



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL CRIMINAL APPEAL NO.3 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. Mrs. Rosemary Kimingi

delivered on 18th May 2016 at Kahawa Garrison Nairobi Court Martial S/No.70151)

DAVID KIPCHOGE BOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, David Kipchoge Bor was at all the material time a member of the Kenya Defence Forces. He was charged before the Court Martial in Count 1 with the offence of desertion contrary to Section 74(1)(a) as read together with Section 74(2)(e) and Section 74(3)(b) of the Kenya Defence Forces Act. The particulars of the offence were that the Appellant while at the School of Transport Kahawa Garrison absented himself without leave on 6th June 2014 until 9th October 2014 when he reported back to his unit, thereby absenting himself for a continuous period of one hundred and twenty-three (123) days, an act he knew or ought to have known is an offence. The Appellant was charged in Count 2 with the offence of being absent without leave contrary to Section 75(1)(a) of the Kenya Defence Forces Act. The particulars of the charge were that while at the School of Transport Kahawa Garrison, the Appellant absented himself without leave on 18th November 2013 until 19th November 2013 when he reported back to the Unit, thereby absenting himself for a period of one (1) day, an act he knew or ought to have known constituted an offence.

The Appellant was charged in Count 3 with the offence of being absent without leave contrary to Section 75(1)(a) of the Kenya Defence Forces Act. The particulars of the charge were that while at the School of Transport Kahawa Garrison, the Appellant absented himself without leave on 17th February 2014 until 14th April 2014 when he reported back to the Unit, thereby absenting himself for a continuous period of fifty-six (56) days, an act he knew or ought to have known constituted an offence. The Appellant was charged in Count 4 with the offence of being absent without leave contrary to Section 75(1)(a) of the Kenya Defence Forces Act. The particulars of the charge were that while at the School of Transport Kahawa Garrison, the Appellant absented himself without leave on 22nd April 2014 until 30th April 2014 when he reported back to the Unit, thereby absenting himself for a continuous period of eight (8) days, an act he knew or ought to have known constituted an offence.

The Appellant was charged in Count 5 with the offence of being absent without leave contrary to Section 75(1)(a) of the Kenya Defence Forces Act. The particulars of the charge were that while at the School of

Transport Kahawa Garrison, the Appellant absented himself without leave on 17th November 2014 until 29th November 2014 when he was apprehended by the civil police and handed over to the military police, thereby absenting himself for a continuous period of thirteen (13) days, an act he knew or ought to have known constituted an offence.

The Appellant was charged in Count 6 with the offence of escaping from custody contrary to Section 105 of the Kenya Defence Forces Act. The particulars of the charge were that while at 12 Engineer Battalion Thika, the Appellant escaped from custody on 17th November 2014 where he had been held under closed arrest until he was apprehended, an act he knew or ought to have known constituted an offence.

When the Appellant was arraigned before the Court Martial, he pleaded not guilty to all the charges. After full trial, he was found guilty as charged and sentenced to serve custodial sentences of nine (9) months in Count 1, one (1) month in Count 2, four (4) months in Count 3, one (1) month in Count 4, three (3) months in Count 5 and nine (9) months in Count 6. The sentences in Counts 1 to 4 were to run consecutively. The sentences in Counts 5 and 6 were to run concurrently. He was further ordered dismissed from the Kenya Defence Forces. 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 taking into consideration the fact that he was assigned other duties outside his normal duties. 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 properly evaluate the evidence on record. He was aggrieved that the Court Martial failed to take into consideration the amount of time he spent during closed arrest in pronouncing the sentence. 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. Were for the Appellant and Ms. Kimiri for the State. Mr. Were submitted that the Appellant did not desert duty. He averred that the Appellant was representing the military in Athletics Kenya Defence Forces (AKDF) and Harambee Sacco Committees. He stated that the Appellant's Commanding Officer, Col. Keitany, wrote a letter seeking the Appellant's replacement since the Appellant had been assigned other duties. He asserted that when PW4 arrested the Appellant, he failed to notify his Commanding Officer (Col. Keitany). He maintained that the Appellant's absence from duty was sanctioned by his Commanding Officer. He submitted that the Appellant lived within the barracks. He was of the view that the prosecution failed to prove that the Appellant was away without permission from his superior. He added that PW15 who was a psychiatrist testified that the Appellant was suffering from a mental disorder which was being treated. He asserted that by virtue of Section 162(2) of the Constitution, a dispute between an employer and employee should not have been canvassed before a Court Martial. In the premises therefore, he urged this court to allow the Appellant's appeal.

