



REPUBLIC OF KENYA



**KENYA LAW**  
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**Emmodoh v Republic (Criminal Appeal 34 of 2019)  
[2023] KEHC 25853 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25853 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL APPEAL 34 OF 2019  
F GIKONYO, J  
NOVEMBER 23, 2023**

**BETWEEN**

**JAMES EMMODOH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. W. Juma  
(CM) in Narok CMCR No. 1124 of 2018 delivered on 27.06.2019)*

**JUDGMENT**

1. The appellant was charged with the offence of desertion from service contrary to Section 94(1) as read with 94(3) of the *National Police Service Act* No. 11A of 2011.
2. It is alleged that on diverse dates between 16.02.2018 and 28.03.2018 at DCI offices in Narok North Sub-county within Narok county, without leave or just cause absented himself from duty for a period exceeding ten days.
3. The prosecution called 1 witness while the defense gave sworn testimony and called two witnesses.
4. The appellant was found guilty, convicted, and sentenced to serve two years' probation.
5. Having been dissatisfied with the conviction and sentence he filed this appeal.
6. The appellant filed his grounds of appeal dated July 29, 2019 as follows;
  - i. That the learned chief magistrate erred in law and in fact by relying on evidence of the investigating officer without corroboration from the station in charge Emurua Dikirr police station.



- ii. That the learned chief magistrate erred in law and fact in failing to take into consideration the mental status of the applicant hence subject him into medical assessment before taking plea and subsequent hearing.
- iii. That the learned chief magistrate erred in law and fact and failed to direct herself into the defence witness 2 Dr. Moses Githinji a medical practitioner who examined the applicant herein when he found aimlessly walking in Thika.
- iv. That the learned chief magistrate erred in law and fact and failed to direct herself into the defence witness 3 Ephraim Emmodo who attended to the appellant.
- v. That the learned chief magistrate erred in law and in fact in convicting the appellant into 2 years' probation without proof as to the offence.
- vi. That the learned chief magistrate erred in law in failing to find that the charges as to desertion were only subjective to normalcy but not in other proven underlying circumstances.
- vii. That the learned chief magistrate erred in law and fact in failing to find that the accused could not have been traced in Thika under the subjective conditions if his mental status was in order.
- viii. That the learned chief magistrate erred in law and fact in failing to find that the facts supporting the absence of the appellant was based on medical grounds as per the medical report as adduced were sufficient to warrant an acquittal of the appellant.
- ix. That the learned chief magistrate erred in law and failing to find that the investigating officer's statement were mere uncorroborated documents which ought to have been authenticated by its maker.
- x. That the learned chief magistrate erred in law and fact in admitting electronic evidence in respect of a signal without a certificate as required.
- xi. That the learned chief magistrate erred in law and wrongly convicted the appellant before cautioning the appellant.

#### **Directions of the court**

7. The appeal was canvassed by way of written submissions. The appellant has filed. The respondent has not filed.

#### **The appellant's submissions.**

8. The appellant submitted that on the diverse dates alleged he had been directed to proceed to Trans Mara East DCIO's office as it was the station he was required to work at as per the marching orders dated February 5, 2018.
9. The appellant submitted that he was suffering from a trauma-related illness. His misgivings to the force arose as a result of several transfers meted on him which was affecting his family and made his wife agitated hence threatening to leave. He was posted to Narok North from Juja on July 27, 2017 and only transferred to Trans Mara East DCIO's office in January 2018. The issues made him stressed till he found himself in Melchizedek Hospital in Ngong where he was treated and given 21 days of sick off. His evidence was corroborated by DW2 and DW3.
10. The appellant submitted that the period of absence as per the charge sheet does not conform with the sections of the law therein referenced. The law is clear that the desertion period unless a just cause is



shown the period should be 21 days unfortunately the charge is pegged at 10 days. According to police standing orders, the appellant was entitled to enough period for reorganizing himself after the transfer which period should not be less than 14 days.

## **Analysis and Determination**

### **Court's Duty**

11. The duty of the first appellate court is to re-evaluate the evidence presented at trial and draw its own conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses firsthand. Thus, demeanor is best observed by the trial court (*Okeno v Republic* [1972] E.A 32).
12. I have perused the lower court record, written submissions, and authorities relied upon by the appellant.
13. The main issue arising herein is: -
  - i. Whether the prosecution proved its case beyond reasonable doubt.
14. However, there is an objection to the charge on the basis that the Act cited was erroneous, thus, making the charge faulty, which is of preliminary significance.

