Case Number:	Civil Appeal 137 of 2007
Date Delivered:	21 Jun 2013
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	John Wycliffe Mwera, Philomena Mbete Mwilu, Stephen Gatembu Kairu
Citation:	Robert Tom Martins Kibisu v Attorney General & 4 others [2013] eKLR
Advocates:	Waigi Kamau for the respondents
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	137 of 2007
History Docket Number:	H.C. PETITION NO.509 OF 2006
Case Outcome:	Appeal Dismissed
History County:	Nairobi
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MWILU & GATEMBU, JJ.A.)

CIVIL APPEAL NO.137 OF 2007

BETWEEN

LIEUTENANT COLONEL ROBERT TOM MARTINS KIBISU.....APPELLANT

AND

THE ATTORNEY GENERAL…….....1ST RESPONDENT

MR. ZACHARY N. MWAURA PS OFFICE OF THE PRESIDENT.....2ND RESPONDENT

GENERAL JEREMIAH MUTINDA KIANGA.....3RD RESPONDENT

CHIEF OF THE GENERAL STAFF.....4TH RESPONDENT

LIEUTENANT COLONEL JEREMIAH MWAURA

NGANGA COMMANDING OFFICER DOD CAU.....5TH RESPONDENT

(Appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Wendoh, J.) dated 29th March, 2007

in

H.C. PETITION NO.509 OF 2006)

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JUDGMENT OF THE COURT

On or about 10th July, 2007 the appellant herein filed a memorandum of appeal containing twenty one (21) grounds. It followed the judgment of the High Court (Wendoh J.) delivered on 29th March, 2007 dismissing his petition (Petition No.509/06). In that petition the appellant had alleged that his fundamental rights and freedoms under ***Ss.73, 74 of the now repealed Constitution***, had been violated. He also alluded to violation of his rights as pertains to the ***Armed Forces Act*** (Cap 199) together with the ***Code of Ethics*** and ***Standing Orders*** thereunder. The appellant argued his appeal in person while Mr. Waigi Kamau, learned counsel appeared for the respondents.

The appellant gave us the background of the matter which the respondents did not dispute, beginning with his employment in 1983 in the Armed Forces, his promotion, training, service and commission up to the time in 2004 when he faced charges before the Garrison Commander at Kahawa where the appellant was the Commanding Officer of a Unit. The charge was that he had refused to have

the boot of his car inspected according to regulations. He was found guilty with the result that he lost seniority, 28 days salary, and he was also given a severe reprimand and reprimand.

The appellant told us that being dissatisfied with that decision, he filed what he called a redress to the Defence Council, apparently a kind of appeal but while waiting for the response thereto he was charged before the court martial with an offence under ***S.68 of the Armed Forces Act*** namely, conduct to prejudice of good order and discipline. Asked how this came to be, the appellant told us that when the sentence handed down before the Garrison Commander was published or entered in his record, he published or caused to be made another entry canceling or amending the earlier entry, an act or conduct that saw him hauled before the court martial set up on 16th March, 2005. The appellant told us that keeping of the records fell under his portfolio. He was tried, convicted and sentenced to one year imprisonment and dismissal from the service. In what sounded to us as suited for an appeal and not a petition, the appellant told us that his view was that the court martial proceedings were contrary to the Armed Forces Act, Rules and Regulations. It was conducted before the Defence Council determined his redress and that in the meantime he had obtained leave to seek a judicial review order of certiorari, which leave was to operate as stay of the order convening the court martial. And further that the court martial sentence was neither promulgated nor confirmed as the case may be, yet he served it. We heard that he filed a ***Court Martial Criminal Appeal No.1 of 2005*** which was determined on 7th December, 2006 when the petition was still pending in the High Court.

The petition citing breach of ***Ss.73, 74 of the repealed Constitution*** had the following as the illustration of the violation:

"1. Denial of ½ pay and full allowances to include house allowance on the mistaken belief that the sentence and conviction of the court martial that tried me was final and conclusive.

2. Denial of access to medical facilities for treatment of self and family.

3. Denial of access to Armed Forces Canteen Organization (AFCO) facilities for self and family.

4. ***Seek leave of High Court to serve 2nd, 3rd and 4th respondents through postal/courier services."***

After hearing the parties, perusing the affidavits filed, addressing such material as had been placed before her and appreciating the submissions, the learned Judge dismissed the petition.