Ms. Kimiri for the State opposed the appeal. She made oral submission to the effect that the prosecution proved its case to the required standard of proof beyond any reasonable doubt. She asserted that the Appellant absented himself from duty on various occasions without the permission of his Commanding Officer. She submitted that PW1 testified that respective absent reports and rejobs were raised each time the Appellant absconded duty. The same were produced in evidence. PW1 also asserted that the Appellant failed to attend daily morning parades which were scheduled between 7.30 a.m. and 8.00 a.m. His evidence was corroborated by Sgt. Magoti (PW2) who was the Appellant's immediate supervisor. Learned State Counsel further averred that the Appellant was not reachable on his mobile phone. She submitted that PW3 told the Court that indeed the Appellant was a member of Harambee Sacco and AKDF committees. However, when he was required to attend to such duties, he was supposed to obtain leave from his superiors. Ms. Kimiri maintained that the Appellant failed to seek leave from his Commanding Officer to attend to other duties. In addition, PW8 testified that the Appellant did not attend AKDF meetings from March 2014. She was of the view that the Appellant was not truthful. She therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, WO1 Isaac Kipketer, was an instructor at the School of Transport where the Appellant was deployed. He told the court that the Appellant absented himself from duty from 18th November 2013 to 19th November 2013. PW1 reported the matter to the Administration Officer, Captain Roba (PW5), who raised an absent report. The Appellant absconded duty yet again on numerous occasions being; 17th February 2014 to 14th April 2014, 22nd April 2014 to 30th April 2014 and on 6th June 2014 to 9th October 2014. He was afterwards declared a deserter after absenting himself from work for a continuous period of more than ninety (90) days from 6th June 2014 to 9th October 2014. On cross-examination, PW1 testified that an officer has to be granted permission to be absent from duty if he has other duties to attend to outside his normal duties at the camp as indicated in Part 1 Orders.

PW2, Sgt. Juma Hassan, was also an instructor at the School of Transport. He reported to PW1 and was the Appellant's immediate supervisor. He corroborated PW1's evidence in regard to the dates when the Appellant was absent from duty. He stated that he informed PW1 as well as the Administration Officer (PW5) on each occasion the Appellant absconded duty. He noticed that the Appellant was absent since he failed to attend master parades which were held every morning. He testified that he tried to reach the Appellant on his mobile phone to no avail. He averred that the Appellant was required to get permission from his superiors if he was required to attend to other duties outside his normal duties.

PW3, Sgt. Patrick Wafula, was a Documentation Clerk at the School of Transport. One of his duties included accounting for service members that reported to work. He testified that the Appellant was absent from duty on 18th November 2013. He called the Appellant who informed him that he was on his way to work. The Appellant however did not report on duty. PW3 informed PW2 that the Appellant was absent. Captain Roba (PW5) instructed PW3 to raise an absent report. The Appellant came back on 19th November 2013. PW3 raised a rejab report when the Appellant reported back to work. He stated that the Appellant absconded duty again on 17th February 2014. PW3 tried to call him but the Appellant could not be reached. He raised an absent report. After eight days, PW3 raised an abseight on 24th February 2014. After twenty-one (21) days, a Board of Inquiry was convened to investigate why the Appellant absconded work. The Appellant reported back to work on 14th April 2014.

