



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.9 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. Rose Makungu

delivered on 9th August 2016 in Moi Air base Barracks Eastleigh Court Martial No.7 of 2015)

ANTHONY KIMARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Anthony Kimari, was at all material times a member of the Kenya Defence Forces. He was charged before the Court Martial with the offence of desertion contrary to Section 74(1)(a) as read together with Section 74(2)(e) and 74(3)(b) of the Kenya Defence Forces Act. The particulars of the offence were that the Appellant while based at a Workshop Battalion within Kahawa Garrison in Nairobi County on 2nd October 2014, absented himself without leave and remained absent until he was apprehended at Gitige within Murang'a County on 21st August 2015, thus absenting himself for a continuous period of more than ninety (90) days, an act he knew or ought to have known is an offence. When the Appellant was arraigned before the Court Martial, he pleaded not guilty to the charge. After full trial, he was found guilty as charged and sentenced to serve twenty (20) months imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. The Appellant was aggrieved by his conviction stating that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. He faulted the Court Martial for convicting him without considering that he was at all the material times at the Unit Camp. He asserted that the Court Martial failed to give reasons for his conviction in its judgment. He took issue with the fact that the Court Martial failed to consider the submission made by his defence counsel in arriving at its decision. He faulted the Court Martial for failing to properly evaluate the evidence on record. He was aggrieved that the Court Martial failed to take into consideration the amount of time he had spent while in closed arrest. 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, the Appellant filed written submission in support of his appeal. This court also heard oral submissions from Mr. Were for the Appellant and Ms. Kimiri for the State. Mr. Were submitted that the Appellant had already been discharged from service and he could therefore not be charged with desertion. He asserted that the Appellant was no longer a member of the Kenya Defence Forces hence the Court Martial did not have jurisdiction to hear and determine the case. He averred that by virtue of Section 159(2) of the Kenya Defence Act, the Service Commander should have communicated his decision in writing to the Appellant. In the premises therefore, he urged this court to allow the Appellant's appeal.

Ms. Kimiri for the State opposed the appeal. She asserted that the Appellant was a service member at the time of his arrest. She stated that the Appellant had earlier been charged and convicted of two offences which led to his discharge from service administratively in the first offence. He was sentenced to serve seven (7) days imprisonment in the second charge. After serving his sentence, he was taken to PW1 who instructed him to wait for communication regarding his discharge from the Service Commander. He was asked to remain in service as he awaited the said communication. Learned State Counsel averred that the Appellant failed to do the same. He absented himself from service on 2nd October 2014. She submitted that the Service Commander wrote a letter dated 13th October 2014 setting aside the discharge from service of the Appellant.

Ms. Kimiri further submitted that by virtue of Section 255 of the Kenya Defence Forces Act, a discharge from service ought to be in writing. She asserted that Section 257(3) of the said Act provides that the discharge must be authorized by the Service Commander. Section 257(4) stipulates that upon discharge, a service member ought to be given a certificate of discharge setting out the reasons for the discharge. She maintained that the Appellant ought to have waited for the Commander's decision regarding his discharge. His absence from work was

therefore not sanctioned. She stated that the Appellant was absent from duty for a period of more than ninety (90) days. She was of the view that his conviction was safe and ought to be upheld. She therefore urged the court to dismiss the Appellant's appeal.

Counsel for the Appellant, in response to Ms. Kimiri's submission, stated that Section 155 of the Kenya Defence Forces Act provides that any officer can be discharged. He added that the letter alleged to be written by the Commander was not produced in evidence by the prosecution. He submitted that due to the military's chain of command, the Appellant did not go to work since he had been discharged by a senior officer. He was of the view that the Appellant's conviction ought to be quashed and his sentence set aside.

