

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, HUMAN RIGHTS DIVISION, COURT 2, ACCRA – GHANA, HELD ON MONDAY THE 30TH DAY OF OCTOBER, 2023, BEFORE HIS LORDSHIP JUSTICE NICHOLAS M. C. ABODAKPI

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CASE CALLED AT 9:20 A.M.

SUIT NO. HR/0101/2016

L/CPL SAMPSON ANDREW KOFI ATOMBO

VS

CHIEF OF DEFENCE STAFF (CDS) & ANOR

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PARTIES: PLAINTIFF – PRESENT

DEFENDANTS – ABSENT

COUNSEL:

- 1. BENEDICTA AKESSE ANNAN HOLDING BRIEF FOR TAPHA TASSAH FOR THE PLAINTIFF – PRESENT**
- 2. JASMIN ARMAH (P.S.A.) FOR DEFENDANTS – PRESENT**

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JUDGMENT

01. The complaint on this action shows that, Plaintiff was enlisted into the Ghana Armed Forces on 7/07/2005 and posted to the 1st Infantry Battalion, Michel Camp. The Plaintiff has alleged that, he has been discriminated against in the eleven (11) years he has served in the 1st Defendant institution. He enumerated the under listed as particulars of discrimination and unfair treatment.

- a) Denied foreign operations since the year 2008.
- b) Denied promotion since 2011, all his colleagues are now sergeants.
- c) Last time given a uniform was in 2013
- d) His passport seized

Secondly, Plaintiff has alleged that, his RUN-OUT-DATE expired on the 6/07/2015 and he has indicated his unwillingness to renew his contract of engagement with the Ghana Armed Forces by not signing the Defence FORM A 2139, Revised which is the extension, Re-Engagement and Continuance of service certificate. And as a result he had written letters on 28/10/2015 and 13/03/2015, 26/01/2016, 4/02/2016 and 13/03/2016, requesting for release.

He concluded that, notwithstanding these requests, the Defendants have failed to release him turning his relationship with them into servitude which is unlawful.

The Plaintiff claims the following Reliefs:

- a) A declaration that the failure of the 1st Defendant to voluntarily release him from the Ghana Armed Forces is unlawful and a breach of his contract of employment and order the immediate voluntary release of the Plaintiff from the Ghana Armed Forces.
 - b) A declaration that the failure to promote the Plaintiff is discriminatory and a violation of his rights as enshrined under the 1992 Constitution of Ghana and an order directed at the Plaintiff to his rightful and deserving rank.
 - c) A declaration that the seizure of the passport of the Plaintiff is unlawful and order the immediate restoration of same.
 - d) Payment of all salary arrears and full entitlements due the Plaintiff and calculated on his rightful and deserving rank.
 - e) Damages for breach of contract
 - f) Cost including legal fees.
02. The defence denied all material aspects of Plaintiff's claims and alleged that he was suspect under investigation in respect of a forgery case and his passport which is a crucial exhibit in the investigation has been seized as a result.

The defence also denied the claim that Plaintiff has not been provided with kits. It was averred that contrary to his claim, Plaintiff had been supplied with kits when it is available.

In addition, it was contended, Plaintiff is not entitled as of right to be nominated for foreign missions. More so, when his run out date is imminent and he had expressed his unwillingness to re-engage, these makes him not eligible for selection.

The defence in response to allegations of various letters submitted by Plaintiff for his release, stated in paragraph 7 that, there has been a pending Disciplinary matter against Plaintiff and as suspect, he cannot be released while the investigation is not completed.

The averments to the effect that, Plaintiff has been a victim of discriminatory and unfair treatment where denied, and the defence contended, Plaintiff is not entitled to his claims.

03. ISSUES FOR TRIAL

- (i) (a) whether or not the refusal of the 1st Defendant to grant the Plaintiff his voluntary release from the Ghana Armed Forces notwithstanding the fact that his Run Out Date has expired is lawful.
- (b) Whether or not the detention of the passport of the Plaintiff by the 1st Defendant is lawful.
- (c) Whether or not the refusal and or failure of the 1st Defendant to pay the Plaintiff his salary and lawful entitlements is a breach of the contract between the parties.

- (d) Whether or not the refusal to promote and appropriately remunerate the Plaintiff in the same manner as his colleagues on the same rank is discriminatory.
- (e) Whether or not the Plaintiff is entitled to his claims.

(ii) **ADDITIONAL ISSUES FOR THE TRIAL**

- 1) Whether or not the Plaintiff is a suspect in a forgery case which was or is being investigated by the Ghana Armed Forces and his seized passport is an exhibit crucial to the investigation.
- 2) Whether or not the Plaintiff's Run Out Date is imminent.
- 3) Whether or not the Plaintiff is entitled to be nominated for foreign missions as of right.

04. ALLOCATION OF BURDEN OF PROOF

This is a dispute about employment relationship, in which constitutional, statutory and public law principles as determined by the Supreme Court are the applicable guides to the decision that this Court will make. The Labour Act 2003, (ACT 561) is not applicable, because members of the Intelligent Service and Ghana Armed Forces are not employees or public servants to whom the law is applicable.

However, the common law principle that an employer is at liberty to treat the employment contract between it and its employee as having been breached where a conduct which is inimical and injurious to the efficient management of the entity has occurred is applicable.

