

**COI QUERY**

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| Country of Origin | Kenya |
| Main subject | Desertion from the Kenya Defence Forces (KDF) |
| Question(s) | <ol style="list-style-type: none">1. Information on whether a member of the Kenya Defence Forces (KDF) is considered a civil servant2. Information on penalties for officers deserting from the army3. Information on cases of ill-treatment of deserters in Kenyan prisons (2013-2018)4. Information on possible punishments against former military officers who have been arrested and convicted abroad |
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This response to a COI query has been elaborated according to the [Common EU Guidelines for Processing COI](#) and [EASO COI Report Methodology](#).

The information provided in this response has been researched, evaluated and processed with utmost care within a limited time frame. All sources used are referenced. A quality review has been performed in line with the above mentioned methodology. This document does not claim to be exhaustive neither conclusive as to the merit of any particular claim to international protection. If a certain event, person or organisation is not mentioned in the report, this does not mean that the event has not taken place or that the person or organisation does not exist. Terminology used should not be regarded as indicative of a particular legal position.

The information in the response does not necessarily reflect the opinion of EASO and makes no political statement whatsoever.

The target audience is caseworkers, COI researchers, policy makers, and decision making authorities. The answer was finalised on the 7 August 2018. Any event taking place after this date is not included in this answer.

COI QUERY RESPONSE

1. Information on whether a member of the Kenya Defence Forces (KDF) is considered a civil servant

Under Subsection (3) of Section 232 of the Constitution (2010), the public service is defined as ‘(a) all State organs in both levels of government; and (b) all State corporations’¹.

The Constitution mentions explicitly the ‘Kenya Defence Forces’ in its article 241².

Section 233 of the Constitution provides for the Public Service Commission which is responsible for the functions, organisation and administration of the public service³ in Kenya⁴.

In Induction Handbook for the Public Service in Kenya, published by the state Public Service Commission in October 2016, the authors distinguish between the public service and the civil service⁵. The former means ‘the collectivity of all individuals performing a function within a State Organ. The Public Service is the principal organ of service delivery by the government’⁶. The latter, according to the same source, is ‘the policy implementation arm of the Government’ and ‘is constituted by ministries and State Departments’⁷.

Concerning the relations between the Public Service Commission and the KDF, Subsection (2) of Section 28 of the Kenya Defence Forces Act states that ‘In developing the criteria for the recruitment, promotion and transfer of members of the Defence Forces, the Defence Council shall consult with the Public Service Commission’⁸. Additionally, under Subsection (2) of Section 29, ‘The Defence Council shall, in consultation with the Public Service Commission, determine the conditions of service of members of the Defence Forces’⁹.

Despite the fact that a specific function is not foreseen in the Constitution, several sources indicate that the Head of Civil Service, the post established by President Kenyatta in 2013, heads all civil servants in the country¹⁰. However, as claimed by Joseph Kinyua, the current Head of Civil Service, in

¹ Republic of Kenya, *Constitution of Kenya 2010*, Section 233, ([url](#)).

² Republic of Kenya, *Constitution of Kenya 2010*, Section 241, ([url](#)).

³ Kenya ‘is divided into 47 counties. Counties are governed by county governments. The counties are led by a county governor and have a county assembly. At each of these levels of administration, there are professionals employed. The employees of Kenya’s civil service are referred to as civil servants’ and civil servants ‘advise and assist in running departments, ministries and counties. See: Fortune of Africa, *Kenyan Civil Service*, n.d. ([url](#)).

⁴ Republic of Kenya, *Constitution of Kenya 2010*, Section 233, ([url](#)).

⁵ Republic of Kenya, Public Service Commission, *Induction Handbook for the Public Service*, October 2016, p. 21 ([url](#)).

⁶ Republic of Kenya, Public Service Commission, *Induction Handbook for the Public Service*, October 2016, p. 21 ([url](#)).

⁷ Republic of Kenya, Public Service Commission, *Induction Handbook for the Public Service*, October 2016, p. 21 ([url](#)).

⁸ Republic of Kenya, *Kenya Defence Forces Act (Act No. 25 of 2012)*, 2012 ([url](#)).

⁹ Republic of Kenya, *Kenya Defence Forces Act (Act No. 25 of 2012)*, 2012 ([url](#)).

¹⁰ Kenyans.co.uk, *Chief of Staff Joseph Kinyua Revokes Amina Mohamed’s Appointments*, 1 February 2017 ([url](#)); Standard Digital, *Joseph Kinyua: Kenya’s most powerful civil servant*, 30 September 2013 ([url](#)); Standard Digital, *Three in line to replace Joseph Kinyua as Head of Public Service and Secretary to the Cabinet*, 19 May 2018 ([url](#)).



an article by Kenyans, a Kenyan online news portal¹¹, 'His role was not designed to take away power from the Public Service Commission (PSC) rather, to coordinate civil servants on behalf of the president'¹²

Several sources refer to military personnel as civil servants¹³.

