



REPUBLIC OF KENYA



KENYA LAW
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**Dogow v Republic (Criminal Appeal 6 of 2006)
[2023] KEHC 23310 (KLR) (Crim) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL 6 OF 2006**

GL NZIOKA, J

SEPTEMBER 29, 2023

BETWEEN

HASSAN ABDILLAHI DOGOW APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision in Criminal Case No. 1 of 2006 in the Court Martial at Langata Barracks before Hon Lillian Mutende delivered on 26th May, 2006)

JUDGMENT

1. The background facts of the matter are that the accused was arraigned before the trial court charged with various offences as stated here-below: -
 - a) Count 1 - Committing a civil offence contrary to section 69 (1)(a) of the *Armed Forces Act*, that is to say murder contrary to section 203 of the Penal Code as read with section 204 of *Penal Code*.
 - b) Count 2 and 3 - Committing a civil offence contrary to Section 69(1) of the *Armed Forces Act*, that is to say causing grievous bodily harm contrary to section 234 of the *Penal Code*
 - c) Count 4- absent without leave contrary to Section 32(a) of the *Armed Forces Act*.
 - d) Count 5- making away with a firearm contrary to Section 42(e) of the *Armed Forces Act*.
 - e) Count 6 -making away with ammunition contrary to Section 42 (e) of the *Armed Forces Act*
2. The prosecution case was that he enlisted into the Armed Forces on 18th July 1994 and having trained as a soldier he was posted to 5 Kenya Rifles as an infantryman. In April 2005, he was deployed to Wajir Military Camp.



3. On the 18th April 2005 he was one of the soldiers given a task of escorting JET A1 and Canteen to Elwak and issued with a Light Machine Gun Butt Number 34 Registration Number F2086 and some 112 rounds of 7.62mm ball ammunition.
4. That on their return journey, while at Lafale near the Kenya Broadcasting Corporation Repeater Station in Wajir District, he fatally shot No. 70854 Private Kenneth Njuguna and that in the course of the said shooting, No. 74432 Private John Gitau and No. 74087 Private Aggrey Otunga sustained bodily injuries.
5. Further immediately after the shooting he left without leave from duty and disappeared, with a firearm and ammunitions issued to him. He was not seen until 30th June 2005 when he was arrested and taken to the District Commissioner's office, Wajir, then the Officer Commanding the Police Division who to No. 18974 Major Shabello. Thereafter investigations were carried out and he was charged.
6. The trial court record show that, at the close of prosecution case, the appellant was informed of his constitutional rights and the meaning thereof in accordance with Rule 58 (1) of the *Armed Forces Rules of Procedure*. That the Defense Counsel, Justice Omondi Tunya (Rtd), advised his client appropriately and they elected to make an unsworn statement.
7. However, following an adverse ruling against them they changed their mind and the appellant opted to remain silent but called a witness. That it was the defense case was that prior to the fateful day, the accused had suffered from Malaria.
8. At the close of the case he was convicted on the 1st to 5th count and sentenced as follows; -
 - a) Charge one - The Court Martial sentences you to suffer death.
 - b) Charge two- The Court Martial sentences you to be imprisoned for 10 years.
 - c) Charge three- The Court Martial sentences you to be imprisoned for 5 years
9. It is noteworthy that the proceedings from the trial court are in complete as to the sentence meted out on count 4 and 5 and since the original could not be traced, the court has to do with what is before it.
10. By a petition of appeal filed on the 14th June 2006, the appellant appeals against the conviction and sentence meted against him vide Court Martial Criminal Case No. 1 of 2006.
11. He relies on the following grounds in the petition of appeal, verbatim reproduced: -
 - a. That I plead not guilty to the charge.
 - b. That the trial magistrate erred in law when she convicted the appellant failing to observe that I was not mentally examined as prescribed by the law especially in cases of this nature.
 - c. That the trial magistrate erred in law when convicting me failing to observe that I was denied my fundamental right when I was not given an interpreter who understands my common language (Somali)
 - d. That the trial magistrate further erred in law when she convicted the appellant relying on prosecution evidence without considering that the same was riddled with many flows and contradictions of which it was not enough to sustain any conviction.
 - e. That the trial magistrate erred in law when she held a case of this nature of which it's a capital offence which the degree of prove was so high for her to hear, therefore to prejudice I the accused.