The conduct in question when fully established may constitute a repudiation of the employment contract, and the employer is required to take steps to investigate

it accordance with the statute, rules and regulations and also constitutional provisions that apply to the contract.

In the case in point, it is the Ghana Armed Forces Rules, Regulations and Statutes that will apply to conduct of the Plaintiff who was a serving soldier at the relevant time.

The legality or otherwise of not granting Plaintiff's request for release and detention of his passport, his suspected involvement in forgery which are issues 'a, b' in the Application for Direction and Issues 1 and 2 of the Additional Issues are matters on which both parties bear an equal burden of proof.

The other issues, namely, Issues 'c, d' and '3' in the Applicant for Direction and Additional Issues are consequential to the determination of the first category of issues as stated supra.

In other words, determination of basis of the refusal to pay salary and remunerations to Plaintiff, the refusal to nominate Plaintiff in foreign missions will depend on the status of his employment contract with the Ghana Armed Forces.

The onus of proof, the burden of persuasion will shift according to the primary facts in issue and in accordance with the claim or defence put up by the parties.

05. EVIDENCE ADDUCED

- i. The testimony of Plaintiff on the first category of issues, is to the effect that he had been enlisted on 7/07/2005 and has endured discrimination, because since year 2012, he has been denied nomination to serve in foreign operation, while his colleagues have had three (3) opportunities to serve.

Similarly, he asserted he is still a Lance Corporal while his colleagues are Sergeants and he has not been issued with uniform and kits since 2014.

In paragraphs 10, 11, 12 and 13, he testified about the fact that his run out date has expired and he has communicated his decision not to extend or ask for re-engagement.

He tendered Exhibit A, a letter dated 1/09/2016 as evidence of the fact that, he did not want an extension, but his request were ignored. The letter also showed that, Plaintiff had complained about being ill and not receiving adequate care and his desire was to be given permission to seek an alternative treatment. The letter showed that, Plaintiff was afraid of losing his life.

In continuation, his evidence is that while pursuing his voluntary release, 1st Defendant had him detained for sixty-five (65) days in the guardroom without trial in year 2014. And in year 2016, he was again detained for three (3) weeks without trial.

In paragraph 18, his evidence is to the effect that, when he was released from detention, he was informed that the investigation into an alleged forgery matter had been completed and that he was exonerated, and even though he was allowed to serve, he was not given a copy of the report even though he had asked for it.

He contended that, as at the date he instituted this action (16/08/2016) there is neither any investigation involving him nor any disciplinary proceedings against him.

Therefore, the Defendants have just been abusing his rights deliberately to show him “where power lies.”

In conclusion, in paragraph 20, which is relevant to the triable issues, he stated as follows:

“In September, 2016, I fell seriously sick and admitted to the military facility where I was left to die. It was at this point that, my father came for herbal treatment ...”

In paragraph 21, he stated:

“When my father came for me, I was at the verge of death, I could not stand, walk nor eat and kept urinating blood but for his intervention, I would have died.

The document, Exhibit ‘G’ series dated 19/09/2018 is a Medical Report on Plaintiff, it includes receipts and has disclosed that he demanded his discharge from the hospital against medical advice.

ii. The salient parts of cross-examination of Plaintiff are as follows:

Firstly, he was asked whether he was under investigation or forgery as a result he is a suspect, and yet he has sued the Ghana Armed Forces over matters related to the investigation.

A few questions and answers are reproduced:

Q: Kindly tell this Court, are you a suspect in a forgery case at the Ghana Armed Forces?

A: No.

Q: Are you being investigated or have you ever been investigated concerning a forgery case at the Ghana Armed Forces, since your employment?

A: Yes.

Q: You were told you were being investigated, not so?

A: Yes.

The testimony on the question of whether Plaintiff has been investigated for the conduct of forging the letter head of the 1st Defendant institution showed that even though he denied forging the letter head, he admitted that he has been investigated.

Whereupon it was put to him that as a serving military officer he will not be released from the service as he has requested if investigation being conducted has not been completed.

Furthermore, Plaintiff asserted that in accordance with the Armed Forces regulation Volume II, Chapter 107, Article 107 on investigation of charges provides that every charge against an officer shall be investigated in his presence without delay. And that he had been interrogated, put in the guard room for three (3) weeks and acquitted and discharged to continue to serve.

This primary fact of Plaintiff being a suspect who had been or is being investigated and therefore cannot be released must be established by the Defence.

The Plaintiff has to establish that he is not a suspect in respect of a pending investigation, because he has been acquitted and discharged already.

Secondly, the assertions about not being promoted as his colleagues who were enlisted at the same time, discriminatory treatment and refusal to supply him with Kits, etc., were all denied by the Defence.

It was put to Plaintiff that, he had been promoted, given Kits when available, sent to foreign missions as every other deserving officer until he became a suspect and was put under investigation. The record showed that Plaintiff gave answers which are similar to his assertions made in his evidence in chief on this issue. When the evidence of the Defendants is reviewed a finding will be made on these primary facts and a conclusion drawn on whether the party that have the burden of proof has discharged the onus on it or not.

Thirdly, the fact that Plaintiff's passport was seized, and was reduced in rank and other decision taken against him were lawful and as a suspect in a forgery investigation, it was put to him he cannot be released and given his benefits until the investigation is concluded.