In an article published on 18 October 2015, by the Daily Nation¹⁴, a Kenyan online newspaper, Bogita Onger, the Department of Defence Spokesman, is quoted as saying that 'The salaries for the KDF are reviewed every four years. You will recall that salaries for other civil servants were reviewed on March 1, 2013. That should have led to the harmonisation of the KDF salaries but we follow the four-year cycle and they had to wait'¹⁵.

An article by the Standard Digital, published on 2 December 2017, informs that a report on allowances in public institution in Kenya by the audit firm Deloitte 'found 61 categories of allowances paid to civil servants' which, according to the same report, include the KDF¹⁶.

According to a more recent article dated 27 April 2018, the government announced a rise in the salaries of several categories of civil servants, including the Kenya Defence Forces¹⁷.

2. Information on penalties for officers deserting from the army

As specified by Section 241 of the 2010 Constitution of Kenya, the Kenya Defence Forces (KDF) consist of the Army, the Navy and the Air Force¹⁸. The KDF are governed by the 'Kenya Defence Forces Act', which provides for the functions, organisation and administration of the KDF within the framework of the Constitution¹⁹.

In 2016, an article by the Standard Digital, a Kenyan online news portal²⁰, notes that 'More than 800 soldiers have left the Kenya Defence Forces (KDF) since the Somalia operation began in 2011. KDF

¹¹ Kenyans.co.uk is a Kenyan online portal based in Nairobi, Kenya, which covers politics, business, technology and sports and, besides, 'provides profiles for artists, politicians, all Kenyan music video as well as other resources on our platform.' For further information, see: Kenyans.co.uk, Facebook profile – Kenyans.co.uk: About, n.d. ([url](#)).

¹² Kenyans.co.uk, Joseph Kinyua Explains His Role as Head of Public Service, 10 Thursday 2018 ([url](#)).

¹³ Daily Nation, Military pay reviewed, teachers' pain mounts, 18 October 2015 ([url](#)); Standard Digital, Salaries commission to scrap some hefty allowances enjoyed by civil servants, 7 February 2017 ([url](#)); Standard Digital, Government seals pay rise deal with civil servants in court, 2 December 2017 ([url](#)).

¹⁴ The Daily Nation is a private Kenyan newspaper founded in 1958. For more information, see: Daily Nation, Facebook profile – Daily Nation: About, n.d. ([url](#)); ABYZ News Links, Kenya, n.d. ([url](#)).

¹⁵ Daily Nation, Military pay reviewed, teachers' pain mounts, 18 October 2015 ([url](#)).

¹⁶ Standard Digital, Salaries commission to scrap some hefty allowances enjoyed by civil servants, 7 February 2017 ([url](#)).

¹⁷ Standard Digital, Public workers handed Sh45 billion in hefty salary hikes, 27 April 2018, ([url](#)), accessed 7 August 2018

¹⁸ Republic of Kenya, Constitution of Kenya 2010, Section 241, 2010 ([url](#)).

¹⁹ Republic of Kenya, Kenya Defence Forces Act No. 25 of 2012, ([url](#)); Republic of Kenya, Kenya Defence Forces (Amendment) Act, Act No. 44 of 2016, ([url](#)); Global Security, Kenya Defence Forces, n. d. ([url](#)).

²⁰ The Standard digital, owned by The Standard Group, is a private Kenyan online news portal which 'delivers breaking news from across Kenya and the globe. It gives the audience information on the latest political stories, business, sports and entertainment.' For further information, see: Standard, Standard Digital ranked top news site in Kenya, 3 February 2018 ([url](#)); ABYZ News Links, Kenya, n.d. ([url](#)).

Director of Prosecution Brigadier Kenneth Okoki Dindi told a Mombasa court that the soldiers left for various reasons, including desertion²¹.

‘Offences related to desertion and absence without leave’ are regulated by Sections 74, 75 and 76 of the aforementioned Act²². A person commits desertion if he or she deserts or persuades or procures any person to desert, as stated in Section 74 of the Act²³. Similarly, Section 75 of the same Act states that a person commits ‘absence without leave’ if he or she is absent without leave or persuades or procures any person to be absent without leave²⁴.

