



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 10 OF 2017

BETWEEN

STEPHEN OUMA ODEDE.....PETITIONER.

AND

REPUBLIC.....RESPONDENT.

JUDGMENT

(Being an appeal from the original conviction and sentence passed in Kahawa Garrison Court Martial No. 5 of 2015 on 12th September, 2017).

Background.

1. No. 82140 SPTE Stephen Ouma Odede, was charged of committing the offence of desertion contrary to Section 74(1)(a) as read together with Section 74(2)(e) and 74(3)(a)(i) of the Kenya Defence Forces Act, 2012. The particulars of the charge were that, while deployed in Operation Linda Nchi in Afmadhow Somalia, absented himself without leave on 11th September, 2012 until 01 August 2014 when he reported back to his unit thereby absented himself for a continuous period of 689 days, an act he knew or ought to have known constituted an offence.

2. At the conclusion of his trial before the Court Martial he was found guilty and sentenced to life imprisonment. He was dissatisfied with both the conviction and sentence against which he lodged the present appeal. His grounds of appeal were that the Court Martial erred in law and in fact in failing to -

a. Find his conviction was moot since he had rejoined Kenya Defence Forces on his own volition; which act negated the intention on the part of the Appellant 'of remaining permanently absent from duty', the necessary mens rea for the offence of desertion in law;

b. Find that the Appellant was on active service against an enemy at the time of the alleged absence from duty, contrary to evidence;

c. Find that the Appellant was insane and lacked capacity to intend to be absent from duty as charged, against the prosecution's own evidence that the Appellant had suffered post traumatic stress disorder due to post combat exposure at the time he failed to rejoin the Kenya Defence Forces after lapse of leave;

d. Find his Conviction for the offence of desertion was against the weight of evidence;

e. Consider that the sentence of life imprisonment was excessive, disproportionate, undeserved and unwarranted in the circumstances;

f. Find that there were mitigating factors not considered;

g. Provide reasons for the verdict;

h. Consider his defence;

i. Consider or take into account the matters of law raised in summing up by the Judge Advocate thereby rendering the process vain and of no essence to the instant proceedings;

j. Find that the offence of desertion had not been proved beyond reasonable doubt as required by law; and

k. Find that the evidence and consequently the conviction and sentence a total sham and travesty of justice.

Evidence

3. **PW1, No. 131052 2Lt Phaebian Murikwa** informed the court that he was an adjutant with the 1KR Battalion based in Nanyuki with duties including record keeping and maintaining discipline of junior officers. He recalled the Appellant as a member of the Battalion and informed the court that the unit was deployed in Somalia during Operation Linda Nchi, an operation intended to suppress the Al Shabaab militants believed to be involved in terror activities. He testified that the Appellant was a deserter and he explained how the Appellant was granted leave on 29th August, 2012 which was supposed to end on 7th September, 2012 but failed to return till 1st August, 2014. He produced an AWOL document which was raised on 11th September, 2012 and a consequent abseign letter that was addressed to service headquarters eight days later. He recalled that a Board of Inquiry was convened on 2nd October, 2012 to ascertain the circumstances of the Appellant's absence. After the Appellant was absent for 90 days he was declared a deserter and part II orders to the effect published on 14th January, 2013. In cross examination, he stated that he was not attached to the unit during the period when the Appellant was absent.

4. **PW2, Col. Dr. Japheth Mwendwa** testified that he was a consultant psychiatrist within the Defence Forces posted at the Defence Forces Memorial Hospital. He recalled that on 26th January, 2015 he had the opportunity to examine the Appellant and give a psychological assessment. He testified that he carried out a mental status assessment and found it to be normal and further laboratory tests were also normal. In his conclusion after the examination he noted that there was the possibility that the Appellant could have suffered from post-traumatic stress disorder during the 2012 operation although at the time of his examination there was no evidence of mental disorder. He testified that the Appellant brought him medical documents from Homabay District Hospital that were filled by a clinician.

5. **PW3, Capt. John Sakwa** was the section commander of number 3 section of number 9 platoon of C Company under 1KR Battalion under which the Appellant served. He testified that his unit crossed over into Somalia on 5th January, 2012 under Operation Linda Nchi. He corroborated the evidence of PW1 with regards to how the Appellant absented himself from service.