Plaintiff's response to the above assertions, offered to defeat his claims is this:

A: I did not tender in my resignation letter after the alleged forgery offence. My resignation letters dated 28/10/2015, 3/12/2015, 26/01/2016, 4/02/2016 and 13/03/2016 were all thrown out. These resignation letters were before the alleged forgery offences.

06. (a) On 5/05/2022, Eugene Okraku Amponsah, Warrant Officer Class 1, testified for the Defence, as DW1. He said he is the Chief Clerk at 1st Infantry Battalion, Michel Camp.

His evidence showed that, Plaintiff was recruited into the Ghana Armed Forces on 7/07/2005, and attached to 1st Infantry Battalion, Michel Camp since 14/12/2005, and has served a period of eleven (11) years and a month in the institution before this litigation arose.

The testimony of DW1 on Plaintiff's status as serving military officer showed that, in 2014, he committed some offences and was charged and convicted on three (3) counts of Absence Without Official Leave [A.W.O.L.], Disobedience of Lawful Command and Conduct to the Prejudice of Good order and Discipline and was eventually sentenced to reduction in rank from corporal to private.

DW1, also tendered Exhibit 'AG6', dated 10/02/2016, which is the document containing the message about alleged forgery and uttering of forged documents, involving the Plaintiff.

The content showed that, he was to make himself available and assist in investigations.

Exhibit 'AG7', dated 11/03/2016, was also tendered, it is a letter written on behalf of Plaintiff by a firm of Lawyers to the Commanding Officer of the 1st Defendant, on the desire of Plaintiff to exit the Ghana Armed Forces.

In it 28/10/2015, 3/12/2015, 26/01/2016 and 4/02/2016, were referred to as dates on which Plaintiff had already written communicating his desire to leave the Ghana Armed Forces, but no response had been given to them.

There is Exhibit 'AG8', is a message dated 28/11/2016, it showed that, Plaintiff was still on A.W.O.L.

Exhibit 'AG9', dated 4/12/2016, is on the same subject, it is a message that Plaintiff was still absent from duty.

Exhibit 'AG10', dated 16/12/2016, is a similar message on the absence of Plaintiff from duty.

Furthermore, in paragraph 10 of his Witness Statement, DW1 stated that, when Plaintiff was released from guard room pending investigation even though he had returned to his UNIT on 26/11/2016, he failed to report for duty and remained absent without permission since then. As a result, messages as in the Exhibits were sent.

In Paragraph 12, he stated as required by the Regulations, a Board of Inquiry was convened by the Commanding Officer of the Unit to inquire into the circumstances leading to the A.W.O.L. of Plaintiff. The completed work this Witness tendered as Exhibit 'AG11'.

He also tendered as Exhibit 'AG12', a copy of the report of the special Investigation Branch of Ghana Military Police on the allegation of forgery case involving the Plaintiff. The report is dated 28/08/2017.

DW1: W.O. II Okraku Eugene Amponsah concluded his testimony by stating that, the Release of a soldier goes through many procedures which involve the clearance and in certain cases the

calculation and payment of end of service benefits, and that Plaintiff is aware that, until he is officially released by the Ghana Armed Forces, he is still in active service and absenting himself from work without leave constitutes a serious offence for which the service seriously frowns upon.

Exhibit 'Attorney General 11', which is the Board of Inquiry Report on Plaintiff, shows the composition of the panel, which is made by five (5) members, namely:

1. Capt. E.R.W. Awudu – as President
2. Lt. FT. Sormenah – Member
3. 187337 W.O.1 OSEI G. – Member
4. 188721 W.O. II Doe E. – Member
5. 2/Lt P.D. Lodo - Member

Its terms of reference were to investigate and find the following:

- a) The date and hour of commencement of the illegal absence
- b) Whether the man has returned or not
- c) Reason/s for absenting himself without leave
- d) Action/s taken on detection of A.W.O.L.
- e) Who is to be blamed for the incident
- f) List of personal equipment which the OR left behind
- g) Any other matter relevant to the inquiry.

The document showed that, Witnesses were called and cross-examined.

First, 187408 W.O.1 Boakye Kwadwo was called, second: 190059 S/SGT Mumuni Drahman, third: 190174 S/SGT Kusi Bright, fourth: 191467 S/SGT Ehyiman Isaac, fifth: 195215 SGT Francis Aba-Iyeleh Bayanlah, sixth: 195715 SGT Ashiabi Evans, seven: W.O.1 Marshal-Conti.

The findings are as follows:

- a) 195643 L/CPL Atombo was posted to the Unit from ARTS upon passing out on 7/07/2005.
- b) L/CPL Atombo was deployed at BAD before he proceeded on A.W.O.L.
- c) OR applied to be released from the service
- d) OR was not punctual at work and had a bad attitude towards work
- e) OR did not discuss his intentions to go on A.W.O.L. with anybody.
- f) The where about of OR is still unknown
- g) L/CPL Atombo is not married and does not have children
- h) OR did not have anybody in the unit who could be described as a close friend
- i) OR was implicated in a number of dubious deals involving civilians and military personnel
- j) OR's military kits and personal effects is attached as ANNEX A.