Under Subsection (2) of Section 74, a person is regarded as a deserter as follows:

‘(a) with the intention, either at the time or formed later, of remaining permanently absent from duty—

(i) leaves the Defence Forces; or

(ii) fails to join or rejoin the Defence Forces when it is the person's duty to join or rejoin them;

(b) being an officer, enlists in or enters the Defence Forces without having resigned the person's commission;

(c) being a service member, enlists in or enters the Defence Forces without having been discharged from any previous enlistment;

(d) is absent without leave, with intent to avoid serving in any place outside Kenya, or to avoid service or any particular service when before an enemy; or

(e) is absent without leave for a continuous period of more than ninety days²⁵.

As stated in Subsection (3) of the same Section, an accused of desertion is subject to trial by a court martial and, if convicted, is liable to imprisonment:

‘(a) to imprisonment for life or any lesser punishment provided for by this Act if—

(i) the offence was committed under subsection (1)(a), the person was on active service or under orders for active service at the time when it was committed; or

(ii) the offence was committed under subsection (1)(b) the person in relation to whom it was committed was on active service or under orders for active service at that time; or

²¹ Standard Digital, *800 soldiers quit Kenya Defence Forces after Somali invasion*, 4 November 2016 ([url](#)).

²² Republic of Kenya, *Kenya Defence Forces Act (Act No. 25 of 2012, amended Act No. 44 of 2016)*, 2012 ([url](#)).

²³ Republic of Kenya, *Kenya Defence Forces Act (Act No. 25 of 2012, amended Act No. 44 of 2016)*, 2012 ([url](#)).

²⁴ Republic of Kenya, *Kenya Defence Forces Act (Act No. 25 of 2012, amended Act No. 44 of 2016)*, 2012 ([url](#)).

²⁵ Republic of Kenya, *Kenya Defence Forces Act No. 25 of 2012*, ([url](#)); Republic of Kenya, *Kenya Defence Forces (Amendment) Act, Act No. 44 of 2016*, ([url](#)).

(b) to imprisonment for not more than two years, in any other case'²⁶.

It is worth noting that, under Section 75 of the same Act, a person who commits an offence of absence without leave 'shall be liable, on conviction by a court-martial, to imprisonment for a term not exceeding two years or any lesser punishment provided for by this Act'²⁷.

Subsection (3) of Section 76 establishes an offence of absence without leave:

'(a) without authority, leaves his or her place of duty;

(b) without authority, is absent from his or her place of duty; or

(c) having been authorised to be absent from his or her place of duty, fails to return to his place of duty at the expiration of the period for which the absence of that person was authorised'²⁸.

It should be noted that, according to an article published, in 2016, by the Kenyan newspaper 'The Star'²⁹, 'Military officers are not allowed to resign until they serve for 10 years'³⁰.

3. Information on cases of ill-treatment of deserters in Kenyan prisons (2013-2018)

Among all sources consulted and within the timeframe allocated to respond to this query, no specific information could be found on the ill-treatment of deserters, in Kenyan prisons, during the period 2013 - 2018.

However, information was found on the general situation in Kenyan prisons as well as on the treatment of deserters by the KDF.

The 2017 report on human rights practices by the US State Department (US DoS) indicates the following:

'Human rights organizations reported that prison, detention center, and police station conditions were harsh due to overcrowding, food and water shortages, and inadequate sanitary conditions and medical care. A Directorate of Health Services in the Prisons Department oversees health and hygiene issues'³¹.

²⁶ Republic of Kenya, *Kenya Defence Forces Act No. 25 of 2012*, ([url](#)); Republic of Kenya, *Kenya Defence Forces (Amendment) Act, Act No. 44 of 2016*, ([url](#)).

²⁷ Republic of Kenya, *Kenya Defence Forces Act No. 25 of 2012*, ([url](#)); Republic of Kenya, *Kenya Defence Forces (Amendment) Act, Act No. 44 of 2016*, ([url](#)).

²⁸ Republic of Kenya, *Kenya Defence Forces Act No. 25 of 2012*, ([url](#)); Republic of Kenya, *Kenya Defence Forces (Amendment) Act, Act No. 44 of 2016*, ([url](#)).

²⁹ The Star is a Kenyan online news portal established in 2011 in Nairobi which claims to be 'The Political Voice of Kenya'. The Star, *Facebook profile – The Star: About*, n.d. ([url](#)); ABYZ News Links, *Kenya*, n.d. ([url](#)).

³⁰ The Star, *Why Muslim officers are leaving KDF*, 30 July 2016 ([url](#)).

³¹ US DoS, *Country Report on Human Rights Practices 2017 – Kenya*, 20 April 2018 ([url](#)).