In arguing his appeal before us, the appellant followed the pattern of the grounds in the memorandum with written submissions on each ground. However, the first fourteen grounds did not address the subject matter of the petition – violation of ***Ss.73, 74 of the Constitution***.

What appears to us to touch on the substance of the appeal now lies from ground 15 to the end, focusing on what we paraphrase/condense as follows:

1. *Failure by the learned Judge to find that the respondents had treated the appellant "inhumanely" and in servitude;*

2. *Failure on the part of the Judge to recognize that the appellant had cited the violations complained*

of under Ss.73, 74; and

3. *That the learned Judge had failed to analyze the respective parties' cases.*

The appellant adopted his submissions wholly opting to add nothing much more except that his prosecution before the court martial was illegal, invalid, null and void. The sentence handed down was equally invalid. It was ***"barbarous, brutal, cruel and degrading.***" It brought upon the appellant "***dishonour and contempt***." That imprisonment was involuntary. It had been preceded with confinement in close arrest through all the time of investigation and trial. We were urged to allow the appeal. In his submissions the appellant even as a layman cited authorities considered relevant for us to appreciate.

In response Mr. Kamau, learned counsel for the respondents opposed the appeal in that while invoking the powers donated by ***S.84 of the repealed Constitutio***n, the petitioner was obliged to set out the sections, violated and stating how they had been violated. Counsel's position was that the appellant cited ***Ss.73, 74 -*** protection from slavery and from inhuman treatment but did not plead or demonstrate how the two sections were violated. We heard that claiming unpaid salary, being denied visits to AFCO facilities and the rest of it did not constitute violation of rights under ***Ss.73, 74***. That failure to demonstrate so resulted in the dismissal of his petition in the High Court and the same should follow here. Mr. Kamau while adopting the affidavit filed by Mr. Ombwayo, and the replying affidavit of Capt. Yvonne Kerubo told us that the facts relating to the appellant's case had been set out including the court martial proceedings that led to his conviction and sentence. Those facts were not disputed. The sentence was formally confirmed and the appellant stood dismissed from the Armed Forces with no rights to any salary or use of the Armed Forces amenities thereafter.

Mr. Kamau told us that the appellant had delved in the court martial proceedings, their validity or otherwise, which was not the matter before us. That stay orders were not permanent and in any case the appellant's appeal against the court martial decision had long been determined. It was dismissed. The respondents' position was to dismiss this appeal. The appellant was heard in reply and now here follows our determination.

As it is trite law, this being a first appeal, we are obliged to go over the whole case as placed before the High Court including its decision, then draw our own conclusion.

Before getting into the High Court proceedings we repeat what we stated at the beginning that the petition was filed claiming violation of fundamental rights under the ***repealed Constitution Ss.73, 74*** – protection from slavery and protection from inhuman treatment. We also set out the grounds stated in the petition namely that salary was withheld and the appellant with his family were denied access to AFCO and to medical facilities.

The hearing of the petition started before Wendoh J. on 29th November, 2006 with the appellant prosecuting his case. He gave the background of his case as we have done already, and made reference to his supporting affidavit. Then he added:

"I have filed a supporting affidavit to the petition. There is no evidence. Has been concluded quoted to support the respondents denied my rights. It is of my rights in the Constitution of Kenya S.73 & 74 of Constitution of Kenya. Armed Forces Act Cap.199 Laws of Kenya, Armed

Forces Standing Orders, President and Commander-In-Chief Regulations for the Armed Forces S.47A and 47 of Evidence Act."

We quote the above part of the submissions as recorded. It appears as the only part so far referring to ***Ss.73, 74*** allegedly breached because the appellant then went off to make reference to the other proceedings he filed, the Armed Forces Orders and procedures, the proceedings before the court martial and so on and so forth – apparently not connected with his claim of violation of rights.

After considerable journey out there the appellant then said:

"2nd respondent Accounting Officer in Office of the President when informed of the Court orders failed to take any action and continued to treat – petitioner inhumanly. Contrary to S.73 and 74 of the Constitution of Kenya."

The appellant came to this point after making reference to Misc.Appl.No.365/2005 in which he got leave to seek the judicial review order of certiorari which leave was to operate as stay. We understood the appellant to be telling the learned Judge that those orders were conveyed to the Accounting Officer in the Office of the President but he did not act on them. And that such inaction constituted inhuman treatment of the appellant, contrary to ***Ss.73, 74 of the Constitution***. That ended the appellant's highlights of his written submissions before the learned Judge.