Exhibit 'AG 12', which is the report of investigation in forgery allegations against Plaintiff, is dated 28/08/2017. It showed that, a complaint was received about Plaintiff on 9/02/2016, and the fact that he has been arrested and place in custody over forgery allegation pertaining to Chilean Embassy in his attempt to obtain a visa. It also showed that Plaintiff was interrogated and statement obtained from LT. Col. J.K. Kumado, an officer who ostensibly signed the letter presented by Plaintiff to the Chilean Embassy. Colonel M. Mustapha also gave a statement, and both officers gave evidence later. The report showed Plaintiff also gave evidence. There was forensic examination of the suspected forgery introductory letter sent by Plaintiff to the Chilean Embassy.

In respect of the forensic examination conducted by Police Forensic Laboratory, it was found as follows:

- a) That it is highly probable that Lt. Col J.K. Kumado (GH/2837) could not have authored the alleged reference signature representing him on the forged introductory letter.
- b) That there are no indications to suggest that the mentioned senior officer authored the questioned document.

The Board of Enquiry found on the whole investigation as follows:

- a) That on 15/01/2016, Lt. J.K. Kumado, Deputy Director, Counter intelligence at GHQ [D1], who was alleged to have signed the introductory letter submitted by L/Cpl. Sampson Andrew to the Chilean Embassy, left Ghana for Cairo in Egypt for a course on counter terrorism and returned on 11/02/2016.
- b) That on 20/01/2016, a forged introductory letter allegedly signed by the Deputy Director Counter-intelligence at GHQ (D1) was forwarded to Chilean Embassy by L/Cpl. Sampson Andrew Atombo to enable him acquire a Chilean Tourist Visa.
- c) That on 27/01/2016, L/Cpl. Sampson Andrew went for an interview at the Chilean Embassy as part of VISA application requirements.
- d) That on 4/02/2016, L/Cpl. Sampson Andrew paid an amount of Forty-three U.S. Dollars [\$43.00] into an ECOBANK account belonging to the Chilean Embassy at the Silver Star Tower Branch.
- e) That the Chilean Embassy contacted Col. Mustapha, Director Operational Intelligence at GHQ (D1) for authentication of the

introductory letter submitted in respect of the application by L/Cpl. Sampson Andrew and upon verification, it was suspected to be forged.

- f) That the introductory letter was forged and the signature which was purportedly signed by Lt. Col. J.K. Kumado was found to be fictitious.
- g) That on 5/02/2016, though the Chilean Embassy issued a Chilean Tourist Visa to L/Cpl. Sampson Andrew, it was cancelled after verification of the introductory letter he attached to his documents was proved otherwise by GHQ [D1).
- h) That an examination conducted on the questioned introductory letter at the Forensic Science Laboratory of the Criminal Investigation Department revealed that it was forged and that, Lt. Col. J.K. Kumado [GH/2837] did not author the alleged signature on the forged introductory letter.
- i) That a message with Reference A. 247 of 281450Z, NOV 16 was received from suspect's Unit indicating that the suspect has been absent without leave [A.W.O.L.] **wef SUN. 6/NOV/16.**

In conclusion, the Report on the forgery allegation is that, L/Cpl. Sampson Andrew should be blamed for authoring the signature of the Deputy Director Counter-intelligence at GHQ (D1) Lt. Col. J.K. Kumado and also for the submission of the forged introductory letter by the Forensic Science Laboratory of the Criminal Investigation Department proved that the

Senior Officer did not author the alleged signature on the letter sent to the Embassy.

It was recommended that, disciplinary action be taken against the Plaintiff herein.

- (b) The Defence also called as DW2 Col. J.K. Kumado as their Witness. His testimony is that, on 16/02/2016, his attention was drawn to an introductory letter purportedly signed by him, which had been presented to the Chilean Embassy by the Plaintiff for the acquisition of a visa. He stated this letter was dated 20/01/2016.

However, between 15/01/2016 to 11/02/2016, he was in Cairo, Egypt on official assignment.

Secondly, physical comparison of the suspected letter showed that, it is different from the genuine letter from the Ghana Armed Forces, and that the LOGO, and format of the introductory letter do not conform.

On the content, he stated, the salutation on the suspected letter was wrong, as DEAR CONSUL was used instead of DEAR SIR/MADAM, which is used by the Ghana Armed Forces. In addition, he stated the signature on the suspected letter is not his as it is remarkably different.

- (c) On the first category of the triable issues, what DW1 and DW2 stated with documentary evidence in support is what has been proffered to attack the case for Plaintiff and his credibility. The testimony is about misconduct of Plaintiff, who has been described as not disciplined and had been involved in wrong doing before the Chilean Embassy episode, and the fact

that he has been on A.W.O.L. and it has also be established as found in a Board of Enquiry Report.

- (d) the legality or otherwise of not granting Plaintiff's request for release, the detention of his passport and his suspected involvement in forgery, these are the issues under consideration, as reflected in how the onus of proof has been allocated supra.

In the cross-examination of DW1 and DW2, Plaintiff's Counsel is required to demonstrate that, Plaintiff had satisfied all the legal requirements of the 1st Defendant institution which entitle him to be released and or show that, the refusal to release him was unreasonable, arbitrary and contrary to the relevant regulations on Release of soldiers in the Ghana Armed Forces.

On the other hand, if the Defence is able to establish the legal basis of its refusal to release Plaintiff and the fact that the allegations of misconduct and forgery were investigated impartially following the relevant rules on the procedure in such matters and that the conclusion arrived at were fair, it may have a favourable finding on the preponderance of the probabilities, taking all the evidence into consideration.

