discrimination; and it is inflicted by a public official or other person acting in official capacity. The Claimants should therefore prove through medical evidence that actual physical and mental suffering was inflicted upon them. In its current bundles such evidence is missing. Accordingly their claim for inhumane treatment should fail.

135. It is because of the above stated reasons that the court should dismiss this claim with costs, however, should the court be otherwise inclined, the defense submits that it should not be guided by the extravagant figures of kshs. 60,000,000 per claimant. These figures are not based on any comparable decided cases and are out of touch with the economic situation of our country. The Court of Appeal in **Jabane vs Highstone Buty Tongoi Olenja [1986] eKLR** that in assessment of damages, it must be borne in mind that each case depends on its own facts and awards should not be excessive, comparable injuries should not attract comparable awards and inflation should also be taken into account.

136. The court should also be guided by the decision of Majanja J in the **Noah Kibet Case supra** where the court awarded Kshs. 600,000.00 as compensation to the Claimant who had joined the Armed Forces in 1979 and was arrested following the coup and was found to have been tortured during his detention.

137. As to the claim under the employment contract, the Respondents submit that the claim should fail for reasons it earlier demonstrated but should the court feel inclined to award damages, they submit that Section 49(1) (c) of the Employment Act provides that the measure of damages should be the equivalent of wages and or salary not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal, which in this circumstances cannot be applied as the Claimants did not prove their gross monthly wages or salary through production of pay slips.

138. Finally as to costs, the Respondent plead that they ought to be awarded costs.

DETERMINATION

139. The 284 Claimants state in the various pleadings filed before court, in the viva voce evidence of

the respective witnesses and the affidavits of the rest of the Claimants that they are servicemen and officers of the Kenya Air Force.

140. They seek reliefs to enforce their fundamental rights and freedoms as enshrined in **Section 72(1), 3, 74(1), 77(1) and 2** of the **Constitution of Kenya 1969 (repealed)**. They assert that the violations were committed by Kenya Army officers and soldiers on divers dates from 1st August 1982 on suspicion of participating in the coup d'état of 1st August 1982.

141. From the onset it is opportune to state that the suit was instituted by a Plaint dated 21st February 1995 with leave and enlarged time by **Alouch, J.**

142. The Plaint was variously amended on 19th September 2000, re-amended on the 4th June, 2004 and further amended on the 24th June 2005.

143. The Claimants seek reliefs set out herein before in this Judgment.

144. The suit was filed as civil suit before the High Court at Nairobi and it proceeded as such before various Judges of the High Court until on 30th August 2012 when **Justice G. Odunga** transferred it to the Employment & Labour Relations Court. As at the time, the matter was part-heard before **Lady Justice Nambuye J**, (as she then was) who had already heard one witness after the commencement of the trial.

145. In a Ruling of **Justice J. B. Ojwang** dated 15th April, 2005 the learned Judge of the High Court as he then was dealt with the objections raised by the Respondent on the issue of limitation with regard to this suit thus,

“The basis of claims in the Plaint is set out in paragraph 5, 6 and 7 of the re-amended Plaint of 4th June, 2004 particularly in paragraph 6 which reads:-

“The Claimants aver that the Commanding Officer of the said so called 82 Air Force had no power or jurisdiction to discipline, dismiss, discharge, terminate and/or take any enforceable action against the servicemen contracted for services by the Air Force (hereinafter known as

Kenya Armed Forces) as constituted by the Armed Forces Act, Cap 199 Laws of Kenya”

Considering that this is the background to all the claims of unlawful dismissal, denial of retirement benefits, loss of terminal benefits, loss of privileges, denial of service benefits, denial of pension etc which means practically all of the claims by the score some Plaintiffs, I would not agree with the learned Counsel who have said that the suit is concerned purely with contracts and torts. The foundation of the claims is lack of jurisdiction and violations of statutory safeguards for employees of the armed forces. I would entertain no doubt at all that such claims are at a general level, public law claims which must be seen as belonging to the categories of Constitutional Law and Administrative Law. Quite contrary to the position taken by counsel for the Respondents a determination of the specific claims in the *Plaint* must start with the declaration of a constitutional nature.

It means, therefore and with much respect, that the contention of counsel that the limitation period for torts and contracts as specified in Section 3 of the Public Authorities Limitation Act (Cap 59) applies is not well founded in law.”