Thereafter, the Appellant absented himself again on 22nd April 2014. PW3 raised an AWOL and after eight (8) days, he raised an abseight. The Appellant came back to work on 29th April 2014 and a rejab was raised. The Appellant absented himself from work again on 6th June 2014. PW3 followed the same procedure and raised an AWOL and Abseight. After 21 days, a board of inquiry was convened to investigate the Appellant's whereabouts. The Appellant was declared a deserter after 90 days had lapsed. The Appellant reported back to his Unit on 9th October 2014. He was immediately apprehended by military police and placed under closed arrest at Thika Military Camp. PW4, Cpl. Solomon Mudibo, was the arresting officer. On 9th October 2014, the Commanding Officer instructed him to apprehend the Appellant who was said to have deserted duty. The Appellant absented himself from duty but was seen on several occasions entering the Unit Camp at wee hours of the night. PW4 arrested the Appellant at the main gate at about 10.20 p.m. on 9th October 2014.

PW5, Captain Roba was an Administrative Officer at the Appellant's Unit Camp. He reported to the Commanding Officer. He was essentially a custodian of all records at the Unit camp. He corroborated PW3's evidence with regards to all the dates when the Appellant absented himself from duty as well as the supporting documents produced in evidence. He stated that when the Appellant absented himself from duty, he tried to reach him on his phone to no avail. It was his evidence that if he had received any correspondence requesting release of the Appellant to attend to duties outside his normal duties, he would have forwarded the same to the Commandant and then write a pass if required. He asserted that the Appellant did not have permission to be absent from duty on all material dates as particularized in the charge sheet. He testified that the Appellant was arrested on 9th October 2014. He however escaped from the guard room at 12 Engineers Battalion where he was being held on 17th November 2014.

PW5 informed the court that he was away from the camp for a short course from May to September 2014. In his absence, PW6 (Lt. Maureen Avugwi) took over his duties for the said months. On 6th June 2014, PW2 informed PW6 that the Appellant absented himself from duty. PW6 tried to call the Appellant but his phone was switched off. She raised an AWOL report dated 6th June 2014. After 21 days, she constituted a board of inquiry to investigate the Appellant's whereabouts.

PW7, Lt. Col. Jeremiah Koikai, was the Commanding Officer at Kahawa Garrison Headquarters. He told the court that he has been the Chairman of Harambee Sacco since 2012. He stated that the Appellant was a member of Harambee Sacco and Athletics Kenya Defence Forces (AKDF) Committees. He told the court that Harambee Sacco Committee held a meeting every month at Garrison Headquarters and that such meetings took about an hour. He stated that duties assigned by the Sacco were not core duties of the Kenya Defence Forces. Therefore, the Appellant needed to report to his station and get permission to be absent from duty if he was required to attend any such meeting. He said that in April 2014, he was informed that the Appellant was absent from duty without permission. He was told he was attending Sacco meetings. The Appellant was immediately demoted from being an official at the Sacco effective from April 2014 (*PEX 29*). He was replaced by Sgt. Gituto. PW7 stated that all upcoming meetings were published in Part 1 Orders at Garrison so as to notify all units to release officials from duty to attend the meetings.

PW8, Major Alfred Olewanawakus, was the Secretary of AKDF Committee. He stated that the Appellant was an Assistant Secretary in the Committee. He averred that AKDF Committee held meetings once or twice a month and that such meetings were held between 9.00 a.m. to 12.00 p.m., after which a member was required to report back to his Unit. PW8 told the court that the Appellant did not attend any meetings held by AKDF Committee since March 2014. He produced minutes of the meetings into evidence which established the same. PW8 called the Appellant's Unit to find out why he was not attending AKDF meetings. He was informed that the Appellant had absconded from duty. Members of AKDF elected another official to replace the Appellant as the Assistant Secretary in December 2014. He produced minutes of the meeting where the Appellant was replaced as an official in evidence (*PEX 38*). He added that a member was required to get permission from his unit before attending to any duties regarding AKDF.