1. The RUN OUT DATE of Plaintiff was the first major primary fact examined, and he answered to the effect that the initial contract after recruitment is for five (5) years and the soldier or Plaintiff is permitted to be re-engaged for another five (5) years and that Plaintiff had served close to ten (10) years at the time the dispute arose. These assertions were accepted by Counsel for Plaintiff.

2. He then put forward the fact that Plaintiff had expressed his intention not to extent his service in various communications to the 1st Defendant. The record showed that, the Defence accepted the fact that he did and the Witness [DW1] explained that the process of dealing with his request had commenced but was halted due to certain factors.

When pressed on the factors that militated against Plaintiff, DW1 stated it was a letter received from High Headquarters indicating that Plaintiff was involved in a forgery incident, and said his Exhibit 'AG12', is the corroborative evidence on the matter.

When it was put to him that Exhibit AG12', is dated 8/08/2017, but Plaintiff had applied earlier in 28/10/2015 and sent a reminder on 3/12/2015 about his request, DW1 stated apart from the forgery case, there were other factors that affected his request adversely, which are disciplinary issues, some of which are in Exhibit 'AG12', as well.

These two (2) questions were also asked on the other factors that prevent the grant of Plaintiff's request for Release. They are:

Q: Apart from Exhibit 'AG12', do you have a record before this Court of any other disciplinary matter against the Plaintiff.

And DW1 answered thus;

A: No.

When he was asked:

Q: I put it to you that, as you stand before this Court, you do not have any evidence of other factors that prevented the processing of the Plaintiff's application for voluntary release.

He answered:

A: My lord, as I said the C.O. directs as to when to process.

At this stage, it is noted that, Exhibit 'AG12', is solely on the Chilean Embassy forged introductory letter and it is Exhibit 'AG11', which showed that Plaintiff had gone A.W.O.L.

But the relevance is that, this Board of Enquiry was in December, 2016. The picture that emerged is that having applied on or about 28/08/2005 for Release, and sent a reminder on 3/12/2015, sometime thereafter, he was investigated as having been absent without permission and convicted.

- (e) The evidence of PW1 and PW2 and other questions posed to defence Witness suggested that he was sick at the time the enquiry was being conducted and that this fact was known to the Defendants.
- (f) Furthermore, DW1 was confronted with the fact that letters sent by Plaintiff on 28/10/2015, 3/12/2015, 26/10/2016 and 4/02/2016, were not acted on and as in Exhibit 'AG7', his Lawyer wrote to the Defendants to act on his request but this was also ignored.

The explanation of DW1 is that, by their routine if the Plaintiff felt his application was not being processed at the UNIT level, he had the opportunity to write to the higher command to seek redress.

Once again it is noted, Exhibit 'AG7' could be described as that appeal to the higher command to process Plaintiff's request for release.

Thus the time it was found he had left without permission and circumstance attending that are the crucial factors to consider in making a determination on the handling of his request, having in mind release from the forces is not automatic or as of right.

Finally, on the request for release Counsel for Plaintiff got DW1 to make an admission, this is the question and answer:

Q: I put it to you that, as at 28/10/2015, when Plaintiff put in his first application for voluntary release, there was no disciplinary issue or any other matter pending against him.

A: That is correct.

But he denied the suggestion that the Board of Enquiry set up to investigate Plaintiff was an afterthought because if within twenty-one (21) days an officer is absent and not heard of without any good excuse an enquiry has to be conducted.

And that, this was exactly what happened as found in Exhibit 'AG11', the Report of the enquiry.

In addition, he denied the fact that, evidence of W.O.1. Boakye Kwadwo and SGT. Mumuni D. Raman and W.O.1. Mashall-Conti, supported the fact that Plaintiff was sick and this was well known to 1st Defendant and yet he was declared as being A.W.O.L.

- (h) The record showed that cross-examination of DW2 by Counsel for Plaintiff was very brief and never touched on material facts he stated about his signature being longed and a letter presented in the name of 1st

Defendant/institution, and under his hand at a time when he was not in Ghana, and never signed same.

The conclusion reached in Exhibit 'AG12', has to be accorded maximum weight because DW2 – Col. J.K. Kumado testified and Plaintiff had his day, he called no Witness, even though he alleged it was one Mr. TAY, who gave him the letter he presented at the Chilean Embassy and Forensic examination has shown that the document was forged, from the LOGO, signature etc.

How can a serving officer present a letter to a diplomatic mission in the name of his superior, where the letter emanates from the custody of a civilian whose address and identity is not fully known to such an officer?

07. THE LAW AND EVALUATION OF THE EVIDENCE

(A) Below are a few legislations which are relevant to the facts of this case.

1) 9.01: COMMAND AND STAFF INSTRUCTIONS AND PROCEDURES VOL. 6, SECTION 9: RELEASE OF OFFICER FROM THE GHANA ARMED FORCES AND PROCEDURE

(a) Premature Release, including Voluntary Retirement from active service and Voluntary Resignation of commission.

9.03: (a) An officer who wishes to retire voluntarily, transfer to Reserve, Resign or Relinquish his commission, must apply.

- (b) An officer applying to resign his commission is to declare in writing that, he shall not enter the service of a foreign power without first obtaining the permission of the General Headquarters. He is also to acknowledge in writing that, he is aware of and accept the financial implication of resignation.