146. With that the learned Judge now a Judge of the Supreme Court allowed the joinder of more Claimants to the suit and the issue of limitation was put to rest, hence the commencement of the hearing of the main suit at the High Court.

147. The Respondent did not appeal the finding by the Judge of the High Court that this matter though commenced as a civil suit dealt with violations of the Constitution of Kenya 1969 (now repealed) and the same cannot competently be revisited before me more than twelve years down the line.

148. For emphasis, I would only refer to the case of **Joan Akinyi Kabasellah and others vs Attorney General, Petition No. 417 of 2014** where the court observed:-

[24] *“Nonetheless I take into account views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as **Dominic Aroy Amolo vs Attorney General, Nairobi High Court Misc Civil Case No.1184 of 2003 (09) (2010) eKLR, Otieno Mark’Onyango vs Attorney General and Another Nairobi Hccc No. 845 of 2003 (unreported)**, Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights”.*

149. I would further note that suits emanating from the failed Coup d’etact of 1982 by the Kenya Air Force including **Hccc Petition No.340 of 2012 David Gitau Njau & 10 others vs The Hon. Attorney General; Peter M. Kariuki vs Attorney General Civil Appeal No.79 of 2012 (2014) eKLR** that were filed many years after the failed coup d’état were entertained and heard on the merits by the High Court

and the Court of Appeal. It would be discriminatory in my view to deny the Claimants access to justice on similar considerations as those who came before the courts before and after them simply because they filed a civil suit as opposed to a Constitutional Petition.

150. In concluding this matter I refer to the **Hccc Petition No.587 of 2012 of General Juma Gichohi & 9 others vs the Attorney General** filed on 21st December 2012 by ex-service officers of the Kenya Air Force on 21st December 2012, more than 20 years from the time the cause of action arose.

151. It is noteworthy that this suit was filed in 1995 and subsequent amendments allowed thereafter up to the year 2005. In refusing to shut out the petitioners, **Justice Lenaola, J.** cited the case of **Harun Thuku Wekesa vs Attorney General Misc Application No.1411 of 2004 in which Okwengu, J.** as she then was stated:-

“I take note of the fact that there are a series of similar cases of alleged breaches of fundamental rights and freedoms committed prior to the year 2002 before the change in Government and the explanation that the environment of the fundamental rights and freedoms has been accepted. In that regard I would borrow the following paragraph from Wachira Waheire vs The Attorney General (Supra). The elections held in the year 2002 and the consequent wave of change in this country are a historical fact. The explanation given by the Plaintiff is therefore not unreasonable”.

152. In this light, the court also recognizes the repeal of Section 2A of the Constitution of Kenya 1969 (now repealed) in 1992 as a historical fact. This was in fact the beginning of the new dawn in Kenya, since the amendment ushered in multiparty democracy. It is quite understandable that the Claimants found courage to bring this suit immediately thereafter.

153. This explanation was advanced by the Claimants before the High Court and at the Employment and Labour Relations Court and I find it reasonable explanation for the delay.

154. Justice Lenaola made profound observations in the case thus;

“I reiterate my sentiments above and would add that it is true that the state today in a reconfigured Kenya cannot shut its eyes from the failings of the past neither can it claim innocence for the excesses of past regimes. It must pay the price for its historical faults and I must also agree with the petitioners’ submissions that the instant petition should be approached in the context of transitional injustices especially now that there is a new dispensation under the Constitution, 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past and the citizenry must not fault the courts for doing justice, albeit belatedly because delayed justice is indeed justice denied.”

155. This court fully embraces these time marking words of the learned Judge and concludes by saying that, **Aluoch J.** enlarged time for the filing of this suit in 1995 and **Ojwang J.** dealt with the issue of limitation in 2004.

156. The violations of human rights and fundamental freedoms disclosed in this suit must be adjudicated upon by this court without undue regard to form and technicalities to lay the ghosts of past injustices to rest once and for all.

157. Having said this, I now turn to determine the merits of the case based on the pleadings, viva voce and Affidavit evidence and the final written submissions by the parties.

Merits of the suit

158. The competing facts of the case in the pleadings and documentary evidence by the parties has been set out in the Judgment.

Determination

159. The issues that arise for determination in this matter as guided by the reliefs sought are as follows;

- a. Whether the Claimants were lawfully removed from the Kenya Air Force
- b. Whether the Claimants have established on a balance of probability, the alleged violation of their human rights and fundamental freedoms by the Respondent
- c. What remedies, if at all, are the Claimants entitled to

Issues I and II

I will deal with issues (a) and (b) together,

160. On 1st August, 1982, there was an attempted coup d'état against the Government of Kenya by the Armed Forces. All the Claimants were at the time either servicemen in various ranks or commissioned officers of the Kenya Air Force.