PW9, WOII Chrispinus Ongamo, was deployed to the 12 Engineers Battalion in Thika. The Adjutant informed him that the Appellant had been transferred to 12 Engineers Battalion as a prisoner on 11th October 2014. He was being held under closed arrest at the guard room. He stated that he was the duty officer on 17th November 2014. At about 11.26 p.m., the Guard Commander (PW11) informed him that the Appellant had escaped from the guard room. PW9 informed the Field Officer (Cpt. Koroso) who was on duty. He also searched for the Appellant around the camp but he did not find him. He called the Appellant on his mobile phone. However, the Appellant declined to disclose his location. PW9 reported the matter to the military police.

PW10, Sgt. Isaac Njuguna, was deployed at 12 Engineers Battalion as a Regimental Police. His duties included securing the main gate as well as prisoners held in the guard room. He told the court that the Appellant was being held on close arrest at the guard room. He was on duty at the Guard Commander on the morning of 17th November 2014. He stated that he handed over two prisoners under closed arrest to the incoming Guard Commander, Sgt. Nzau (PW11) at 6.00 p.m. The Appellant was one of the prisoners. When he reported back to work on 18th November 2014, he was informed that the Appellant had escaped custody.

PW11, Sgt. Daniel Nzau stated that he was on duty as the Guard Commander on 17th November 2014 from 6.00 p.m. He took over duty from PW10. There were two prisoners including the Appellant in the guard room. He left the Appellant on one of the beds in the sentry. He went to receive arms for safe custody from military police who had come from 10 Engineers Battalion. He came back to the sentry room at about 9.00 p.m. and discovered that the Appellant was missing. The Appellant was nowhere to be

found. When PW11 called the Appellant, the Appellant informed him that he was within the camp and that he would come back to the sentry. However, he never came back. PW11 sought the assistance of a CID officer named Mwika who was able to trace the Appellant's phone and located it at Cheptiret in Uasin Gishu County. PW11 reported the incident at Makongeni Police Station. On 22nd November 2014, PW11 went to Kapsabet accompanied by Spte. Kiprop to try locate the Appellant. With assistance from police officers from the Police Station, PW11 was able to apprehend the Appellant in Cheptiret on 28th November 2014. They took the Appellant to Kesses Police Station. He afterwards handed over the Appellant to the military police.

PW12, Cpl. Abdullahi Duale, was based at Kesses Police Station. He testified that the Appellant was brought to the said station by police officers from Cheptiret Police Post accompanied by PW11 on 29th November 2014. The Appellant was booked at Kesses Police Station since Cheptiret did not have any vacant cell. The Appellant was alleged to have deserted duty and escaped from custody. The Appellant was released to military police on 30th November 2014.

PW13, Cpl. Amos Nyunda, told the court that he was on duty at Military Police Eldoret Camp on 30th November 2014. PW11 informed him that he had apprehended the Appellant. He requested for assistance to place the Appellant under military custody. PW13, PTE Otiato and PW11 proceeded to Kesses Police Station where the Appellant was being held. They took the Appellant to Moi Barracks where he was held awaiting to be picked up by his Unit. The Appellant was picked up by his Unit on 9th December 2014.

PW14, Captain Jackson Muthee, was the investigating officer. He received instructions from the Military Police Headquarters to investigate the complaint that the Appellant had deserted duty from 6th June 2014 to 9th October 2014. PW14 visited the Appellant's Unit at the School of Transport. He perused the Appellant's personal file. He also interviewed the Administration Officer (PW5) who informed him that the Appellant was a habitual absentee and that there were various AWOL cases pending against him. PW5 furnished him with various AWOL, Absent and Part 1 & 2 Order documents showing that the Appellant had absconded from duty on several occasions. PW14 stated that he conducted investigations and collected evidence in regard to the various instances where the Appellant absented himself from duty. He also discovered that the Appellant, while being held under closed arrest at Thika barracks escaped from custody. PW14 interviewed the prosecution witnesses and took down their statements. He interrogated the Appellant regarding his absenteeism from work. The Appellant informed him that he was attending to other duties at AKDF and Harambee Sacco committees. However, when he interrogated PW7 and PW8, they informed him that the Appellant failed to attend several meetings in both committees and that he was replaced as an official due to chronic absenteeism.