9.08: An officer who has not been guilty of misconduct may at any time be called upon to retire or relinquish his commission or resign his commission on any grounds specified in Table at Article 15.01 of Armed Forces Regulation Vol. 1 [Administration] Vol. 3 (sup) Alternatively, if the Headquarters so decides, he shall be called upon to apply for transfer to the reserves COMMAND AND STAFF INSTRUCTIONS AND PROCEDURE [Amendment No. 1] RELEASE OF OFFICERS, MODES AND PRACTICES.

9.03: Notification of Voluntary Retirement

(c) ...

(d) ...

(e) ...

(f) All officers who intend to voluntarily resign from the Armed Forces shall be required to give notice of such intention to their service Headquarters through their commanding officers as follows:

1) Major or equivalent and below:

- six (6) months prior notification.

2) Lieutenant Colonels or equivalent and above
three (3) months prior notification.

(g) It shall be unlawful for any officer to put in an application for release or resignation while he/she is on assignment outside Ghana.

2) 206.39: SERVICE GRATUITIES

(1) ...

(2) ...

(a) ...

(b) ...

3) COMMAND AND STAFF INSTRUCTION AND PROCEDURES

VOL. 6 – SECTION 6

ARTICLE 6.01 – 6.14

CONVERSION/EXTENSION

6.01: The following general rules governing the terms of short service commission are published for the information and guidance of all officers.

4) DEFINITION

6.02: Short Service Commission means commission granted for a period of not less than ten (10) years minimum whether granted with an option to extend the terms or otherwise.

DURATION OF SERVICE

6.03: ...

6.04: ...

6.05: ...

6.06: ...

6.07: ...

5) 15.1: RELEASE OF OFFICERS AND MEN

- 1) An officer or man may be released, during his service only in accordance with this Article and the table hereto.
- 2) When the service of an officer or man is terminated by death, his release shall be recorded for that reason
- 3) Except as prescribed in 4 of this Article, authority to approve release shall be :
 - (a) the President acting on the advice of the Armed Forces Council in the case of an officer of colonel and above or
 - (b) the chief of the Defence Staff, or such officer as he may designate, in the case an officer of the rank of Lieutenant – Colonel and below a subordinate officer and man.
- 4) Except as provided in (3) of this article an officer or man may be released, during his service, only for the reasons and under the conditions prescribed in the table to this article.
- 5) The authority to approve the release of an officer or man under a punishment of dismissal with disgrace from Armed Forces or dismissal from Armed Forces shall be that authority who may approve the punishment in accordance with AFR and release shall be deemed to be approved upon approval of the punishment.

ARTICLE 15.02 – RELEASE AS OF RIGHT

1. Except during an emergency or when he is on active service, an officer or man is entitled to be released at the expiration of the term of service for which he is enrolled or re-engaged
2. Unless the Chief of Defence staff otherwise directs, any period of absence without leave, or desertion, shall not be reckoned towards the completion of the term of service for which an officer or man was enrolled or re-engaged.
3. Subject to (1) of this Article, no officer or man may claim his release as of right except: -
 - a) An officer not on active service (by reason of emergency)
 - i. Under item 4 (c) [on request] of the table to Article 15.01, if he is a subordinate officer who requests his voluntary retirement where he will otherwise be reverted to the rank from which he was promoted to subordinate officer;
 - ii. Under item 4 (d) [or request – other causes] of the table to Article 15.01;
 - b) A man not in active service by reason of an emergency, under item 4 (c) of the table to Article 15.01

ARTICLE 15.03 – EFFECTIVE DATE OF RELEASE

The effective date of release shall –

- a) In the case of a punishment awarded by a Court martial of dismissal with disgrace from the Armed Forces or dismissal from the Armed Forces, be as soon as practicable after approval of the punishment; and
- b) In all other cases: -
 - i. be set by the approving authority, or

- ii. if no date be set by the approving authority, be as soon as practicable after release is approved.

ARTICLE 15.04 – PLACE OF RELEASE

- 1) Except as prescribed in (2) and (3) of this Article, an officer or man shall be released in Ghana.
 - 2) An officer or man who is serving outside Ghana at the time his release is approved may, if he so requests, be released at the place where he is serving if prior approval is obtained from the Chief of Defence Staff.
 - 3) The provisions of (1) of this Article shall not apply to an officer or man who is released as a consequence of imprisonment beyond Ghana following conviction by the civil power.
 - 4) An officer or man who is an alien serving with the Ghana Armed Forces and whose release is approved, may if he so requests be released in Ghana and repatriated to his country of origin [see Article 209.73].
- B. The employment relationship between Plaintiff and Defendants must terminate by one form or made or the other.

The relevant parts of the Regulations that the 1st Defendant has power to make have been reproduced. Under Article 214 of the 1992 Constitution, it has power to make regulations on policy relating to defence and strategy and matters of finance and budget and as well as control, administration and conditions of service in the Armed Forces, acting through the Armed Forces Council and in consultation with the president of Ghana.

In the management of the Armed forces the officers who make decision are bound to comply with Article 23 that provides for administrative justice. They are required to be fair, Reasonable and there must be legal compliance in the decisions they take.

I refer to:

AWUNI

VRS.

W.A.E.C.

[2003/2004] SCGLR,

where discretionary power is exercised, the Defendants and it officers are bound to be fair, candid and they are to avoid arbitrariness, capriciousness, bias and personal dislike and discriminatory conduct that manifests in treatment of a citizen differently and to his disadvantage, mainly due to his tribe, place of origin religious belief or gender and those other imperatives stated in Article 17 of the 1992 Constitution, as well as Article 296 of the Constitution.

