



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL APPEAL NO.7 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. Benson Ireri – SPM delivered on 26th July 2017 in Kahawa Garrison Court Martial Case No.8 of 2016)

SPTE JOHN KWIRICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Spte John Kwirich was at the material time a member of the Kenya Defence Forces. He was charged with the offence of **desertion** contrary to **Section 74(1)(a)** as read with **Section 74(2)(c)** and **Section 74(3)(b)** of the **Kenya Defence Forces Act 2012**. The particulars of the offence were that, the Appellant being a member of the Kenya Defence Forces and therefore subject to the **Kenya Defence Forces Act 2012**, while at 15th Kenya Rifles on 1st April 2011 absented himself from duty without leave until he surrendered to the Military Police on 12th June 2015 thereby being absent for a continuous period of 901 days, an act he knew or ought to have known constituted an offence. When he was arraigned before the Court Martial, he pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to serve twelve (12) months imprisonment. In addition, he was ordered dismissed from the Kenya Defence Forces in accordance with **Section 181** of the **Kenya Defence Forces Act**. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court against the said conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence that did not establish that he was a deserter to the required standard of proof beyond any reasonable doubt. The Appellant faulted the Court Martial for failing to consider that his absence was caused by reasons that were not of his making and further that he was following orders of his superiors. He took issue with the finding of guilt reached by the Court Martial despite the fact that there was evidence that he had been granted leave of absence from his place of work. He was aggrieved that his defence and closing submission were not considered by the Court Martial before it reached the impugned verdict. He took issue with the fact that the conviction was against the weight of evidence tendered by the prosecution. He accused the Court Martial for failing to properly analyze the evidence and thereby reached an erroneous decision. On sentence, he faulted the Court Martial for failing to take into consideration the fact that he had been in pre-trial custody for a period of two (2) years and therefore ought not to have been sentenced to serve a further term in prison. He was of the view that his fundamental right to fair trial had been infringed. For the above reasons, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed by the Court Martial.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Kyalo for the Appellant and Ms. Akunja for the State. Prior to the hearing of the appeal, the Appellant also filed written submission in support of his appeal. Mr. Kyalo submitted that the Appellant had been a diligent officer since he joined the armed forces in 1984. Except for 2009 when he was absent due to clashes at Mt. Elgon, he had always been on duty. He returned on duty in 2011. He was transferred to 15th Kenya Rifle while he was on leave. He received three conflicting letters which first indicated that he had been transferred and later indicated that the transfer had been revoked. Another letter was later sent that he should report to 15th Kenya Rifles. He was later told verbally to wait at Langata Barracks while his issue was being resolved. Due to this confusion, he went to his home at Mt. Elgon to pursue a land dispute in regard to his father's land. Learned Counsel submitted that the Appellant was not a deserter nor did he have any intention of deserting from duty. He submitted that the prosecution failed to establish that the Appellant had the intention to desert from duty. He cited several authorities in support of submission that the prosecution ought to have proved intention on the part of the Appellant to desert before finding him guilty of the offence of desertion. He further submitted that the Court Martial failed to take into consideration the fact that the Appellant was in pre-trial custody for a period of twenty-five (25) months before he was convicted. This period was more than the maximum sentence of one (1) year imprisonment that the Appellant was eventually sentenced to serve. He therefore urged the court to take into consideration this period and find that the Appellant ought not to have been sentenced to serve a further term in prison. He urged the court to allow the appeal and reinstate the Appellant back to work.

Ms. Akunja for the State opposed the appeal. She submitted that the prosecution had established to the required standard of proof that the Appellant had absented himself from work for a period of four (4) years without the permission of his superiors. There was no evidence that

the Appellant was ever granted permission to be away from duty. She urged the court to dismiss the Appellant's assertion that he had been told to wait in his village for a period of four (4) years on where he was to be deployed. She explained that the prosecution established to the required standard of proof that indeed the Appellant formed the intention to be away from duty and had no authority of his superiors to so absent himself. On sentence, she conceded that indeed the Appellant had been under closed arrest for a period of twenty-four (24) months and therefore this period ought to have been considered by the Court Martial before it sentenced the Appellant to serve a further period in prison. In the circumstances, she urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **desertion** from duty to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the Court Martial. It has also considered the submission made by the parties to this appeal. The submission were both oral and written. There are certain facts that are not in dispute in this appeal. It is not disputed that the Appellant was a member of the Kenya Defence Forces at all material times. He was therefore subject to the **Kenya Defence Forces Act**. According to the prosecution, the Appellant deserted from duty from 1st April 2011 to 12th June 2015 when he surrendered himself to the Military Police. PW1 Captain David Chacha of the 15th Kenya Rifle testified that at the material time, he was the second in command to the unit where the Appellant was posted. The Appellant requested to go on leave on 28th February 2011. He was to return on 31st March 2011. The Appellant did not return on duty upon completion of his annual leave. He was declared absent without leave. He was not seen until when he was brought back by Military Police on 12th June 2015. PW2, Sgt David Kiprotich Kirui, PW3 Captain Collins Okoth and PW4 Snr PTE Dickson Ekapolo all testified that the Appellant was away from duty without leave on the material days. They produced evidence which showed that after the Appellant had been declared absent without leave, a board of inquiry was convened which declared the Appellant a deserter.