6. **PW4, No. 53085 WOII Omar Swale** was the Company Sergeant Major to the C Company of 1KR Battalion whose role encompassed checking on the administration of soldiers. He recalled that the Appellant was a member of the company and he corroborated the evidence of PW1 and PW3 that the Appellant was declared a deserter after failing to return from his official leave that was ending on 7th September, 2012. **PW5, Lt Michael Ogeto Onditi**, testified that he was the platoon commander of platoon 9 within the C Company of the 1KR Battalion. He testified that the Appellant was a member of his command unit where he held the role of a machine gunner. His evidence was similar to that of PW1 to PW4 respecting to how the Appellant was declared a deserter.

7. **PW6, Maj. Moses Ruta Omukoko** was the Officer Commanding the C Company of 1 KR Battalion. He reiterated the evidence of PW1,3, 4 and 5 that they were deployed in Somalia during the period relevant to the present matter where they were engaged against the Al Shabaab and that he authorized the grant of a pass to the Appellant on 29th August, 2012 but he failed to return as per the terms of the pass and was consequently declared a deserter.

8. **PW7, Sgt. Lukas Miruka** was the investigating officer. He testified that he approached the adjutant who supplied him with all the documents relating to the Appellant and confirmed that the Appellant had been granted a pass on 29th August, 2012 with a return date of 7th September, 2012 but had failed to return. That consequently he was declared a deserter on 14th January, 2013 before rejoining on 1st August, 2014.

9. After the close of the prosecution case, the Court Martial ruled that the Appellant had a case to answer. He testifies as DW1 and called one more witness to support his defence. He stated that he enlisted in the Kenya Defence Forces on 27th April, 2009 and was posted to Section 3 of number 9 Platoon of C Company of 1KR Battalion. He recalled that his role in the section was as the number 1 machine gun operator despite all officers being trained and proficient at operating the gun. He was deployed to Somalia for nine months continuously without leave during which period they lost colleagues and others were maimed. He recalled that the objective of the unit was to capture five towns. He added that between 11th September, 2012 to 1st August, 2014 he was unconscious. He stated that after arriving home for his leave he started experiencing headaches that he could not recall what transpired until 28th July, 2014 when he regained consciousness.

10. **DW2, Hezekiah Odoyo Odede**, the Appellant's brother recalled that on 5th September, 2012 his brother returned home from work and after three days he became unwell. The Appellant was unintelligible, uttering words that they could not make out. They took him to Homabay District Hospital where they saw a Dr. Ochola who ordered for his admission as he was suffering from acute depression. He recalled that the Appellant was admitted for 3 days at the hospital but since he was still unwell they called a witch doctor from Tanzania to heal him as they thought he was bewitched. He testified that the witch doctor worked on the Appellant for 18 months before he regained consciousness. In cross examination, he denied the contents of the medical report that the Appellant was not admitted at Homabay Hospital.

Determination

11. After considered the evidence and the respective rival submission of the parties I find that the following issues arise of determination:

i. What the scope of application of Section 74(2)(e) of the Kenya Defence Forces Act is.

ii. Whether the present matter falls within the Strict Liability exception.

iii. Whether the Appellant absented himself for a continuous period of more than 90 days.

iv. Whether the Appellant was on active duty.

(i) Scope of Section 74(2)(e) of the Kenya Defence Forces Act:

12. This court has previously delivered itself on this issue in this appeal in an application for bail pending appeal by the Appellant. see **Stephen Odede v. Republic**[2017] eKLR, where the court stated that:

“I would then not hesitate to conclude that although the offence under Subsection 2(e) of the Act, per se, is a strict liability offence, if an accused demonstrated that he lacked the mental capacity and therefore did not have the mens rea to commit the offence, nothing stops the court from acquitting him.”

11. For avoidance of doubt, Section 74(2)(e) reads:

“(2) A person deserts if that person—

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

13. In the present case, the Appellant was charged and convicted under this provision of the law and while the same is *per se* a strict liability offence this court clearly set out an exception in cases where the accused person clearly advances the defence of mental incapacity to commit the offence. This is the scenario advanced in the present case as the Appellant reiterates that he was mentally incapacitated as at the time he absented himself from service. I would justify this because Section 74(2)(e) must be read as a corollary to Section 74(1) which requires proof of intent. This then leads me to the next issue, namely:

(ii) Whether the Appellant had the requisite mens rea to commit the offence:

14. Counsel for the Appellant, Mr. Kaluma, stated in his submission that the Appellant was not possessed of the requisite *mens rea* to commit the offence of desertion as there was no intention to remain absent. He submitted that the Appellant suffered a mental disturbance while at home leading him to be taken to Homabay District Hospital. He relied on DW2's evidence to buttress this submission. He submitted that the Respondent's assertion that the Appellant was not seen by a specialist could not be sustained as his family members simply took the Appellant to the hospital they normally attended.

