REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.127 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. T. Mwangi – SRM and Hon. E.K. Nyutu – PM delivered on 28th March 2013 in Makadara CM. CR. Case No.2092 of 2010)

CHARLES MWANGANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Charles Mwangangi was charged with the offence of **desertion from the Kenya Police Force** contrary to **Section 4(3)** of the **Police Act** (now repealed). The particulars of the offence were that 19th August 2010 at Muthaiga Police Station in Nairobi, the Appellant, being a police constable employed in the Kenya Police Force deserted the police force after absenting without leave for a period exceeding twenty-one (21) days while attached at Muthaiga Police Station. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to pay a fine of Ksh.2,000/- and in default serve a custodial sentence of one (1) month. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was of the view that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. He was aggrieved by his conviction stating that the ingredients of the offence of desertion were not established by the prosecution. He faulted the trial magistrate for shifting the burden of proof to the defence. He was aggrieved that the trial court failed to properly evaluate his defence before arriving at its decision. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submissions from Mr. Nthiwa for the Appellant and Ms. Atina for the State. Mr. Nthiwa submitted that the charge as drafted was fatally defective since the Appellant was charged under the wrong section of the law. He asserted that **Section 4(3)** of the **Police Act** (now repealed) was non-existent. The charge against the Appellant was not established by the prosecution. In the premises therefore, he urged this court to allow the Appellant's appeal.

Ms. Atina for the State opposed the appeal. She conceded that **Section 4(3)** of the **Police Act** (now repealed) does not provide for the offence of desertion. She stated that the Appellant ought to have been charged under **Section 41(3)** of the **Police Act** (now repealed). She however asserted that the error in the charge sheet was curable and the same did not prejudice the Appellant. She submitted that the evidence adduced established the charge against the Appellant to the required standard of proof. She pointed out that the Appellant failed to raise the objection in the trial court. She therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, C.I Johnstone Wanyama, was the then OCS Muthaiga Police Station. He stated that the Appellant was attached to Muthaiga Police station. On 10th May 2010, he was informed that the Appellant was not on duty. The officer in charge told him that the Appellant had a fungal infection and had not reported to work for two days. PW1 informed his superior, the OCPD that the Appellant had absconded duty without leave. PW1 stated that he sent two reminders; one on 10th August 2010 and the other on 19th August 2010. The Appellant was declared a deserter after the twenty-one (21) days lapsed. He sent another reminder to the Headquarter on 3rd September 2010. He was later informed that the Appellant had been seen in Mathare Area. He went to Mathare and arrested the Appellant.

PW2, Senior Sgt. Samuel Moraa of Muthaiga Police Station was in charge of police lines and discipline. He was the Appellant's immediate supervisor. Sometime in January 2010, the Appellant informed him that he had a fungal infection. The Appellant proceeded on leave and was required to report back to work on 26th June 2010. He reported back on the stated date. Shortly after, on 7th August 2010, the Appellant failed to report to work. PW2 was unable to reach him as he had switched off his mobile phone. PW2 went to his residence at Mathare Police Depot. He met the Appellant together with his wife at his house. The Appellant assured PW2 that he would report back to work. He however did not show up on duty. On 11th September 2010, the Appellant was declared a deserter. On 11th September 2010, PW1, PW2 and PW3

(Corporal Ruth Aida) went to visit a colleague at Mathare Police Depot who was bereaved. They found the Appellant among the mourners. They arrested him. The Appellant had absconded duty from 7th August 2010 to 11th October 2010. PW2 produced the duty roaster register in evidence.

The Appellant was put on his defence. He denied the charge against him. He stated that he fell ill in 2009. He had a fungal infection on his feet and hands. His legs were swollen. He was therefore unable to discharge his duties. He stated that he was admitted at Bishop Kioko Hospital in Machakos for two weeks. After being discharged, he reported back to work. His condition however deteriorated. He went on leave and reported back to work in June 2010. In August 2010, he went to the station and informed PW2 that he was still unwell. PW2 gave him permission to be out of work. He denied PW2's testimony that he was not able to reach him and stated that it was false. He produced medical documents into evidence to prove that he was unwell at the time.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses **(See Okeno vs Republic [1972] EA 32). I**n the present appeal, the issue for determination is whether the prosecution established the Appellant's guilt on the charge preferred against him to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. This court will first address itself on the issue of the defective charge sheet. The Appellant submitted that the charge sheet as drafted was fatally defective since he was charged under a non-existent section of the **Police Act** (now repealed). The Appellant was charged under **Section 4(3)** of the **Police Act** which section did not exist. Learned State Counsel on the other hand, while conceding to the defect, was of the view that the defect was curable and that the Appellant was not prejudiced by the same. She stated that the Appellant ought to have been charged under **Section 41(3)** of the **Police Act** (now repealed). She asserted that the evidence adduced by the prosecution witnesses disclosed the offence the Appellant was charged with.