### **Objection: charge faulty**

15. The applicant was charged with the offence of desertion from service contrary to Section 94(1) as read with Section 94(3) of the [National Police Service Act](#) No. 11A of 2011.
16. Section 94(1) and (3) of the [National Police Service Act](#) No. 11A of 2011 provides that
  94. Desertion
    - (1) A police officer who absents himself from duty without leave or just cause for a period exceeding twenty-one days shall, unless the contrary is proved, be considered to have deserted from the Service.
    - (3) Any police officer who deserts from the Service commits an offence and is liable on conviction to summary dismissal or imprisonment for a term not exceeding two years or to a fine not exceeding one hundred thousand shillings.
17. The above law was revised and the [National Police Service Act](#) Chapter 84([NPS Act](#) Revised 2014) was enacted. Section 94(1) and (3) of the [National Police Service Act](#) Chapter 84([NPS Act](#) Revised 2014) provides: -
  94. Desertion
    - (1) A police officer who absents himself from duty without leave or just cause for a period exceeding ten days shall, unless the contrary is proved, be considered to have deserted from the Service.
    - (3) Any police officer who deserts from the Service commits an offence and is liable on conviction to summary dismissal or imprisonment for a term not exceeding two years.



18. Given the period when the offence was committed “on diverse dates between 16.02.2018 and 28.03.2018’, the Act that was in force at the time of the offence was NPS Act Revised 2014. It therefore implies that there was an error in the long title of the Act.
19. According to Section 134 of the CPC requires: -

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.
20. The applicant was charged with the offence of desertion from service. The particulars of the charge are that he deserted from service for a period exceeding ten days- ‘on diverse dates between February 16, 2018 and March 28, 2018 at DCI offices in Narok North Sub-county within Narok county’. Accordingly, the offence and particulars relate to offence of desertion established in section 94(1) of the NPS Act Revised 2014. And, the relevant penalty section is section 94(3) of the said Act. These sections cited in the charge are the correct sections in the Revised Act.
21. The evidence adduced was in support of the charge as stated.
22. Therefore, despite the anomaly in the long title of the Act, the charge contained, a statement of the specific offence with which the accused person is charged and the relevant sections thereto, together with specific particulars necessary for giving reasonable information as to the nature of the offence charged. The charge is therefore sufficient in law and the anomaly noted did not detract from the specific offence charged or the substance of the charge.
23. The charge does not offend the Rules for the Framing of Charges and Information in section 137 of the CPC.
24. The appellant seems to rely on the repealed law to argue his appeal especially that desertion is for a period not exceeding 21 days. This is contrived.
25. Nonetheless, it is absolutely important that the DPP should cite the applicable law in the charge sheet, and in case of such anomaly, amend the charge accordingly to avoid objections of this nature.
26. The objection does not hold sway and the ground of appeal based on the objection is dismissed.

### **Proof of charge**

27. The prosecution carries the onus of proving the charge beyond reasonable doubt.
28. Was the charge proved?
29. PW1 CPL Moses Lutenyo of DCI Narok investigated the case. On 17.10.2018, he was summoned by his bosses the DCIO and the CCIO, and directed to arrest the appellant who was with them for the offence of desertion from the police force. The appellant was present. There was an arrest warrant against him. The appellant was charged in court the following day. It was the evidence of PW1 that the appellant was attached to DCI Narok although he had been transferred to Emurua Dikirr. A letter had been written to the previous DCI Mr. Ondego dated 26.01.2018 absent without leave. He produced a signal of 26.01.2018. on 23. 03.2018 another signal from Transmara West by David Some in charge of DCI Transmara West. He produced the second signal as P Exh 2. The CCIO who was the boss of the appellant wrote a letter dated 03.04.2018 (P Exh3) stopping his salary. A casual return was written by David Some showing the day the appellant returned to work dated April 4, 2018. He produced the



letter as P Exh 4. There was a signal showing the appellant was arrested on 17.10.2018 (P Exh 5). The dates singled out for desertion are 16.02,2018 to March 28, 2018 as per signal P Exh 3. According to PW1, the appellant deserted for over 10 days. He had been given permission to go home but the period he was given exceeded the days.