PW15, Col Dr. Ndegwa, was the Chief Psychiatrist at the Defence Forces Memorial Hospital. He told the court that the Appellant was treated at the said hospital from 2nd May 2014 to 12th May 2014. He was diagnosed with adjustment disorder due to grief and alcohol use disorder. After he was discharged, he was advised to attend counselling sessions. He however failed to attend the sessions. PW15 later examined the Appellant in January 2015 to determine whether he was fit to stand trial. He stated that the Appellant was of proper mental health. However, he still suffered from alcohol use disorder.

The Appellant was put on his defence. In his unsworn statement, he denied absenting himself from work without leave. He told the court that his Commanding Officer gave him permission to attend to other duties involving Harambee Sacco where he was a member, and Athletics Kenya Defence Association where he was elected as an Assistant Secretary. He stated that he has never been asked to show cause why he was absent from duty since his Commanding Officer knew of his whereabouts. He averred that he was living at the camp at all material times. He was of the view that proper investigations were not conducted by PW14 since he failed to interview his Commanding Officer. He denied the charges against him.

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 charges 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. The Appellant was charged in Count 1 **with the offence of desertion contrary to Section 74(1)(a) as read together with Section 74(2)(e) and Section 74(3)(b) of the Kenya Defence Forces Act. 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 90 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 was a member of the Kenya Defence Forces at the time the offence was committed. The Appellant was therefore subject to the **Kenya Defence Forces Act**. The prosecution's case was that the Appellant deserted duty from 6th June 2014 and was continuously absent for a period of 123 days until his arrest on 9th October 2014. The prosecution witnesses including PW1, PW2, PW3 and PW5 who were the direct supervisors of the Appellant at the time told the court that the Appellant absconded duty during the stated period. The Appellant did not dispute the fact that he was away from duty during the said period. His explanation was that he had permission from his superiors to attend to other duties at Harambee Sacco and Athletics Kenya Defence Forces (AKDF) Committees.

The Appellant's supervisors, *i.e.* PW1, PW2, PW3 and PW5 told this court that the Appellant did not have permission to be absent from duty. They further stated that if a service member was needed to attend to other duties outside the core duties at the camp, the unit was notified via a letter requesting the release of the said service member. In addition, the service member's absence was published in Part 1 Orders, indicating that he was to attend to other duties outside his normal duties. They asserted that the Appellant did not have permission to be absent from duty as he had alleged. The prosecution produced in evidence several absent reports, abseight letters, rejab reports, Part 1 Orders as well as Part II Orders which established that indeed the Appellant absconded from duty.

PW7 who was the Chairman of Harambee Sacco stated that the Appellant was an official at the said Sacco. He told the court that all upcoming meetings were published in Part 1 Orders at Garrison so as to notify all units to release the officials of the Sacco from duty. He also testified that the Appellant was demoted as an official in April 2014 since he was severally reported absent from duty without leave. PW8 who was the Secretary at AKDF stated that the Appellant was an Assistant Secretary. He told the court that the Appellant had not attended any AKDF meetings since March 2014. He produced minutes of the meetings into evidence which established that the Appellant was not present in the said meetings. PW8 called the Appellant's unit to find out why he was not attending AKDF meetings. He was informed that the Appellant had absconded from duty.

The Appellant's assertion that he was absent from duty from 6th June 2014 to 9th October 2014 as he was allegedly attending to other duties at Harambee Sacco and AKDF Committees was therefore false. PW7 and PW8 established that the Appellant did not attend any meetings since April 2014. He was replaced as an official in both committees due to his absenteeism. The Appellant failed to report back to duty until he was arrested by PW4 on 9th October 2014 as he was sneaking back to the camp at the wee hours of the night. Upon re-evaluating the evidence adduced in that regard, this court is of the opinion that the prosecution proved to the required standard of proof beyond any reasonable doubt that the Appellant deserted duty for a continuous period of more than 90 days without the permission from his superiors.