The facts of the case according to the prosecution are as follows: PW1, Capt. Robert K. Butaki, was an Adjutant at the Workshop Battalion where the Appellant was deployed. On 2nd October 2014, he was informed that the Appellant was absent from duty without permission. He raised an Absent Without Leave (AWOL) notice. He told the court that prior to that, the Appellant had earlier been charged with the offence of being drunk and disorderly while on standby duties. He had been discharged from duty administratively, but the same was subject to approval by the Army Commander. On 30th September 2014, the Appellant was brought to his office. PW1 stated that he instructed the Appellant to continue attending to his duties as he awaited communication from the Army Commander regarding his discharge. He stated that the Appellant reported to work on 1st October 2014. He however absconded duty from 2nd October 2014 and could not be reached. PW1 raised his AWOL. After eight days, he raised an Absent Without Leave notice dated 10th October 2014. After 21 days, a Board of Inquiry was formed. The Appellant was eventually declared a deserter on 30th December 2014 after ninety (90) days had lapsed. He was arrested on 21st August 2015 and a Rejab was raised. PW1 afterwards wrote a letter to military police instructing them to carry out investigations into the Appellant's absence. PW1 stated that the order discharging the Appellant was quashed by the Army Commander. He produced the Commander's letter in evidence. The letter was dated 13th October 2014. PW1 stated that the Appellant was already AWOL when he received the letter from the Commander.

PW2, Cpl. Stephen Mungai, was also deployed at the Workshop Battalion. He stated that after the master parade on 2nd October 2014, he was informed that the Appellant had absconded from duty. He immediately filled an Absent Without Leave form and forwarded the same. PW3, Cpl Martin Kipkirui, told the court that he was on duty at Kahawa Garrison when Snr. Sgt. Major Wanjala (PW5) reported that he had received a call from the Appellant's father claiming that the Appellant had deserted service. PW3 accompanied by PW5 made their way to the Appellant father's home in Murang'a County. With the help of PW4 who was a police officer from Gitige Police Post in Murang'a, they arrested the Appellant. PW4, Sgt. George Mwangi, corroborated PW3's evidence.

PW5, Snr Sgt Moses Wanjala, testified that on 2nd October 2014, he was at the master parade when he noticed that Appellant was missing. He immediately issued instructions for him to be declared absent. He testified that earlier on 30th September 2014, he had escorted the Appellant to the Adjutant's (PW1) office. PW1 informed the Appellant that he was to await communication from the Service Commander regarding his discharge. PW5 stated that the Appellant reported to work on 1st October 2014 but however absconded on 2nd October 2014. He tried to contact the Appellant on his mobile phone to no avail. On 20th August 2015, he received a call from the Appellant's father informing him that the Appellant was at home in Murang'a County. PW5 and PW3 went to the Appellant's home and apprehended him on the following day.

PW6, Col. Dr. Japheth Mwendwa, was the Chief Psychiatrist at the Defence Forces Memorial Hospital. He stated that he received a letter on 30th September 2015 from the Military Police instructing him to conduct a medical psychological assessment of the Appellant. He testified that the Appellant had earlier been diagnosed with substance abuse at Murang'a County Hospital. PW6 did a urine test which confirmed the same. He stated that the Appellant was abusing several addictive substances such as alcohol and marijuana. He added that from his examination, the Appellant did not suffer from any mental disorder.

PW7, SPTE. Alex Gitari, was the investigating officer. On 24th August 2015, he was instructed to investigate the circumstances under which the Appellant absented himself from duty. He obtained the Appellant's AWOL notice, Absent Without Leave, Part 1 Orders that convened the Board of Inquiry and Part II Orders which declared him a deserter. He produced the same into evidence. He also obtained the letter from the Army Commander which quashed the Appellant's order of discharge. It was dated 13th October 2014. The Appellant absconded duty on 2nd October 2014. He also interviewed the witnesses and recorded witnesses' statements. He thereafter took the Appellant to Defence Forces Memorial Hospital where PW6 confirmed that the Appellant was fit to stand trial. He thereafter preferred the charge against the Appellant.

The Appellant was put on his defence. In his unsworn statement, he told the court he failed to report to work since an order of discharge from service was made and that the same was upheld. He stated that he did not receive any communication from his superiors that the verdict had been quashed or reversed. He availed his father, Samson Kimari (DW2), to adduce evidence. DW2 denied calling the Military Police to inform them that the Appellant was at home and that he had become a nuisance. He stated that he took the Appellant to Murang'a General Hospital sometime in July 2015 because he was unwell. The doctor referred the Appellant to Defence Forces Memorial Hospital since he was from the military. DW2 took the reference letter from the doctor to Kahawa Barracks. He stated that he later received a call from the Military Police informing him that they were on their way to his house. He testified that the Appellant had been home for more than three months.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the Court Martial 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). In the present appeal, the issue for determination by this Court is whether the prosecution established the Appellant's guilt in 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. **Section 74(2)(e) of the Kenya Defence Forces Act** provides that a person deserts if that person is absent without leave for a continuous period of more than ninety days. The prosecution was required to establish that the Appellant was a member of the Kenya Defence Forces; that the Appellant absented himself from duty without leave for a continuous period of 90 days; and that there was no lawful reason for the Appellant to absent himself from duty.

