



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 35 OF 2015.**

**ANDREW MUSYOKI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from Judgment of Court Martial Case Number 8/22 .01.2015 at Lanet –Nakuru –Hon Felix Kombo Resident Magistrate dated 22<sup>nd</sup> January 2015 in Criminal Case No.35 of 2014)***

**JUDGMENT**

1. The appellant being a member of **Defence Force Number 66555 Corporal Andrew Musyoki** was charged with the offence of **Desertion contrary to section 74(1) (a) as read together with section 74(3) (b) of the Kenya Defence Forces Act, 2012**. Particulars are that while deployed with the 3<sup>rd</sup> Mechanized Infantry Battalion at Afmadhow Somalia he absented himself without leave with effect from 5<sup>th</sup> April 2013 until he reported back to his unit headquarters 2 Brigade on 14<sup>th</sup> April 2014, an act he knew or ought to have known constituted an offence.
2. The appellant denied the charges. On 20<sup>th</sup> August 2014, the charge was amended to include the total number of days the appellant was absent as 375 days.
3. The appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal on the following grounds: -
  - i. *That the learned magistrate erred in law and fact by failing to appreciate that the appellant had proceeded on official leave which had been approved by the commandant (OC).*
  - ii. *That the learned magistrate erred in law and fact by failing to appreciate that the appellant fell sick on his way back to Somalia to join his company and was hospitalized, at Njunja Mission Hospital and thereafter transferred to Kahawa MRS – Hospital and eventually to Forces Memorial Hospital.*
  - iii. *That the learned magistrate erred in law and fact by failing to take into consideration of the medical documents produced before the court from the two Military Forces Hospital and those from the Mission Hospital.*
  - iv. *That the learned magistrate erred in law and fact by failing to appreciate the evidence of Major Kinyanjui, the officer commanding 2BDE headquarters who testified that all along had in touch by signals with C.O.9KR Somalia where he was officially stationed.*
  - v. *That the learned magistrate erred in law and fact by failing to appreciate that the C.O.9KR forced the Forces Memorial Hospital to discharge me within 24 hours even before recovery.*
  - vi. *That the learned magistrate erred in law and fact by failing to appreciate my twenty-four years’ stainless service record produced before the trial court martial.*
  - vii. *That the learned magistrate erred in law and fact by disregarding the receipt evidence adduced before court by the hospital.*
4. The appellant later filed supplementary grounds of appeal on 11<sup>th</sup> April 2016 and submissions on 23<sup>rd</sup> May 2019 through his **Mr. Mongere Advocate**. The supplementary grounds of appeal are as hereunder: -
  - i. *That the court martial erred in law and fact in convicting the appellant while relying on the contradicting evidence of the prosecution witnesses.*

- ii. *That the court martial erred in law and fact in convicting the appellant and yet there was no eye witness and no identification was done.*
- iii. *That the court martial erred in law and fact by overlooking the fact that the evidence relied on was not watertight to justify a conviction.*
- iv. *That the court martial erred in law and fact in sentencing the appellant to 12 months imprisonment.*
- v. *That the court martial erred in law and fact that there was communication failure.*
- vi. *That the court martial erred in law and fact after being referred to Dence Forces Memorial Hospital Co 9ker AFmathow Somalia pressurized the Hospital to be discharged within 24 hours.*
- vii. *That the court martial erred in law and fact that after being discharged from Forces Memorial the same date the Appellant was called back to hospital by Chief Nursing Officer (C.N.O.) and was informed that the appellant still under medication.*
- viii. *That the court martial erred in law and fact they used military languages which my defence Counsel could not understand.*
- ix. *That the court martial erred in law and fact by shifting the burden of proof to the appellant.*
- x. *That the court martial erred in law and fact by failing to consider the strong defence and submission by the appellant.*
- xi. *That the appellant having been injured while on duty in Somalia and was being treated at the Forces Memorial.*