- C. There is a principle of law that must guide the meaning and effect that an interpreter of a Constitution, statute and non-statutory documents.

In his Book on Interpretation of Documents: Purposive Interpretation in Law Princeton and Oxford, Aharon Barak, who is a legal colossus on the law of Interpretation wrote as follows:

“In law and especially in relation to interpretation of non-statutory documents, statutes and national constitution, interpretation is often broadly defined as a rational process of determining the Legal or Normative message of a legal TEXT; often for the purpose of applying it to a

particular set of facts or situation before a court or interpreter.”

He stated also that, it is a rationale process of ascertaining the MEANING of language used in the document, and the determination of it subject to any Rule of Law or the scope or effect of the document/provision/text.

Still on purposive interpretation of documents Aharon Barak stated, the normative meaning or message of a text must or ought to bear in a context to legal interpretation. This normative meaning or message he explained speaks to specific Rights or Obligations imposed or conditions that are permitted, prohibited or directed by the Text; or which the text ought to be understood as prescribing often on pain of sanction.

- D. i) Thus applying the principles to the facts, an officer who is seeking release from the Ghana Armed Forces is enjoined to comply with stated requirements and abide by evaluative criteria in the Regulations that will determine the outcome of his application for release. There are rights, duties and obligations created and imposed, with advantages and sanctions attached in the application of the Regulations on release of a serving officer.

Whether Defendants have complied with the law and by the standard set in the constitutional provisions in the 1992 Constitution [some of which have been cited supra], is tested or measured by the veracity of the evidence led by Plaintiff or a claimant that the laws have not been complied with.

- ii) The normative standard found in the laws and in the context of the facts:
1. Thus Plaintiff herein is required to submit notice of his desire to be released or exit the service.
 2. That notice must be communicated to the Unit Commander of the Plaintiff.
 3. That application has to be processed – i.e. there is a criteria where various factors are considered in the management of the request for release.
 4. That from the rank of Colonel and above, it is the president of Ghana that has to approve the Release
 5. And from the rank of Lt. Colonel and below, it is the C.D.S. that is the approving authority.
 6. That it is permissible to Release an officer/Applicant under punishment but it is the authority that has power to approve or apply the punishment that can approve the Release.
 7. That a Run up Date, is reckoned by deduction of period of A.W.O.L., and Desertion, in the determination of the completion time of term of service.
 8. There is Release as of Right, but not without conditions as stated in Article 15.02 (3) (a) (i) (ii) and (b), which must be satisfied. Thus there is no absolute right of Release.
 9. That effective date of Release may be affected by punishment awarded either by Court martial or by the 1st Defendant acting through its other organs.
 10. That a serving officer outside Ghana cannot apply for Release except with a prior approval of that request for release made through the C.D.S. and approval is with the proviso as stated in Article 15.04 (1) of the Regulation.

This Court using the foregone meaning of the law as the framework, will put on the judicial scale, the legality or otherwise of NOT granting Plaintiff's request for Release, the continuous detention of his passport, the fact of his suspected involvement in a forgery case and its impact on his request for release.

- E. The above are the first category of triable issues on which Plaintiff and Defendants bear an equal burden of proof.

The testimony of the Defendants in rebuttal to the claim that, they have refused to release Plaintiff is that when investigation into misconduct levelled against him is/are concluded, he could be released. This could be seen in questions asked in cross-examination of the Plaintiff by Counsel for the Defendants.

There is uncontested evidence that in year 2014, Plaintiff was detained for a number of weeks after his conviction for misconduct and other offences related to discipline in the Armed Forces.

Then there is uncontroverted evidence that on or about 9/02/2016, Plaintiff was arrested for his involvement in a forgery of letterhead in an application for visa he had submitted to the Chilean Embassy in Accra.

On the aggregate of testimony heard, that investigation was concluded on 28/08/2017, when Exhibit 'AG12', a Report on the investigation was issued.

I have found that, the investigation was thorough and comprehensive, the Plaintiff was heard in his defence, so were other officers who had a role to

play. The composition of the panel and its procedures were in accordance with the requirements of Administrative justice, enshrined in Article 23 of the Constitution and as interpreted by the Supreme Court, as stated supra.

The Plaintiff was found culpable, it is clear falsehood for Plaintiff to assert as he did in the trial that, he had been acquitted and discharged and asked to resume work. If the Report was not given to Plaintiff as he has said, albeit without contestation, how did he come by the information that he was acquitted and discharged?

I find and hold that from February, 2016 to 28/08/2017, Plaintiff was under investigation and he could not be released within that period. Plaintiff who is said to be on A.W.O.L. issued a writ on 18/08/2016. It stands to reason that no determination of matters he has raised in this trial could be determined by the Defendant as that will amount to the usurpation of the powers of this Court as enshrined in Article 125 and 127 of the 1992 Constitution.

I have also found that Plaintiff has been found after a trial not to be punctual and that he is an officer with bad attitude. This is in Exhibit 'AG11' and '3' [where he refused to attend a course at Teshie Army Training School] and it is incontrovertible. He was sanctioned accordingly, but the period is relevant to his application for release, even though prior in time Plaintiff had been reduced in rank as punishment and Exhibit 'AG1' is corroborative of that, this is his track record which is neither admirable nor exemplary.