In the present appeal, it is not disputed that the Appellant absented himself from duty for a continuous period of more than ninety (90) days as particularized in the charge sheet. What is in dispute is whether the Appellant was a member of the Kenya Defence Forces at the time the offence was committed. The Appellant claimed that he was discharged from duty at the material time and therefore could not be charged with the offence of desertion. The prosecution's case was that the Appellant was still on active duty when he deserted work on 2nd October 2014. The background of the case was that prior to commission of the offence, the Appellant was on 27th August 2014 charged with the offence of being drunk and disorderly while on standby duty. He was found guilty and was administratively discharged from duty subject to the Army Commander's approval. On 29th August 2014, the Appellant was additionally charged with the offence of being absent from work without leave from 29th August 2014 to 3rd September 2014. He was convicted as charged and sentenced to imprisonment for seven days as well as ordered to forfeit 5 days' pay.

The Appellant served the seven days custodial sentence with regard to the second offence. He was released on 30th September 2014. PW5 collected him from the guard room after his release and took him to the Adjutant's office (PW1). PW1 stated that he explained to the Appellant that his punishment in the first offence was discharge from duty but that the same was subject to the Army Commander's approval. He instructed the Appellant to continue with his duties pending communication from the Army Commander. His testimony was corroborated by PW5 who was present when the Appellant was given the said instructions by PW1. The Appellant reported to work the following day on 1st October 2014. He however again absconded work on 2nd October 2014 and was away until his arrest on 21st August 2015. The Army Service Commander, in a letter dated 13th October 2014 quashed the Commanding Officer's decision to discharge the Appellant. However, by this time, the Appellant had already absconded duty and was unreachable.

It is clear from the evidence on record that the Appellant failed to await discharge by the Service Commander as required by **Section 255** and **Section 257(3)** of the **Kenya Defence Forces Act**. **Section 257(3)** of the **Act** states that:

“A service member shall not be discharged unless the discharge has been authorized by order of the Service Commander or an officer authorized in that behalf.”

In the present appeal, the order discharging the Appellant from service by the Commanding Officer was subject to the Army Commander's approval. The same was not approved. It was set aside by the Army Commander. The Appellant absented himself on 2nd October 2014 before the decision whether to discharge him or not was made by the Army Commander. The Appellant was therefore at the time the offence was committed still a member of the Kenya Defence Forces and therefore subject to the **Kenya Defence Forces Act**. The Appellant did not dispute the fact that he absented himself from duty from 2nd October 2014 to 21st August 2015. The Appellant in his defence stated that he had not absconded but that his services were no longer required. However, when the Appellant was released from confinement on 30th September 2014, the Adjutant Officer (PW1) informed the Appellant to continue with his duties as he awaited the Service Commander's decision. This fact was corroborated by PW5 who was present. In addition, the Appellant's charge sheet (**PEX2**) indicated that the Appellant's discharge from service by his Commanding Officer was subject to the Army Commander's approval.

The fact that the Appellant reported for duty the following day on 1st October 2014 is indicative that he was aware that he was still in active service pending the decision of the Service Commander. His decision to abscond work from 2nd October 2014 was not sanctioned by his superiors. His immediate supervisor, PW5, tried to reach the Appellant on phone but was unable to contact him. The Appellant did not make any efforts to come back to work until he was arrested. He absconded his duties for about eleven months before he was arrested at his father's home. The prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant absented himself from duty from 2nd October 2014 to 1st August 2015 without leave. He therefore deserted from duty.

This court is of the view that the Appellant's testimony and that of DW2 did not dent the otherwise overwhelming prosecution evidence against him. His guilt in the present case was established to the required standard of proof beyond any reasonable doubt. In the premises, 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 on conviction lacks merit. The same is hereby dismissed.**

On sentence, this court notes that the Appellant has been dismissed from the Kenya Defence Forces. The court has also taken into account the period that he has been in custody, both during and after his conviction by the Court Martial. This court is of the view that the period that the Appellant has been in lawful custody is sufficient punishment. The court commutes the custodial sentence to the period served. He shall be refunded the cash bail that he deposited in court when this court released him on bail pending appeal. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF OCTOBER 2019

L. KIMARU

JUDGE