161. The narrative of each of the Claimants as found in the oral testimony and the depositions filed differs slightly in some fine aspects but by and large once the mutiny by the Kenya Air force was suppressed by the Kenya Army, all the Claimants were rounded up and were subjected to severe punishment by the Kenya Army soldiers which included;

- a. Being subjected to severe beating with all manner of weapons including gun butts upon being stripped naked
- b. Travelling for relatively long distances on their knees while being subjected to severe beating
- c. Put in overcrowded military trucks under severe beating and taken to Kamiti Maximum Security Prison
- d. Subjected to severe beating as they were offloaded from the trucks and taken to various cells
- e. Being confined in filthy cells, some in solitary confinement, and others sharing with insane inmates
- f. Being denied food and water for prolonged periods while in the cells and when given, got some foodstuffs unfit for human consumption
- g. Being subjected to prolonged investigation by Army officers and in the process were subjected to torture including being put in water logged cells for periods of between 3 to 10 days
- h. Not allowed to receive visitors including relatives and legal representatives
- i. Being kept incommunicado for about 8 months plus or minus at Naivasha and Kamiti Maximum Prisons
- j. Being confined in a cell with very powerful bulbs for 24 hours a day which led to mental anguish and hallucinations
- k. Being forced to confess to crimes they had not committed on the guise of a promise to be released and/or after succumbing to immense pressure
- l. Most were sentenced to various terms in prison without following due military process whereas others were released and sent home without payment of salary, terminal benefits or pension to date.

162. The Respondent did not adduce any oral or documentary evidence to contradict the testimony by the various witnesses who testified on behalf of the Claimants in court and depositions filed by the Claimants in court. The Respondent did not also file responses to the damning evidence in the Affidavits

sworn by the Claimants and filed as Witness Statements.

163. As stated earlier in this Judgment, the Respondent only called one witness from Department of Defense who had no personal knowledge of the matters the subject of this suit except that he was in charge of keeping records at the Department of Defense.

164. RW1 confirmed in his testimony that all the Kenya Air Force soldiers including the Claimants were arrested, confined at Kamiti and Naivasha Maximum Prisons. That some were sent to various prisons and others were released and had their employment terminated without payment of any benefits and/or pension.

165. RW1 was unable to produce records of almost all officers and so he was not in a position to refute the evidence that the Claimants were summarily tried and discharged from the Armed Forces whereas others were brought before a court martial convicted and sentenced to varying jail terms. That they were not subjected to any lawful authority as the Armed Forces law required nor were they subjected to a proper court martial. A report of the review of court martial findings and sentences in the trial of 23 of the Claimants was filed in court at the end of the case. This did not help much in the court's view to shake the concrete evidence by the Claimants on the unlawful conduct by the Respondent in violation of the Kenya Armed Forces Act, Cap. 199 (Now repealed) and section 72(1), 3, 74(1), 77 (1) and (2) of the Constitution of Kenya 1969 (now repealed)

166. In any event, it is the court's finding from the evidence common from all parties that on 12th August, 1982, Kenya Air Force was disbanded and replaced by an entity known as 82 Air Force. That all servicemen and officers who were not taken up by the new entity had their employment with the Armed Forces terminated. That indeed all the Claimants were not re-admitted to the new outfit and had their fates sealed without any prove of misconduct on their part.

167. Justice Akilano Akiwumi (as he then was) in **Misc. Application No. 293 of 1993 Captain Geoffrey Kusoga Vs. Attorney General** ruled that the new outfit, 82 Air Force was not founded on the Armed Forces law that appertained then and was indeed illegal.

168. This court finds on the basis of the finding by **Akiwumi J.** that the termination of the employment of the Claimants by the Commander of 82 Air Force was null and void since the Claimants were employees of the Kenya Air Force and not 82 Air Force.