The Appellant was also charged with four additional counts of being absent without leave contrary to **Section 75(1)(a) of Kenya Defence Forces Act**. The Appellant did not dispute the fact that he was absent on the stated dates as particularized in the charge sheet. As stated earlier in this judgment, the prosecution did establish that the Appellant did not have permission from his superiors to be absent from duty. The evidence by PW1, PW2, PW3 and PW5 as well as the absent reports, abseight letters as well as rejab

reports produced in evidence established that the Appellant absconded duty without leave on the said dates. Even if this court was to believe the Appellant's testimony that he was attending meetings at the said committees, the Appellant still failed to report back on duty. PW7 and PW8 testified that such meetings took place once or twice a month and for a few hours, after which a member was required to report back to his unit. The Appellant absented himself for several days *i.e.* fifty-six (56) days in Count 3 and eight (8) days in Count 4. His defence did not displace the otherwise strong cogent prosecution evidence against him.

The Appellant was charged in Count 6 with the offence of **escape from custody** contrary to **Section 105** of the **Kenya Defence Forces Act**. The said Section provides that:

“A person subject to this Act who escapes from arrest, prison or other lawful custody (whether service custody or not) commits an offence and shall be liable, on conviction by a court-martial, to imprisonment for a term not exceeding two years or any lesser punishment provided for by this Act.”

The evidence by PW9 established that after the Appellant was arrested by military police on 9th October 2014, he was transferred to 12 Engineers Battalion in Thika under closed arrest since the guard room at School of Transport was full to capacity. The prosecution produced in evidence a letter dated 10th October 2014 which authorized the transfer of the Appellant to 12 Engineers Battalion to be held under closed arrest pending investigations by the military police. The Appellant was received at 12 Engineers on 11th October 2014. PW11 was the Guard Commander on duty on 17th November 2014 when the Appellant escaped from custody. He stated that he left the Appellant on one of the beds in the sentry room as he went to receive arms for safe custody from the military police who came from 10 Engineers Battalion. He came back to the sentry room at about 9.00 p.m. and found the Appellant missing. He looked around the camp but the Appellant was nowhere to be found. When he called the Appellant on his mobile phone, the Appellant informed him that he was within the camp and that he would come back to the sentry room. However, the Appellant never returned. He informed PW9 that the Appellant had escaped from custody. PW11 afterwards sought the assistance of a CID officer who was able to trace the Appellant's phone and located it at Cheptiret. The Appellant was apprehended at Cheptiret on 28th November 2014.

From the evidence on record, this court is of the view that the prosecution was able to establish that the Appellant escaped from lawful custody on 17th November 2014. The Appellant in his defence did not give any explanation of why he left the camp in Thika where he was being held under closed arrest, or how he ended up in Eldoret where he was apprehended. The evidence by the prosecution was uncontroverted. It is clear to this court that the Appellant escaped lawful custody. PW11 was only able to locate him after tracking down his mobile phone to Eldoret.

In the premises, this court is of the view that the Appellant's testimony did not dent the otherwise overwhelming prosecution evidence against him. His guilt in the present appeal 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.**

As regard sentence, this court has taken into consideration the fact that the Appellant was in pre-trial detention from the time of his arrest on 28th June 2014 to the time of his conviction by the Court Martial on 18th May 2016. He further remained in custody for two (2) months awaiting to be sentenced. Apart from being sentenced to serve a custodial term, the Appellant was dismissed from the Kenya Defence Forces. He is no longer a member of the Kenya Defence Forces. This court forms the view that the Appellant has been sufficiently punished in the period that he has been in lawful custody. His custodial sentence is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. The order that he be dismissed from the Kenya Defence Forces is upheld. **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