15. This court was not furnished with a copy of the medical report from Homabay District Hospital although it was privy to the evidence of PW2 who testified that when he examined the Appellant he was not laboring from any mental issues. The witness was quick to add that in his findings he did not dispute that the Appellant might have suffered from post-traumatic stress disorder at the time of his alleged desertion. The Appellant's brother on the other hand testified that he is the one who took him to the hospital after he fell unconscious. He testified that one Dr. Ochola ordered that the Appellant be admitted as he was suffering from severe depression. The admission of the Appellant was a contentious issue though. This is in view of the fact that in cross examination whilst relying on the medical document, DW2 stated that although the doctor had recommended the admission of the Appellant the advice was ignored. This called into question the credibility of the witness' version that the Appellant was admitted more so because he was a singular witness to the assertion.

16. Flowing from the above observation, it is noteworthy that whereas the Appellant rejabed on 1st August, 2014 he was not medically examined until 28th January, 2015 which was a few months after his return to the garrison. A twist in this fact sharply contrasts a purported reality advanced by the defence that the Appellant was unconscious for a period of about 18 months. To buttress this, DW2 stated he carried the Appellant to and from the hospital whilst unconscious. This account was not however captured by the medical evidence adduced.

17. Whereas the medical evidence is not present, needless to state is that from the above chronology, the Appellant's 'rejab' was at odds with such a prolonged period of unconsciousness particularly his testimony that immediately after he regained consciousness on 28th July, 2014 he asked his brother for fare and went about reporting back to his place of work. His version of account of events is definitely illogical more so, coupled with the inconsistencies in the defence of his mental incapacitation. I hold that in the circumstances, the Appellant's submission that he was mentally incapacitated to commit an offence was unproven.

(iii) Whether the Appellant absented himself, without leave, for a period of more than 90 days:

18. The fact that the Appellant was absent for a period of more than 90 days without leave is not in contention. The evidence was that the Appellant was granted leave on 29th August, 2012 which was to last for 10 days until 7th September, 2012. His failure to return to work on the date set led to him being declared a deserter on 14th January, 2012. This was clearly more than 90 days after the an Away Without Official Leave(AWOL) letter was raised by C Company to 1KR Battalion on 11th September, 2012. The Appellant was clearly away without leave for a continuous 689 days.

19. The court thus hereby upholds the Appellant's conviction under Section 74(2)(e) of the Kenya Defence Forces Act.

(iv) Whether the Appellant was in active duty at the time of desertion:

20. The question of whether or not the Appellant was in active service is pertinent to sentencing. The Kenya Defence Forces Act defines “on active duty” under Section 2 as:

“(a) when used in relation to a person means that the person is serving in or with a unit of the Defence Forces engaged in operations against an enemy;

(b) when used in relation to a unit of the Defence Forces, means that the unit is engaged in operations against an enemy;”

21. My understanding of the definition of being on “active duty” is that it requires the member of the defence force to be engaged in operations against the enemy. Section 2 goes ahead to define the enemy as:

“(a) any person or country committing external aggression against Kenya;

(b) any person belonging to a country committing such aggression;

(c) such other country as may be declared by the Cabinet Secretary, to be assisting the country committing such aggression;

(d) any person belonging to the country referred to under paragraph (iii)

22. The prosecution witnesses testified that they were all deployed to Somalia under the Operation *Linda Nchi*. A glimpse at the essence of the operation can clearly be discerned from the speech of Hon. Haji, the then Minister of State for Defence to Parliament on 7th December, 2011, in the following words:

“... on 16th October, 2011, the Kenya Defence Forces (KDF) in exercise of the right to self determination under Article 51 of the Charter to the UN, engaged the Al Shabaab. This was done in defense of the sovereignty and the territorial integrity of the Republic. Consequently, the Kenya Defence Forces (KDF) launched the Operation Linda Nchi and in hot pursuit of Al Shabaab, crossed into Somalia.”

23. No doubt then that the Operation Linda Nchi was clearly meant and intended to stop persons (*Al Shabaab*) who were committing external aggression against Kenya. Pursuant to this undertaking, when the operation was undertaken on 16th October, 2011 all units involved in that operation were on *active duty* as they were engaged against the *Al Shabaab* who candidly are and were external aggressors and therefore enemies under the Kenya Defence Forces Act.