In 2016, the KDF was in the spotlight for the treatment of its soldiers, including those with mental conditions ‘charged with committing offences under military law’³². An article by the Daily Nation states that court documents ‘provide interesting insights into the military’s “hard justice” with soldiers being held in detention for long periods without trial and, in certain cases, being summarily dismissed’³³. According to the same article, several defense lawyers expressed their concern over the manner in which trials proceeded and, moreover, accused courts of deciding cases before defendants were brought to courts³⁴.

In 2018, the Kenya High Court freed respondents convicted of desertion by a court martial³⁵. Originally, 25 soldiers, who claimed to have resigned, were charged with deserting in 2007 and 2008 and sentenced to life imprisonment for desertion at war³⁶. An article by the Daily Nation, published on 19 April 2018, informs that, according to a judge, ‘prosecution failed to prove its case’ and the judge argued that ‘life imprisonment handed the former soldiers was excessive’³⁷. As reported in the same article, ‘The judge noted that charges preferred against the soldiers were flawed and that the court martial erred in law and facts in making a determination that the respondents were active in service’³⁸.

In addition, in an article on the same case, published on 25 August 2015, Kenyan.co.uk reports that ‘The ex-soldiers have accused KDF of using coached witnesses to jail them unlawfully. They blame the KDF for torturing them mentally and physically while in Mtongwe’³⁹.

4. Information on possible punishments against former military officers who have been arrested and convicted abroad

The Kenya Defence Forces Act does not include any special provisions for former military officers who are arrested and convicted abroad.

Nevertheless, Section 133 of the Act establishes punishment for a person who commits a civil offence whether in Kenya or elsewhere:

‘ (1) A person subject to this Act who commits a civil offence whether in Kenya or elsewhere, shall be, on conviction by a court-martial—

(a) if the civil offence is treason or murder, sentenced to death; and

³² Daily Nation, *Hard justice: How Kenya’s military deals with errant soldiers*, 15 May 2016 ([url](#)).

³³ Daily Nation, *Hard justice: How Kenya’s military deals with errant soldiers*, 15 May 2016 ([url](#)).

³⁴ Daily Nation, *Hard justice: How Kenya’s military deals with errant soldiers*, 15 May 2016 ([url](#)).

³⁵ Daily Nation, *State wants 25 former soldiers jailed for life for deserting duty*, 19 April 2018 ([url](#)); Kenyan News, *State appeals after court frees KDF deserters*, 18 April 2018 ([url](#)).

³⁶ Citizen TV, *25 KDF soldiers acquitted of deserting duty*, 21 April 2015 ([url](#)). Citizen TV is a private online television station founded in 2009. It intends to ‘be and remain the biggest and most trusted media organization in the region’. For further information, see: Citizen TV Kenya, *Facebook page - Citizen TV Kenya: About*, n.d. ([url](#)). Standard Digital, *Ex-military officer sentenced to life imprisonment for deserting duty*, 27 September 2014 ([url](#)).

³⁷ Daily Nation, *State wants 25 former soldiers jailed for life for deserting duty*, 19 April 2018 ([url](#)).

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³⁹ Kenyans.co.uk, *Why Ex-KDF Soldiers Had Been Jailed for Life*, 25 August 2015 ([url](#)).



(b) in any other case, liable to any punishment which a civil court could award for the civil offence if committed in Kenya being one or more of the punishments provided for by this Act, or such punishment, less than the maximum punishment which a civil court could so award, as is provided for by this Act'⁴⁰.

The Kenyan Ministry of Foreign Affairs and its embassies provide general recommendations for citizens arrested abroad and offer assistance to those in distress⁴¹. As recommended by the Consular section at the Kenya High Commission in the United Kingdom, a person who is arrested and detained should 'seek an explanation from the law enforcers and ask to talk to the Consular section at the Kenya High Commission'⁴².

On 9 March 2018, The Star reports that approximately 1,300 Kenyan citizens are imprisoned abroad⁴³. The same article notes that 'Out of these 478 have been convicted while the rest are still on holding'⁴⁴.

⁴⁰ Republic of Kenya, *Kenya Defence Forces Act No. 25 of 2012*, ([url](#)); Republic of Kenya, *Kenya Defence Forces (Amendment) Act, Act No. 44 of 2016*, ([url](#)).

⁴¹ The Star, *Foreign jails hold 1,300 Kenyans, says CS Juma*, 9 March 2018 ([url](#)); The Star, *Locked up: 183 Kenyans are held in foreign jails*, 6 February 2017 ([url](#)); Kenya Consulate General in Los Angeles, *In Case of Arrest*, n.d. ([url](#));

⁴² Kenya High Commission, *Other Services* n.d. ([url](#)).

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