Mr. Ombwayo learned counsel for the respondents referred to the replying affidavit of Capt. Kerubo and opposed the petition. He told the learned judge that it did not fall within the ambit of ***S.84 of the Constitution*** and the appellant had not satisfied the court that Ss.73, 74 had been violated by demonstrating/showing how. That salary, allowances, access to medical facilities and AFCO were only available to serving officers. The petitioner was a dismissed officer. Denying him these facilities did not constitute violation of the Constitution. His appeal was pending against the court martial findings. That that did not however mean that those findings would be reversed. Counsel went over the history of the whole case. As regards leave operating as stay in Misc.App.365/05 Mr. Ombwayo said that it was hard to serve it within time. The court martial did not disobey such an order. Proceedings went on according to the rules. The appellant was convicted and his sentence was confirmed by the Army Commander on 16th April, 2005. It was added that the Public Service Commission Act did not apply to officers in the armed forces and ***C.A.278/03 Capt. Wafubwa Vs. Attorney General*** was cited. Mr. Ombwayo added that the ***Armed Forces Act, S.102(6)*** mandated that once a sentence of imprisonment is pronounced, the officer is automatically dismissed. The appellant got one year in prison. He was dismissed.

Learned counsel took the judge through the provisions and rules that governed the appellant and asked her to dismiss the petition. The appellant was heard in reply and the judge rose to consider her decision. However, before we move to that decision it appears prudent to refer to other aspects of the material in the High Court record.

Beginning with the supporting affidavit and confining ourselves to the parts pertinent to the subject petition based on ***Ss.73, 74 of the old Constitution***, the petitioner spoke of being denied medical facilities or access to AFCO, and that his salary had been illegally denied (paragraphs 13 to 16).

The appellant filed a further affidavit sometime in November, 2006. It was in response to the replying affidavit of Capt. Yvonne Kerubo dated 16th October, 2006. We have already alluded to this replying affidavit regarding the facts set out by the respondents. Again focusing on the relevant parts to the petition, we found nothing in the further affidavit referring to the alleged violations of fundamental rights under ***S.73, 74 of the repealed Constitution*** or how they were violated.

We now turn to the appellant's submissions filed in court on 26th October, 2006 together with authorities. As relates to contravention of ***Ss.73, 74 of the Constitution*** we were only able to glean this:

"My Lord the decision to deny the petitioner his ½ pay, allowances to include house allowance, medical cover for self and family and Armed Forces Canteen Organization (AFCO) benefits for self and family is unfair, and burdensome and unconstitutional (inhuman and slavery in nature contravening section 73 and 74 of the Constitution of Kenya) since his Appeal Court Martial 1 of 2005 is pending determination by the High Court."

The script then went off again and near the end it added:

"The import of which was to punish the petitioner illegally, which is unacceptable, as it constitutes inhuman treatment. Thereby violating the petitioner's rights as enshrined under the Constitution of Kenya Section 73 and 74."

In the decision of Wendoh J. she started off by setting out the claim that the appellant's fundamental rights had been violated under ***Ss.73, 74 of the Constitution*** and the nature of the violation was as reproduced earlier. The learned judge then referred to the filing of the petition along with a chamber summons dated 11th September, 2006 - the same date of the petition. Coming to the supporting affidavit and further affidavit filed by the appellant, the learned judge concluded that they related to the chamber summons but not the petition. To her the petition was bare. Having perused these affidavits we are of the respectful view that they did not relate to the summons alone or at all but that they were in connection with the petition. And even after so finding, and in our view in error, the learned judge nonetheless proceeded to entertain the petition on its merits, we think rightly so, to achieve the ends of justice, even when the appellant had not complied with ***Rule 12 of the "Gicheru" Rules*** applicable to petitions like the one under review. Under Rule 12 use of ***Form D*** is mandatory. It sets out how petitions ought to be drafted.

The learned judge went over the history of the case as we have done above, all the way to the trial, conviction and sentence by the court martial. She reviewed the appellant's contention that the court martial proceedings with particular attention to his submissions on all matters canvassed. Wendoh J reviewed the petitioner's case as per submissions on four pages. She then turned to the submissions by Mr. Ombwayo for another three pages. She then stated:

"I have considered both the petitioner's and the respondents' submission, petition and reply thereto."