169. In the final analysis, based on the pleadings under paragraphs 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54 of the Further Amended Plaint and the evidence before court, the court finds;

a. **The Claimants suffered in the hands of an illegal authority called 82 Air Force which had no authority to retire dismiss or terminate their services as the Claimants had contracted their services with the Kenya Air Force authority and not any other illegal establishment out of the Kenya Armed Forces Act, Cap. 199 Laws of Kenya (now repealed)**

b. **That the Claimants suffered torture and degrading treatment, wrongful arrest, wrongful imprisonment/confinement for prolonged periods and many were imprisoned for varying periods without a fair hearing by a court martial in violation of Section 72(1), 3, 74(1), 77(1) & (2) of the Constitution of Kenya 1969 (repealed)**

c) **The Claimants, upon discharge from the Armed Forces were sent home without payment of any salary, terminal benefits and/or pension contrary to the Armed Forces Act and the Armed Forces Standing Orders.**

170. This finding is in line with the decision by **Lenaola J. in Gerald Juma Gichohi (supra)** where the learned Judge stated,

“I am alive to the provisions of Section 72(1) (2) and (3) of the Repealed Constitution which provided for the right to personal liberty as follows;

72(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases in execution of sentences or orders of a court whether established for Kenya or some other country in respect of a criminal offence of which he has been convicted; in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or another court in tribunal”.

171.

Section 72(2) and (3) provided as follows;

(2) A person who is arrested shall be informed as soon as reasonably practicable in a language that he understands the reasons for his arrest or detention

(3) A person who is arrested or detained

a. **For the purpose of bringing him before a court in execution of the order of a court; or**

b. **Upon reasonable suspicion of his having committed, or being about to commit a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable.....the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that he provisions of this subsection have been complied with.”**

172. In the present case no reasonable explanation was given by the Respondent for the prolonged confinement of the Claimants before they were discharged and sent home and/or brought, without following the law, before a court martial and/or summarily tried by Kenya Army Officers.

173. Furthermore, Section 74(1) of the repealed Constitution provides,

“No person shall be subjected to torture or to inhuman or degrading punishment or other treatment”.

174. The court has already found that the vivid evidence by the Claimants that they were subjected to torture and inhuman and degrading treatment while at Eastleigh and Nanyuki Air Bases and at Kamiti and Naivasha Maximum Prison has gone unchallenged since no witness was called to refute the same nor was any affidavit filed in answer to these detailed accounts of torture, cruel and degrading treatment at the hands of the Respondent. The court finds the allegations by the Claimants have been proved on a balance of probabilities.

175. The court will hasten to add that Articles 5 of the United Nations Universal Declaration of Human Rights (“UDHR”) provides,

“No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment.”

176. The court cannot shut its eyes to these atrocities only because of the manner the suit was brought by the Claimants and finds the same to have been sufficiently proved by the Claimants.

Issue III – Remedies

177. The court will now deal with the remedies the Claimants are entitled to in view of the above findings by the court and the prayers sought in the pleadings.

178. The substantive remedies sought by the Claimants are;

- a. Declaration that the Claimants be absorbed back to duty in the Kenya Air Force failing which a legal framework for discharge be determined by the court
- b. In the alternative, payment of the full current salary, privileges and benefits in respect of each Claimants rank and/or higher ranks from the date of discharge and/or termination until the date of retirement of each officer
- c. Payment of full retirement benefits including pension and three months' pay in lieu of notice
- d. Payment of severance pay calculated at one month's salary for each completed year of service for dates enlisted until date of retirement
- e. Aggravated damages for wrongful imprisonment/ confinement, arrest and torture
- f. Award of general damages
- g. Costs and interests

Reinstatement

179. Given the lapse of time from 1982 to date, and the ages of the Claimants, the remedy for reinstatement is not available to the Claimants. As a matter of fact, almost all of the Claimants are beyond the retirement ages set out herein before in this judgment.

180. This brings us to the second remedy sought by the Claimants being payment of current salaries from the date of discharge to the respective dates of retirement. This must be considered together with the claim for award of general damages since that would be the actual import of such a grant.

181. In the **Court of Appeal Civil Appeal No. 79 of 2012, Peter M. Kariuki vs Attorney General (supra)**, the learned Judges of Appeal stated at page 43 that;

“.....it bears repeating that assessment of amount of damages is a matter for the discretion of the trial Judge which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions”.

182. The court referred to **Cuosseus vs Attorney General (1999) 1EA 40**, a decision of the supreme court of Uganda thus;

“.....the object of an award of damages is to give an injured party compensation for the damages, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury.”

183. The Claimants herein claim equivalent of Kshs. 60,000,000 each as general damages in addition to the award of terminal benefits set out in the Further Amended Plaintiff.