5. Parties agreed to proceed by way of written submissions

#### **APPELLANT'S SUBMISSIONS**

6. On whether there was contradictory evidence, the appellant submitted that PW2 contradicted himself by saying, he knew the appellant while in Somalia while in cross examination, he said he knew the appellant before the training to go to Somalia and also knew his wife and had communication with his wife and he was informed that the appellant was unwell. Further that PW3 said he wrote statement while in course yet he could not write while on duty.
7. On whether there was eye witness, the appellant submitted that the investigating officer never went to look for the appellant to ascertain the reason why he was not on duty but went ahead to charge the appellant when there was no eye witness who saw the appellant desert duty and further there was no identification done to confirm that the appellant was carrying out his business when he was supposed to be on duty. That no eye witness was availed to testify that the appellant deserted duty yet the appellant produced sufficient evidence to show that.
8. On sentence the appellant submitted that the court erred in sentencing him for 12 months' imprisonment for an offence he did not commit as he was unwell at the time he is alleged to have been absent from duty.
9. On failure of communication, the appellant submitted that there was communication failure between him and commander in Somalia about his absence and that when he reported to **OC Major Kinyanjui and OC Odongo**, they asked him to continue with medication.
10. The appellant cited the case of Court Martial No.215 of 2015 **Wako Guyo Nura Vs Republic [2016] G.W Ngenye-Macharia J** where the court stated as follows: -
- “My view is that had the said court properly evaluated all the medical evidence tendered before it, it would have arrived at a conclusion that the appellant did not deliberately desert duties and his dismissal was unwarranted. This was because proving or disapproving the same necessary.”**
11. On use of military language, appellant submitted that his advocate did not understand military language used in the proceedings resulting in unfair trial contrary to **article 150 of the constitution**.
12. Appellant further submitted that the Court failed to consider his strong defence in that he produced medical reports to prove that he was unwell throughout the year and he was not in a position to report back to work and that he had been granted two months' bed rest; further that he had been injured while in Somalia and was being treated at War Memorial Hospital; that he was on duty when he got injured and later fell ill and did not therefore desert duty.
13. That there is need for fairness in judicial proceedings and rules of natural justice should be followed. Appellant urged the Court to disregard decision by the trial magistrate and find that the prosecution evidence was not sufficient to convict the appellant, allow the appeal and set aside the earlier judgment; that appellant be acquitted and be reinstated back to service.

#### **RESPONDENT'S SUBMISSIONS**

14. The respondent submitted that the appellant was tried by the Martial Court and found guilty of the offence of **Desertion contrary to section 74 (3) of the Kenya Defence Forces Act 2012** and sentenced to 12 months imprisonment.

15. She submitted that offence of desertion is absence without leave for a continuous period of more than 90 days and the essential ingredients that were substantiated by the prosecution were the following: -

- a. Continuous absence,
- b. Without leave,
- c. For more than 90 days.

16. The state counsel submitted that in evidence, the prosecution called a total of nine witnesses who adduced weighty and compelling documentary and oral evidence proving beyond reasonable doubt that the appellant was guilty of the offence. That PW1, PW2, PW3, PW4, PW6 and PW8 all identified the appellant in court and stated he was a signaller under the communications unit named CCOY and had been deployed in Afamdhow, Somalia and thus was subject to the KDF Act 2012.

17. She further submitted that PW1 testified that the appellant was granted leave on the 3<sup>rd</sup> February till the date 3<sup>rd</sup> March 2013. He produced the leave forecast of the appellant as Exhibit 1. When the appellant failed to return, a letter showing he had not returned was drafted from his sub unit to the higher office (Exhibit 3-first AWOL letter); and at the time the unit was wound up and returned to Kenya in October 2013, the appellant had still not returned as stated by PW2. A Board of Inquiry (BOI) was appointed and convened to investigate the appellant's absence (Exhibit 7).

18. She further submitted that the appellant stated that he became unwell and sought treatment at the Kahawa MRS Hospital and was thereafter admitted to Defence Forces Memorial Hospital (DFMH) on the 15<sup>th</sup> March and was discharged on the 16<sup>th</sup> March 2013 and was given a sick off till the 30<sup>th</sup> March 2013 when he was to return for review to assess if the appellant was fit to resume duty; that a letter from Defence Forces Memorial Hospital was produced as Exhibit 5 and in view of the letter appellant's reporting date was extended to 15<sup>th</sup> April 2013 and When the appellant failed to report a second letter was sent from his unit (Exhibit 6- second AWOL Letter).

19. She submitted that PW3 testified that he had the duty to report if an officer under his command were to fall sick and stated he never received any information from the appellant. PW5 stated the appellant called him around March 2013 and asked him when he would return to Somalia from Kenya but he never mentioned he was unwell or was undergoing treatment. PW6 produced Exhibit 11 which was a document known as FF55, a document that is filled when a military officer seeks treatment while on leave on. The same is filled by the hospital where the officer seeks treatment. The appellant's document had not been filled and thus there was no evidence the appellant had sought treatment on leave beyond the dated communicated by Defence Forces Memorial Hospital for sick-off.

20. The state counsel submitted that PW7 informed Court that he examined the appellant at Defence Forces Memorial Hospital and stated that he never returned for review; further that, PW8 stated that he received a call from the appellant in July 2013 asking why his salary had been stopped and mentioned he was unwell. That PW8 further stated that he advised the appellant to request Defence Forces Memorial Hospital to write a letter on ongoing treatment to the Officer Commanding that would in turn be copied to the Amisom Headquarters and the appellants unit.