- f. That the trial magistrate still erred in law when she convicted the appellant without giving me an opportunity to defend myself that the date that was kept for my defence is when it was supposedly was judgment day.
12. It suffices note that, from the time the appellant filed the appeal on 14th June 2006, the appeal was not canvassed at all, because the record of the trial court could not be traced. I was seized of this matter on 19th September 2021, when I was posted to Court Criminal Division of the High Court at Milimani Nairobi. The matter had been pending for 15 years.
13. The court did all it could as per record to obtain the proceedings. In the meantime, as can be seen from the proceedings of 17th September 2021, the appellant abandoned the appeal on conviction and opted to pursue appeal on sentence alone seeking for a non-custodial sentence. On the 8th October 2021, the appellant applied to withdraw notice of appeal allegedly filed in the Court of Appeal vide Appeal No. 106 of 2006.
14. By 6th January 2022 the proceedings of the trial court were eventually obtained and on 28th March 2022 the respondent filed grounds of opposition to the application which states as follows
- a) That the prosecution proved its case against the Appellant to the required standard of beyond reasonable doubt.
 - b) That the Appellant was convicted on sound evidence that was clear, candid and consistent.
 - c) That there is no legal requirement for mental assessment before trial unless the court notes tendencies requiring such psychiatric attention.
 - d) That even if there was such a need, it is clear from the record of proceedings that he was assessed and a medical report filed confirming that the appellant was fit to stand trial.
 - e) That the appellant was represented by counsel and had the opportunity and indeed cross-examined all witnesses.
 - f) That the appellant's appeal lacks merit and should accordingly be dismissed.
15. On 18th May 2022, the court noted the appellant appeal was filed out of time. He was directed to file an application for leave for the appeal to be admitted out of time. However, he declined to do so and hence forth to participate in the matter. He told the court that he has opted to serve the sentence as he has been in court for too long. It was evident to the court that he had despaired.
16. The appellant was then advised to consider an application for re-sentencing following the decision in; *Francis Karioko Muruatetu & another v Republic* [2017] eKLR but he declined to do so however eventually he sought for leave to appeal out of time vide High Court Misc. E175/2022 which was allowed.
17. The court ordered the parties to file submissions and fixed the matter for judgment on 20th September 2022. The appellant declined to comply. The matter remained dormant following my transfer to Naivasha High Court. On 30th August 2023 the matter was listed for further orders. The appellant did not attend court and left the matter to court.
18. I have considered the appeal and I find that following the decision in *Muruatetu* (supra) the mandatory death sentence has been declared unconstitutional and therefore the court can exercise its discretion in sentencing in offences of murder.



19. In considering alternative term sentence, the Supreme Court of Kenya gave the following guideline: -

“ [71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.”

20. In the instant matter I note that, the appellant has conceded to conviction. As regards sentence he was sentenced on; 26th May 2006 therefore he has served an imprisonment term of seven years (17) years without remission. With remission he would have been given a sentence of twenty-five (25) years and be eligible for release now after seven years (17) years.

21. He is quite elderly most likely aged over 70 years. His age would have been established with certainty through pre-sentence report but he declined to be interviewed.

22. From the conduct of the appellant he has despaired and given up on life. He even opted to be left to serve the sentence of death. His resentment is understandable by virtue of the fact that; the appeal has taken all the while to be concluded.

23. It is the considered opinion of this court that, he has served adequate period and most likely the duration of all the other sentence held in abeyance and overtaken by events. However, before he is released I direct the Probation Department establish whether it will be accepted by the family and society for re-integration and/or a security threat to the society. The report be availed in two (2) weeks' time.

24. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant in court virtually

Ms Odour for the State

Ms Ogutu: Court Assistant