When the Appellant was put on his defence, he denied that he had deserted from duty. He explained that there was confusion in relation to where he was to be posted. He produced three letters which first indicated that he had been posted to 15th Kenya Rifles but later the posting had been revoked. Another letter was sent reinstating his posting. He sought advice and was told to wait for further communication from his Commanding Officer to clarify the situation. While awaiting this determination, he went home. It was only in 2015 that he was arrested by the Military Police after he went to Endebbes to resolve a land issue. He denied that he had deserted from duty.

Section 74 of the Kenya Defence Forces Act provides as follows:

“(1) A person who is subject to this Act commits an offence if that person-

(a) deserts;

(b) ...

(2) A person deserts if –

(a) with the intention, either at the time or formed later, of remaining permanently absent from duty –

(i) leaves the Defence Forces; or

(ii) fails to join or rejoin the Defence Forces when it is the person's duty to join or rejoin them.”

According to this Section, the prosecution was required to establish to the standard of proof beyond any reasonable doubt that the Appellant, being a member of the Kenya Defence Forces, and being subject to the **Kenya Defences Forces Act**, deserted from duty with the intention to permanently leave the Kenya Defence Forces or that he failed to rejoin the Kenya Defence Forces when he was so required to. As stated earlier in this Judgment, it was common ground that the Appellant was at the material time a member of the Kenya Defences Forces. He was therefore subject to the **Kenya Defence Forces Act**.

According to the prosecution, it had established to the required standard of proof that the Appellant absented himself from duty without permission for a period of 901 days and therefore he was a deserter within the meaning ascribed to the term by the **Act**. On the other hand, the Appellant asserts that the prosecution failed to prove that he had the intention to permanently leave the Kenya Defence Forces. In that regard, he explained that he had been given permission to be absent from duty due to contradictory communication that he had received in relation to his transfer and posting to the 15th Kenya Rifle.

Upon re-evaluation of this evidence, this court holds that the prosecution indeed established to the required standard of proof beyond any

reasonable doubt that the Appellant deserted from duty. The argument advanced by the Appellant in his defence to the effect that the prosecution had failed to establish that he had the intention to desert from duty is not convincing. *How is intention supposed to be proved in such a case?* In this court's considered view, intention to permanently leave the Kenya Defence Forces under **Section 74(2)(a)(i)** of the **Kenya Defence Forces Act** is established when evidence is placed before the court that the Appellant absented himself from duty without the permission of his superiors and without lawful excuse.

In the present appeal, the prosecution was able to establish that indeed the Appellant absented himself from duty without the permission of his superiors. He was given permission to go on his annual leave but failed to return to duty. An absent without leave notice was raised. A board of inquiry was later convened which declared the Appellant a deserter. During the period of his absence, the Appellant neither communicated nor contacted his superiors to indicate his whereabouts. Secondly, he had no lawful excuse to be away from duty. Indeed, he did not explain to the court the justification for his failure to report on duty.

The statement he gave in his defence that there was confusion regarding his transfer to the 15th Kenya Rifles is incredible. If indeed there was confusion in relation to his transfer, he ought to have sought clarification and not leave for his rural home without the permission of his superiors. Therefore, this court holds that intention to desert was established when the Appellant absented himself from duty and continued with his absence without informing his superiors of his whereabouts for a period of more than ninety (90) days. The prosecution was able to establish to the required standard of proof that the Appellant deserted from duty. The appeal against conviction lacks merit and is hereby dismissed.

On sentence, the Appellant is on firmer grounds. It was common ground that the Appellant was placed on closed arrest for a period of 25 months before he was tried and convicted by the Court Martial. This period ought to have been taken into account by the Court Martial before another custodial sentence was meted on the Appellant. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016** (unreported) held thus at Page 28:

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

The Appellant therefore has a case when he states that he was sentenced to serve a longer sentence than the one that is provided by the law due to failure by the Court Martial to take into account the period that he was in pre-trial custody. That being the case, the custodial sentence imposed on the Appellant is hereby set aside and substituted by this court's sentence commuting the custodial sentence of the Appellant to the period served. As regard the order dismissing the Appellant from the Kenya Defence Forces, this court holds the same to be legal. It shall not interfere with the same. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF OCTOBER 2019

L. KIMARU

JUDGE