21. She submitted that the appellant reported back to work on the 14<sup>th</sup> April 2014 at the headquarters and PW4 and PW8 aware of the appellant's status as a deserter and the two identified for arrest by military police. That a Rejab letter (letter showing the appellant had absented himself from duty and was deemed to have constituted an offence of desertion) was produced as Exhibit 8 by PW3 and PW9.

22. The state counsel urged the Court to dismiss this appeal as the trial court rightfully convicted the appellant. That in exclusion of the leave and sick off days he had been granted, the appellant was unable to demonstrate his whereabouts and he deliberately absconded duty for 375 days and only enquired when his salary was stopped. She submitted that this clearly demonstrates the appellant was unethical and this was proof that the appellant's actions were orchestrated to evade his call of duty but still receive a monthly remittance.

23. That the efforts of the appellant and his wife to share information of his treatment was only done informally and was in breach of the strict code of regulation regarding communication and the chain of command contingent to the military protocols. She urged the court to take notice of the fact that the appellant never forwarded any correspondence of his whereabouts to the headquarters or his unit; that no documentary evidence of treatment as from 30<sup>th</sup> March to 14<sup>th</sup> April 2014 were presented to the Officer Commanding and thereafter the trial court.

#### **ANALYSIS AND DETERMINATION**

24. This being the first Appellate Court, I am required to reevaluate evidence adduced before the Court Martial and arrive at an independent determination. This I do knowing that unlike the trial Court, I never got the opportunity to take evidence first hand and observe demeanor of witnesses. For this I give due allowance. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

**“The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”**

25. In view of the above I have perused the proceedings before the court martial presided over by **Hon. Felix Kombo** in his capacity as

**Judge Advocate.** I have also perused and considered submissions filed by the appellant through his Advocate **Mr. Mongeri** and submissions by **Rita Rotich** state counsel for the state.

26. It is not disputed that the appellant was an army officer rank of corporal attached to Amison Mission in Somalia which commenced work in June 2012 and they were to return in September 2013. It is not disputed that the appellant was granted leave for 21 days from 3<sup>rd</sup> February 2013 and was to resume on 25<sup>th</sup> March 2013. It is not also disputed that while on leave he fell sick and was treated at Kahawa MRS Hospital and was referred to Defence Forces Memorial Hospital where he was admitted from 14<sup>th</sup> March up to 16<sup>th</sup> March 2013 and was granted sick off for 14 days. He was expected back on duty on 30<sup>th</sup> March 2013.

27. There is no doubt that he failed to report back to Somalia on duty as expected until the team came back to Kenya in September 2013. Evidence adduced is that he reported back on 14<sup>th</sup> April 2014. What I consider to be in issue is whether the prosecution proved beyond reasonable doubt that the appellant was absent without permission or knowledge of his supervisors for the 375 days as per the charge preferred against him.

28. Record show that PW6 produced Exhibit 11 which was a document known as FF55, a document that is filled when a military officer seeks treatment while on leave on. The same is filled by the hospital where the officer seeks treatment. The appellant never adduced evidence to the effect that between 30<sup>th</sup> March 2013 and 14<sup>th</sup> April 2014 FF55 was filled to confirm that for the period he was sick; There is therefore no evidence the appellant had sought treatment on leave beyond the date communicated by Defence Forces Memorial Hospital for sick- off; there is no extension of sick nor any other document to demonstrate reason for the appellant's failure to go back to Somalia for duty.

29. Further if the appellant was unable to go back due to illness or any other reason, there is no indication that he reported to headquarters in Kenya his inability to go back to work. He only talked of his wife communicating to **Major Kinyanjui**. There is nothing to show that he was prevented by any factor from communicating personally either in writing or visiting the headquarters or even local administration to communicate to his bosses on his behalf.

30. There is no doubt that he continued drawing salary without working or letting his immediate supervisor of his whereabouts and only made enquiries when the salary was stopped. The fact that he went to head office to enquire about salary show that he was able to communicate but chose not to do so even through local administration or by sending his wife to his bosses.

31. On fairness during hearing, the appellant was represented by an Advocate. Proceedings show that English language was used and for few military terms used, I have seen explanation given. Further there is nowhere in the proceedings where the Advocate complained of failing to understand any new term used or to follow proceedings. In my view, this ground of appeal is an afterthought. The appellant was given an opportunity to be heard and verdict rendered.

32. In my view, the prosecution proved that the appellant absented himself from duty without permission. He was rightfully charged, convicted and sentence for deserting duty.

33. **FINAL ORDERS**

1. Appeal on both conviction and sentence is hereby dismissed.
2. Appellant to serve the remainder period of sentence.

**Judgment dated, signed and delivered via zoom at Nakuru**

**This 11<sup>th</sup> day of June, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola - Court Assistant

Mr. Mongeri Counsel for Appellant

Rita for State