At this point we are, before moving to the other parts of the appeal, of the view that the ground touching on failure by the learned Judge to analyze cases of both parties is not merited and is hereby dismissed. She did that and at considerable length.

Turning to the contention that the petitioner had claimed and even submitted that he was subjected to an unlawful trial before the court martial, the learned Judge properly found that the appellant ought to have cited ***Ss.70 or 77 of the Constitution*** which he did not, and if we may add, ***S.86(2)*** could not have permitted that because of exclusion of members of the armed forces from claiming any violation of rights except as under ***Ss.73 and 74*** only. Either way the learned judge could not be justifiably faulted here.

Wendoh J then moved to the cited Ss.73, 74 of the Constitution – protection from slavery and

forced labour and protection from inhuman treatment. The learned judge repeated the claimed violations as narrated by the petitioner, denial of salary, denial of access to medical facilities and AFCO and found that:

"The petitioner never even demonstrated in his affidavit or in the petition how Section 73 and 74 were violated. It is not enough just to allege. It is up to the petitioner to adduce evidence in support thereof. The petition in my view does not disclose any cause of action and does not fall under Section 84 of the Constitution."

Without more, we entirely agree with the learned judge. On our own we have reviewed every aspect of this matter as evidenced above – the petition, affidavits, submissions and all. At every stage it was clear that the appellant was alleging that being denied salary, medical facilities, visiting AFCO shops was tantamount to violation of ***Ss.73, 74 of the old Constitution***. We do not agree. Missing out on a salary or benefits may be a hardship but not a violation of a fundamental right unless one is entitled to these as fair remuneration (Article 41(2(b) Constitution 2010) for work done or to be done. Those benefits were not due to him once the sentence of imprisonment was validly passed on the appellant by the court martial and he stood dismissed. We say validly because even his appeal challenging court martial proceedings was dismissed. The appellant fell into error to include claims of invalid court martial proceedings or contravention of the Armed Forces Act, Rules and Regulations in this appeal as pleadings or in his submissions. Ours was only to reevaluate the High Court record as regards the petition brought under ***Ss.73, 74 of the repealed Constitution*** and arrive at a conclusion whether its dismissal had been wrong or otherwise. We did the reevaluation and we have concluded that the learned judge properly considered the petition before her in all necessary aspects and rightly concluded that it was unmerited. She gave reasons for that conclusion and dismissed the petition. We have similarly come to the same conclusion and so we dismiss this appeal.

As we conclude this appeal, it may not be amiss to comment on the meanings of the types of protection which were spelt out in the ***repealed Constitution (ss.73,74)*** and as contained in the Bill of Rights Chapter Four in the Constitution 2010. Our comment is not backed by relevant legal research for example in works like ***Legal Words*** & ***Phrases***, on the meanings of those rights partly on the ground that such meanings were not before us to decide. But suffice it to refer to the dictionary meanings which may be of some guidance.

S.73 – ***Protection from slavery and forced labour***: While forced labour can be understood without requiring much explanation as to what that entails, perhaps we need to say something about slavery. The ***Oxford Concise English 9th Edition Dictionary*** comes in handy:

"Slavery" - 1. condition of a slave

2. exhausting labour, drudgery

3. the custom of having slaves."

And one definition under "***Slave***" is the most fitting:

"1. a person who is the legal property of another or others and is bound to absolute obedience; a human chattel."

Forced labour may mean being coerced or threatened to perform a certain task. One has no choice at all.

S.74 – ***Protection from the inhuman treatment***: The meaning of treatment is rather obvious. But "***inhuman***" is defined as:

"1. (of a person, conduct, etc) brutal; unfeeling; barbarous.

2. not of a human type."

The appellant referred to the denial of salary and other benefits/facilities on being convicted and sentenced as describing violations under ***Ss.73, 74 of the Constitution.*** Such denial hardly fits in the definitions above. The denial of those things was by a court process in accordance with the law. That could not constitute violation of rights as claimed by whatever stretch of definition.

Having dismissed the appeal earlier we, as the High Court did, order that each party will pay its own costs.

Delivered and dated at Nairobi this 21st day of June, 2013

J. W. MWERA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR