



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL APPEAL NO. 2 OF 2018

(An Appeal arising out of the conviction and sentence of the Court Martial at Kahawa Garrison delivered on 21st December 2017 in Court Martial Case No.10 of 2015)

WALTER MAYODI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Walter Mayodi was at the material time a member of the Kenya Defence Forces. He was charged with **desertion** contrary to **Section 74(1)(a)** as read with **Section 74(2)(c) & (3)(b)** of the **Kenya Defence Force Act 2012**. The particulars of the offence were that the Appellant, being a service member of the Kenya Defence Forces and therefore being subject to **Kenya Defence Forces Act 2012** and attached to the 15th Kenya Rifles, on 30th January 2015 absented himself without leave until he was arrested at Kitale on 19th December 2015. The Appellant had therefore absented himself for a period of more than ninety (90) days, 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 the charge. After full trial, he was found guilty as charged and sentenced to serve eighteen (18) months imprisonment. The Appellant was aggrieved by his conviction and sentence. He 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 aggrieved that he had been convicted by the Court Martial in the absence of any evidence that established his guilt to the required standard of proof beyond any reasonable doubt. He took issue with the fact that some of the witnesses who were called to testify in the case were surprise witnesses whom he had not been supplied with their witness statements prior to their giving testimony before the Court Martial. He was therefore denied an opportunity to prepare for the trial. He was aggrieved that the duration of two years that he was in custody at Kahawa Garrison was not taken into consideration before the Court Martial sentenced him to serve a further eighteen (18) months in prison. Taking into consideration the maximum sentence to be meted in the event that he was convicted is twenty (24) months imprisonment, he was of the view that the additional sentence of eighteen months imprisonment was harsh and excessive. He faulted the trial court for failing to take into consideration his defence and particularly that he was away from duty attending to his ailing mother and hence reached the erroneous determination that he had deserted from duty. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Mathenge for the Appellant and by Ms. Kimiri for the State. Mr. Mathenge submitted that the trial court failed to take into consideration the inconsistencies in the evidence that was adduced by the prosecution witnesses and thereby arrived at the erroneous decision that the prosecution had established its case to the required standard of proof beyond any reasonable doubt. He was of the view that the defence offered by the Appellant exonerated him from the crime yet the trial court had ignored it. As regard sentence, Learned Counsel submitted that the trial court failed to take into consideration that the Appellant was in pre-trial detention for a period of five months which the trial court ignored when it sentenced the Appellant to serve eighteen months imprisonment. He urged the court to find that the custodial sentence that was imposed on the Appellant was in the circumstances harsh and excessive.

Ms. Kimiri for the State opposed the appeal. She submitted that the prosecution proved to the required standard that the Appellant indeed deserted from duty. Apart from the evidence adduced by the prosecution, the Appellant admitted in his defence that he was away from duty for a period of ten months without the permission of his superiors. She urged the court to take the Appellant's defence that he was attending to his ailing mother with a pinch of salt. No evidence was presented to court in form of medical evidence to support the Appellant's assertion that indeed the Appellant's mother was sick. She submitted that the subsequent desertion was not the first time the Appellant had deserted from duty. He had earlier deserted from duty and was sentenced to serve forty-two days imprisonment. She further denied the Appellant's assertion that he had voluntarily surrendered himself to the military police. The true fact was that the Appellant was arrested by the police before he was handed over to the military. As regard the allegation whether the Appellant understood the charge, and whether he followed the proceedings, Learned Prosecutor submitted that the Appellant followed the proceedings and infact was not prejudiced at all in the manner

in which the proceedings were conducted. As regard sentence, she urged the court not to interfere with the same as it was legal. The further order that the Appellant be dismissed from service was also legal. She urged the court not to find favour with the Appellant's appeal and proceed to dismiss it.

The facts of this appeal are rather straight forward. The Appellant was at the material time a member of the Kenya Defence Forces. According to PW1, Captain Mathew Marangu, the Appellant was attached to the 5th Kenya Rifles. On 30th January 2015, he was informed by PW3 L/Cpl. Mohammed Juma that the Appellant had absented himself from duty. Earlier on 29th January 2015, the Appellant had informed PW3 that he had on 27th January 2015 absented himself from duty without leave because he had attended to his sick mother. He wanted to be given an extension of leave of absence so that he could go back and attend to his sick mother. PW3 told him to wait for the officer in-charge who would give him authority to go home. The Appellant was given a day to attend to his sick mother. He was supposed to return on duty on 30th of January 2015. He did not return on duty on that day. Effort to contact him proved fruitless. An Absence Without Leave (AWOL) notice was raised. He was later declared a deserter after he had been continuously absent from duty for a period of ninety (90) days. The Appellant was arrested by civilian police on 19th December 2015 at Kitale. He was then handed over to the military police led by PW4 Sgt Lucas Ochieng Oriko. He was brought to his unit where he was placed under closed arrest until he was tried and convicted by the Court Martial.

When he was put on his defence, the Appellant explained that he was away from duty after he had been given permission by his superiors. When pressed to produce documentary evidence that he had been given such permission, he explained that the permission was given to him verbally. He later told the court that he had applied to go on leave to attend to his sick mother but was denied permission. He explained that it was imperative that he be away on duty to attend to his sick mother and deal with a civil case which was pending in court which he could not do while he was on duty.

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 grounds of appeal and the submission made before this court, both oral and written. It was uncontroverted fact that the Appellant at the material time was a member of the Kenya Defence Forces. He was therefore subject to the **Kenya Defence Forces Act 2012**. What is disputed is whether the Appellant deserted from duty. **Section 74(1)** of the **Kenya Defence Forces Act** provides thus:

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

(a) Deserts;

(b) ...”

Section 74(2) provides that:

“A person deserts if that person –

(a)...

(b)...

(c)...

(d)...

(e) is absent without leave for a continuous period of more than 90 days.”

Section 74(3)(a)(i) provides that:

“A person who commits an offence under sub-section (1) shall be liable upon conviction by a Court Martial –

to life imprisonment or any lesser punishment provided for by this Act if –

the offence was committed under sub-section (1)(a) the person was on active service or under orders for active service at the time when it was committed;

ii) ...

(c) To imprisonment for not more than two years in any other case.”

In the present appeal, the prosecution was able to establish to the required standard of proof that indeed the Appellant deserted from duty. According to the evidence that was adduced by the Appellant’s superiors PW1 and PW3, the Appellant sought permission on 29th January 2015 to be away from duty for a day to attend to his sick mother. He was granted permission and was supposed to return on duty on 30th January 2015. According to the evidence adduced by prosecution witnesses, the Appellant did not return on duty for ten months until he was arrested by the police on 21st December 2015 and handed over to the Kenya Defence Forces. The prosecution therefore established that indeed the Appellant deserted from duty for a period of more than ninety days. The explanation given by the Appellant in his defence did not exonerate him from the charge. The offence of desertion is that of strict liability. When a member of the Kenya Defence Forces is charged for desertion, the duty is placed upon the member to show that he had been granted permission to be away from duty or that there were circumstances that were beyond his control that prevented him firstly, from communicating to his superiors of his absence from duty and secondly, that the circumstances prevented him from returning to work as he was required to. In the present appeal, it was clear to this court that indeed the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant deserted from duty without his superiors’ permission. For that reason, the appeal against conviction lacks merit and is hereby dismissed.

On sentence, the Appellant is on firmer ground. The Appellant was sentenced to serve eighteen months imprisonment by the Court Martial. Upon perusing the proceedings of the Court Martial, it was clear that the Court Martial did not take into account the period of five months that the Appellant was in pre-trial detention before his conviction. That period taken into account, together with the seven months that the Appellant served sentence while awaiting the hearing of this appeal, and before he was released on bail pending the hearing of the appeal, is sufficient punishment. This court therefore commutes the custodial sentence imposed on the Appellant to the period served. The Appellant shall therefore be set at liberty forthwith unless otherwise lawfully held. In addition to the imprisonment, the Appellant was dismissed from service pursuant to **Section 191(4)** of the **Kenya Defence Forces Act**. This court upholds the order of the Court Martial in that regard. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF OCTOBER 2019

L. KIMARU

JUDGE