The test the court ought to apply in determining whether a charge sheet is defective was set out by the Court of Appeal in **Obedi Kilonzo Kevevo v Republic [2015] eKLR.** The Court held that:

> ***"The test applicable for an appellate court when determining firstly the existence of a defective charge, and secondly its effect on the Appellants'conviction is whether the conviction based on the alleged defective charge occasion miscarriage of justice resulting in great prejudice to the Appellant. In the case of JMA v Republic (2009) KLR 671, it was held inter alia that:***
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> > ***"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the Appellant is not discernable.""***

In **PNB v Republic [2017] eKLR,** the court held that even where a defect is detected in a charge by the Appellate court, not all defects result in invalidation of the charge. The test that the court should apply is whether the charge sheet contains sufficient information which contains a specific statement of offence which gives the Appellant necessary information for the Appellant to mount a defence or challenge to the charge brought against him.

In the present appeal, it was clear to this court that the defect noted by the Appellant was not fatal to the prosecution's case. The charge contained information which set out the offence that the Appellant was charged with. It contained particulars of the charge that the Appellant was being called upon to answer to. The defect in the penal section of the charge sheet did not prejudice the Appellant. It was clear to the court that in drafting the charge sheet, the prosecution failed to include the number **"1"** after **"4"** and this ended up stating the Section upon which the charge was based as **Section 4(3)** instead of **Section 41(3).** This was an obvious human error. The same is curable under **Section 382** of the **Criminal Procedure Code.** It was clear to this court that the Appellant knew the charge that he was facing. He ably defended himself during the entire trial. The particulars set out in the charge clearly enabled him to defend himself. The Appellant's written submission filed in the trial court actually quoted the correct section which is **Section 41(3)** of the then **Police Act**. He was therefore well informed of the charges he faced. This court finds this ground of appeal to be without merit.

Did the prosecution establish the Appellant's guilt to the required standard of proof beyond any reasonable doubt? It is not in dispute that the Appellant did not report to work from 7th August 2010 upto 11th October 2010 when he was arrested. The prosecution's case is that the Appellant absconded from work without the permission of his superiors. The Appellant on the other hand did not dispute the fact that he was absent from work on the stated dates which exceeded the statutorily permitted period of twenty-one (21) days. He stated that he was on sick leave and that his superiors were aware of the reason why he was absent from work. He produced in evidence medical records as proof that he was unwell. The medical documents showed that the Appellant was admitted at Bishop Kioko Hospital from 29th September 2009 to 12th October 2009. He afterwards continued with treatment as an outpatient at Pona Medical Clinic.

The Appellant was given a six (6) month leave from January 2010 to June 2010. This was on account of his illness. He resumed work in June 2010. He was assigned light duties at the police station. On 7th August 2010 he failed to report to work. His immediate supervisor (PW2) tried to call him but he was unreachable. PW2 went to the Appellant's house. He found the Appellant at his house. The Appellant promised to return back to work. He however failed to do so. The Appellant absconded from work from 7th August 2010 to 11th October 2010. The Appellant maintained that PW2 gave him permission to be out of work during that period since he was unwell. He however failed to avail any evidence to prove that he was out of work on an approved leave. The medical records produced by the Appellant failed to show that he was incapacitated hence was not able to report to work. The records indicated that the Appellant was only given three days off by the doctor from 22nd May 2010.

The Appellant did not make any efforts to come back to work until he was arrested. The Appellant was required to be on duty when he absented himself from work. He had been assigned light duties at the police station by PW2. He failed to provide proof that he had been given sick leave by his superior. The Appellant was arrested at his colleague's house who was bereaved. He had gone to console with the family of the said colleague. This showed that the Appellant was not incapacitated. He ought to have reported for duty at the police station as required or sought extension of his sick leave if he was unable to discharge his duties. His absence from work was therefore not justified.

This court is in agreement with the trial court's finding that the Appellant absconded from work without leave. **The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt.** This court, having re-evaluated the evidence adduced before the trial court and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. **The Appellant's appeal lacks merit. The same is hereby dismissed. The conviction and sentence of the trial court is hereby confirmed. It is so ordered.**

DATED AT NAIROBI THIS 23RD DAY OF JULY 2019

L. KIMARU

JUDGE