184. The Court was referred to the case of **Major (RTD) Ezra Imanyara Laibuta V Attorney General & 4 Others (supra)**, a decision of the Industrial Court rendered on 29th November, 2013, in which a former major was awarded Kshs.7,000,000.

185. The learned Judges of Appeal in **Peter Kariuki (supra)** cited the venerable madan J.A. (as he then was) in **Ugenya Bus Service vs Gachiki (1976 – 1985) EA 575** at page 579 thus;

“General damages for personal injury are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can”.

186. The Judges of Appeal went on to say,

“The challenge in our view is not limited to assessment of damages in personal injury claims alone. It extends to all assessment of general damages that are essentially at large”.

187. The court notes that each case depends on its own facts as no cases are exactly alike, and that awards of damages should not be excessive nor should it be miserly. It should be realistic and satisfactory and therefore must be reasonable. **See Mohamed Juma vs Kenya Glass Works Ltd C.A. No. 1 of 1986.**

188. In the circumstances of this case, given the prayers by the many Claimants, considering their various ranks; length of service and varying remuneration; their different dates of discharge as summarized in a schedule to this judgement marked ‘A’.

189. While also considering the finding by the court that all the Claimants were tortured and put in unlawful custody for prolonged periods while undergoing interrogations; were subjected to immense torture and inhuman and degrading treatment while in custody, were subjected to unlawful and unfair summary trials and court martial; falsely imprisoned for varying periods and unlawfully discharged from service without payment of terminal benefits and pension.

190. Further considering the award by the Court of Appeal in **Peter Kariuki vs Attorney General (supra)** which case dealt with the Commanding Officer of all the Claimants herein who was discharged from service under similar circumstances as all the Claimants herein.

191. The court also takes into account that almost all of them were unable to get any gainful

employment upon discharge due to the stigma attributed to them having been branded as rebels and actual effort by the authorities to ensure that they remained in their homes and did not get alternative employment.

192. It is the court's finding that the pain and suffering endured by the Claimants at the hands of the Respondent is gross beyond measure.

193. Therefore, the court awards each of the Claimants

i.

Salary arrears based on the current salary appertaining to servicemen and officers in the Armed Forces in their respective ranks as set out in the documents filed by the Claimants from date of discharge to due date of retirement.

ii.

In addition the Claimants are to be paid aggravated damages for wrongful imprisonment, torture, inhuman and degrading treatment, and violation of the right to fair hearing in the sum of Ksh. 1,000,000 each since the pain and suffering was equally suffered by all Claimants irrespective of their rank and station in life from the respective dates of their unlawful arrest up to date of their discharge.

iii.

In addition, the Claimants ranks, honours and decorations be restored forthwith.

iv.

The Claimants be paid their pension from date of this judgement.

Final Orders

194.

In the end the final orders to be made are the following;

- a. A declaration that the Claimants suffered in the hands of an illegal authority called 82 Air Force which had no authority to retire, dismiss or terminate their services as they the Claimants had contracted their services with the Kenya Air Force authority and not any other illegal establishment out of the Kenya Armed Forces Act, Cap. 99 of Laws of Kenya.
- b. A declaration that the Claimants suffered wrongful torture, arrest, unfair trial, imprisonment and discharge from service without payment of arrear salary, terminal benefits and pension.
- c. General damages are awarded to each of the Claimants comprising salary arrears and based on the current salary payable to servicemen and officers in their respective ranks at the time of discharge set out in the witness statements and affidavits filed by the Claimants and summarized in schedule 'A' to this Judgment from the date of their respective discharge to the date of their respective retirement or to the date of this Judgment whichever is earlier.
- d. The Claimants are awarded aggravated damages for wrongful imprisonment, torture, inhuman and degrading treatment and violation of their right to fair hearing in the sum of Kenya shillings One Million each (Kshs.1,000,000)
- e. The Claimants ranks, honours and decorations be restored from the date of Judgment since their discharge was unlawful.
- f. The Claimants be paid pension from the date of this Judgment.
- g. The award in (c) and (d) above be paid with interest at court rates from date of this Judgment till payment in full.
- h. Costs of the suit be paid by the Respondent.
- i. The computation of the award in (c) above be filed with the court by the Respondent within sixty (60) days from the date of this Judgment failing which the Claimants to file their computation within 30 days upon expiry of 60 days.

Dated and Delivered at Nairobi this 15th day of April 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE



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