24. However, the circumstances of the Kenya Defence Forces deployment changed consequently and this court relies on an excerpt from **Fighting For Peace in Somalia: A History and Analysis of the African Union Mission (AMISOM), 2007-2017**, that:

“More than a month into Operation Linda Nchi, on 25th November 2011, IGAD Heads of State called upon Kenya to consider integrating its forces into AMISOM. Kenya’s cabinet approved that decision on 5th December and it was unanimously endorsed by the Kenya Parliament two days later.”

25. From the above excerpt, it is safe to conclude that the members of the KDF who joined AMISON forces ceased to act under Operation Linda Nchi. By so doing, they fell within the scope of the AMISOM mandate which is set out in the **Status of Mission Agreement (SOMA)** entered into between the Transitional Federal Government of the Somali Republic and The African Union on 6th of March, 2007 in Addis Ababa.

26. Article IV of SOMA is titled “**Mandate of AMISOM**”. Paragraph 5 of the Article reads:

“The Peace and Security Council (PSC), at its 69th meeting on 19th January 2007, authorized the conduct of AMISOM, mandating it to provide support to the Transitional Federal Institutions (TFIs) in their efforts towards the stabilization of the situation in Somalia and the furtherance of dialogue and reconciliation; to facilitate the provision of humanitarian assistance; and to create conducive conditions for long-term stabilization, reconstruction and development in Somalia.”

27. In light of the foregoing, it is clear that the overriding objective for the continued stay of members of the Defence Forces in Somalia ceased to be the engagement in operations against the enemy as by joining the AMISOM forces they morphed into a peace keeping force. This can be glimpsed from an excerpt of the **President’s Annual Report on Measures taken and progress achieved in the realization of national values and principles of governance, Gazette Notice No. 2117 of 31st March, 2015**, in which it is stated:

“[153] ..., Kenya continues to support the African Mission in Somalia (AMISOM) initiative by deploying the Kenya Defence Forces (KDF) to parts of Somalia. This initiative has helped in the reduction of terrorism and piracy in the region.”

28. From the foregoing, I cannot labour to conclude that the definition of *active service* and *enemy* as set out in the Kenya Defence Forces Act are too stringent to accommodate actions undertaken by the Defence Forces when attached to a multinational peace keeping mission. According to the United Nations, the principles of peacekeeping which are inter-related and mutually reinforcing, are; (i) consent of the parties, (ii) impartiality and (iii) Non-use of force except in self-defense and defence of the mandate.

29. To stamp this definition, the Collins Dictionary defines a peacekeeping force as:

“a group of soldiers that is sent to a country where there is war or fighting, in order to prevent more violence. Peacekeeping forces are usually made up of troops from different countries.”

30. And therefore, following the incorporation of the Kenya Defence Forces into AMISOM they ceased to be engaged in operations against the enemy and as a result KDF soldiers ceased to be on *active duty* as defined in the Kenya Defence Forces Act. Therefore, the Appellant and his battalion crossed over into Somalia after the Kenya Defence Forces had joined AMISOM. He was at the time he deserted service a member of the AMISON and was bound by their mandate. A sentence under Section 74(3)(a) of the KDF Act could not therefore hold. He thus ought to have been sentenced him under Section 74(3)(b) of the Act which provides that;

“(3) A person who commits an offence under subsection (1), shall be liable, upon conviction by a court-martial—

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

31. Sub-section(1)(a) of the Act on the other hand provides that;

“A person who is subject to this Act commits an offence if that person—

(a) deserts; or

(b) persuades or procures any person subject to this Act to desert.”

32. I accordingly set aside the life imprisonment and substitute it with two years imprisonment. Needless to state is that the Appellant has been in remand for more than two years. He has therefore serve vd his sentence and I order that he be forth with set free unless otherwise lawfully held. He remains dismissed from service without honours.

33. As I conclude, I wish to thank Mr. Kaluma for the insightful submissions he made in this appeal, giving this court an opportunity to relook at the issue of KDF engagements and sentence differently. I add that although the Appellant was dismissed from the force, we ought to recognize his dedicated service to our country under very difficult circumstances. It is unfortunate our KDF men continue to be dismissed from service because of the trauma they go through in times of war. They desert because they are sick and not because they do not want to serve our country. That is not to say that they should not remain true to their duty and calling. They must work within their mandate and disciplinary machinery. Nevertheless, courts and the employer should not shy away from recognizing that the soldiers are human beings and when Post Traumatic Disorders set in, help and penalty is the solution. A different way and manner of penalizing them should be recommended in the law.

DATED and Delivered at Nairobi this 30th July, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Kaluma for the Appellant.

2. Miss Sigee for the Respondent.