It stands to reason that, it is accurate when the Defendants asserted that he has not been released, because the process which had commenced was

halted by Plaintiff's misconduct as in the forgery episode in January, 2016, that investigation ended on 28/07/2017. If it asked rhetorically why he has not been released since then, the intervening factor or reason is his suit filed on 18/08/2016.

The processing of Release is a statutory duty which must be performed transparently as noted already, but it took two (2) years from the time the application was made i.e. March, 2015 [i.e. soon after his conviction in year 2014] to 2017 to conclude an investigation of a case of misconduct against him as in Exhibit 'AG12'.

The Defence has established satisfactorily that, it did not REFUSE to Release the Plaintiff, but the investigation of him and the litigation kept the process in abeyance.

Thus the law on Release of persons found liable of misconduct must apply to Plaintiff, within time which is practicably possible, that is to say within a reasonable time.

This Court is fortified in its finding as stated supra with the meaning of what Administrative justice entails as explained by the Supreme Court in the AWUNI case cited supra.

The apex Court stated:

"In my ... the scope of Article 23 is such that there is no distinction made between acts done in exercise of ordinary administrative functions and quasi-judicial administrative functions. Where a body or officer has an administrative function to perform the activity must be conducted with

and reflect the qualities of FAIRNESS, REASONABLENESS and LEGAL COMPLIANCE ... at the very least however, ... it includes probity, transparency, objectivity, opportunity to be heard, legal competence and absence of bias or ill will. In particular where as in this case, the likely outcome of administrative activity is of panel nature.”

Furthermore, the Common Law of Ghana as stated in the case:

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defines what unreasonable conduct is in the following terms, as a conduct that suffers from

- i. illegality
- ii. irrationality and
- iii. procedural impropriety

Thus the question is, has the conduct of Defendants in the handling of Plaintiff's request for release complaint with the standard, as stated by the Supreme Court, this is crux of the whole case.

The Supreme Court explained the first TEST of Illegality or otherwise of the decision under scrutiny, to mean or connotes that, the decision maker must understand and correctly apply the law that regulates his decision making power and give effect to it.

Secondly, by the TEST of Irrationality or otherwise of the decision which has been challenged or complained about, the apex Court defined that to mean that, the decision taken or the conduct must be the kind which could be properly described as outrageous and by its nature constitutes defiance of logic or accepted moral standard that no person who had applied his mind to the question to be decided, could have arrived at it.

Thirdly, it was explained that a decision that suffers from PROCEDURAL IMPROPRIETY, is one which was arrived at or made by failing to act with procedural fairness towards the person who will be affected by the decision.

Finally, another decision of the Supreme Court, which provides the mechanism of measuring whether public sector decision making conduct and management of the business of government or its Agency has been done in accordance with the laws and regulations is

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[2015/2016] SCGLR at 48

In the judgment of BENIN J.S.C. could be found a very concise TEST for evaluation of propriety or otherwise of administrative and quasi-judicial decision making by public sector institution and their officers.

The summary of what the eminent jurist stated is as follows:

- i. Is the Agency action arbitrary capricious, an abuse of discretion or
- ii. Is the Agency action contrary to constitutional Right and

iii. Has the Agency acted without principle or reason?

The answers to these set of criteria must be affirmative otherwise the decision taken by the Agency must not be permitted to stand.

In other words, a decision which is tainted with arbitrariness capriciousness abusive of discretion and without principles nor reason, is a decision that must be annulled so that the rights of the citizen or the complainant could be upheld and the bounce of the rule of law maintained for the greater good and promotion of an accountable democratic governance environment.

BY COURT:

1. (a) On the preponderance of the probabilities, Plaintiff has failed to prove that Defendants have refused or failed to process and determine his application for Release from the Armed Forces and in contravention of the law and have unlawfully held into his passport whilst he had been exonerated on a forgery charge Defendant had investigated against him.

On the preponderance of probabilities, the Defendants have proved that in year 2012, Plaintiff had been issued with kits when it was available, selected on UNFIL, mission on 22/12/2010, as in Exhibit AG1 and promoted and demoted having been converted hence the fact that Plaintiff is not on the same rank with colleagues in the same intake cannot be attributed to discriminatory and unfair treatment of Plaintiff.

- (b) On the second category of triable issues, on salary etc., which I said can only be predicated on successful proof of the first categories of issues, I must state are issues Plaintiff has failed to establish as well.

2. (a) The reliefs endorsed on the writ of summons taken from this Court on 18/02/2016, are dismissed with a proviso that Plaintiff shall be RELEASED within a reasonable time.
 - (b) This case is adjourned to 12/12/2023 for a report on formal Release, termination of the relationship between the parties at 9:00 a.m.
3. No cost awarded.

(SGD.)

**H/L NICHOLAS M.C. ABODAKPI
JUSTICE OF THE HIGH COURT**

REFERENCES:

1. *AWUNI VRS. W.A.E.C. [2003/2004] SCGLR*
2. *THE REPUBLIC VRS. HIGH COURT, ACCRA EX PARTE: CHRAJ [INTERESTED PARTY] [2003/2006] SCGLR*
3. *ABU RAMADAN & NIMAKO NO.2 VRS. THE ELECTORAL COMMISSION & ANOR. [2015/2016] SCGLR at 48*