30. The appellant testified as DW1. He gave sworn evidence. He testified that he had worked with national police service DCI Emurua Dikirr. He had previously worked at Narok North and posted from DCI Juja to Narok North on 27.07. 2017. He worked at Narok till 13.01.2018 when he was transferred to Transmara East which was a new station. He stated that they were given a grace period for the new in charge to put structures in place. It was from 13.01.2018 to 05.02.2018. The marching orders were given to him by Mr. Ondengo at DC.I Narok to proceed to his new station. He produced the marching orders dated 05.02.2018 as D Exh 1. He used to commute from Juja to Narok for the time he was here. He had no house. He went and came back on 16.02.2018. together with his colleague PC David Otieno, they proceeded to Emurua Dikirr police station. There was still no office or working station. On 17.02.2018 he went to the police station and met DCIO CIP Some. He told him the DCI Transmara East could give them space to work from. Since it could take time to do logistics as it was a hollow office, he asked the DCIO to go organize with his family to relocate. He was given one week. He went to his home in Juja. He reported back to Emurua Dikirr on 29.03.2018 vide OB 9/29/03/2018. He continued working for three weeks and then sought further permission to meet family. Upon reaching home he found his wife threatening to separate from him and go to her parents because of his transfer. He had changed transfers in 8 months for four months. He was traumatized. He was stressed. Within April 2018, he found himself at Melchizedek Hospital in Nairobi for 3 weeks. He was treated and given 21 days of sick off. He produced a medical report of 10/08/2018 as D Exh 3. He then reported back to work in late April or May. In August 2018 his DCIO, Mr. Some asked him where he had been. In October 2018 he went to see the DCIO and CCIO and he was arrested. He produced a transfer signal of 12.01.2018 as d exh2.
31. On cross-examination he stated that from 27.07.2017 he worked at Narok police station till January 13, 2018 when he was transferred to Transmara East. The transfer signal was read to him but he was not released by the CCIO. He was given a period from 13.01. 2018 to 05.02.2018 to finalize and hand over pending work. The grace period was given verbally. On 05.02.2018 he went to his residence in Juja and came back on 16.02.2018 and reported to duty at Emurua Dikirr. He did not sign his reporting back on duty there. He stated that offs are not documented. He did not have the medical evidence from 16.02.2018 to 28.03.2018.
32. In reexamination he stated that he had permission to be away in February and March from his boss DCIO CIP Some. He stated that as per the medical report, the trauma started in February to March 2018. He stated that he reported to Emurua Dikirr on 16.02.2018 and did not record his appearance as there was no office.
33. DW2 Dr. Moses Githinji. He testified that he is a medical doctor and had personally seen the appellant on 29.04.2018. He had been brought by well-wishers in a state of confusion. He was uttering gibberish words and was incoherent. His significant findings were; on vitals- an increased heart rate, and numerous laceration on the face and neck; on the central nervous system- his mini-mental examination score was 22 out of 30 which indicate someone confused and not oriented in time and place; he was exposing disturbing thoughts and feelings that were trauma related; and working on diagnosis at the time was post-traumatic stress disorder. The treatment given was psychotherapy. The appellant was given 21 days off duty. At the time of writing the report, the appellant had attended the facility severally for follow-up. He produced his medical report as D Exh2.



34. On cross-examination, DW2 stated that he treated the appellant but did not have the treatment notes that he had used to prepare the report.
35. DW3-Epharim Emodo. He is the cousin of the appellant. He testified that he was called by the wife of the appellant on 28.04.2018 that things were not okay. The wife stated that they had quarreled with the appellant and he was not at work nor home. He reported to Thika police station. The colleagues of the appellant assisted them in tracking the appellant. He was traced. They took him to Melchizedek Hospital. when they found him, he was quiet and looked like a madman.
36. The relevant period in the charge was 'on diverse dates between 16.02.2018 and 28.03.2018 at DCI offices in Narok North Sub-county within Narok county'. From the evidence adduced by PW1 the appellant deserted for over 10 days. PW1 stated that the appellant was given 7 days off duty from 16.02.2018. The seven days' off-duty was to end latest on 23.02.2018. The exceeded days ran from 24.02.2019 to 28. 03.2018. which makes it 33 days.
37. Is there a lawful explanation of account of this period?
38. The appellant was transferred from Narok North DCI to Narok East. His boss was CCIO Narok. There was no evidence that during the relevant period, the appellant worked at his new station. He also stated that he was transferred to Emuria Dikirr. He told the trial court that he reported there briefly but he did not record his reporting because there was no office. There was no evidence to show he reported or worked at Emuria Dikirr during the relevant period.
39. The appellant testified and called his cousin. The defense dwelt on the post 28.03.2018 period. The appellant claimed that he was taken ill and produced evidence towards that end. He also stated that he had domestic problems arising from his too frequent transfers which were in quick short succession. These domestic problems resulted into illness. He also called a doctor. The doctor puts the problems of the appellant after the period since April 2018. This was long after the alleged period of desertion.
40. The appellant was missing even from home when his cousin picked him up after getting information from the Thika police station and took the appellant to hospital.

### Observations

41. Before closing, the court has noted quite serious matters relating to rights of police officers emerged in this case but were not litigated as proper constitutional issues or employee's rights. Nevertheless, except where limited by law or the *Constitution*, rights of the police officers should be respected and embodied within the command. Fully engrained wellness of the officers- including mental health, preventive initiatives, and socio-psycho support- within the police operations, processes, procedures, duty codes, work ethics and commands should avoid or mitigate the kind of distress we see in the force.
42. Back to the main.
43. The appellant reported back on March 29, 2018 and three weeks later took an off-duty for some time. The 21 days of sick off are documented but this was after the initial desertions.
44. The medical evidence was quite stretched in terms of time. The court real sympathizes with the unfortunate happenings. But, it was after, and did not account for the relevant period.
45. There is no lawful or reasonable account of the relevant period.
46. The prosecution proved beyond reasonable doubt that the appellant deserted from service for a period exceeding 10 days.



47. The appellant has not challenged the sentence. In any case, the sentence has been served. In the circumstances, the appeal is dismissed.

48. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**

.....

**HON. F. GIKONYO M.**

**JUDGE**

**In the presence of:-**

1. Mr. Muraguri – C/A
2. Ms. Koina for DPP.
3. M/s. Ombati for Appellant

