

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.5 OF 2016

(An Appeal arising out of the conviction and sentence of COURT MARTIAL delivered on

27th July 2016 in Moi Airbase Eastleigh Court Martial Case No.7 of 2015)

ALLAN OMONDI ANYANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Allan Omondi Anyanga was charged before the Court Martial with **desertion** contrary to **Section 74(1)(a)** as read with **Section 74(2)(e)** and **Section 74(3)(b)** of the **Kenya Defence Forces Act, 2012**. The particulars of the offence were that the Appellant, while deployed at Kahawa Barracks for Push-up duties on 8th September 2014 absented himself from his place of work without leave and remained so absent for a continuous period of more than 90 days until 25th March 2015 when he was apprehended by military police personnel at Lazarus Inn within Nairobi Central Business District, an act he knew or ought to have known constitutes an offence. After full trial, he was convicted as charged and sentenced to serve 18 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. He was aggrieved that the Court Martial found him guilty yet the prosecution had failed to establish its case to the required standard of proof beyond any reasonable doubt. The Appellant took issue with the fact that the Court Martial failed to take into consideration the evidence that he had placed before the court that he was infact living at the camp and could not therefore be accused of having deserted from the Forces. He faulted the Court Martial for failing to take into consideration his defence and the submission that he had filed in his defence before arriving at the erroneous decision to convict him. He was of the view that the Court Martial failed to discharge its mandate that required it to evaluate the evidence on record before reaching the verdict to convict him. On sentence, the Appellant was aggrieved that the Court Martial had not taken into consideration the period that he was under close arrest before sentencing him to serve the custodial sentence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed upon him.

Prior to the hearing of the appeal, the Appellant filed an application before this court to be released on bail pending appeal. His application was allowed. He was released on bail pending appeal on 21st December 2016. During the hearing of the appeal, Mr. Were for the Appellant submitted that the Appellant had been deployed to Kahawa Barracks to assist his Unit (10 Engineers Battalion Nanyuki) with Push-up duties. This entailed coordinating the transfer of supplies for the Unit from Kahawa Barracks to Nanyuki. At the time of deployment, the Appellant worked under the supervision of Sergeant Halowe. After a while, Sergeant Halowe proceeded for training, leaving the Appellant to undertake the said Push-up duties. Learned counsel submitted that at all the material times it was alleged that the Appellant had deserted from duty, he was infact working at Kahawa Barracks. He explained that there was contradiction in the evidence adduced by the prosecution witnesses as to whether the Appellant should have travelled to Nanyuki or should have been facilitated to travel to Nanyuki. If that were the

case, then, the Appellant should have been charged with insubordination and not desertion from duty. He was of the view that taking into consideration the totality of the evidence adduced, the prosecution had failed to establish to the required standard of proof that indeed the Appellant had deserted from duty. He pointed out that no witness from Kahawa Barracks was called to shed light whether the Appellant was on duty at the time it is alleged that he had deserted from duty. He urged the court to allow the appeal.

On her part, Ms. Sigei for the State opposed the appeal. She submitted that whereas there is no dispute that the Appellant was deployed by his mother Unit to work at Kahawa Barracks to undertake Push-up duties, the prosecution adduced evidence which established to the required standard of proof that when the Appellant was recalled back to his mother Unit at Nanyuki, he failed to honour the recall. His immediate supervisors looked for him but could not raise him resulting in absent without leave (AWOL) being raised. The Appellant did not return on duty until he was arrested by the military police in Nairobi. Learned State Counsel submitted that the evidence adduced by the prosecution witnesses pointed to the irresistible conclusion that during the material time, the Appellant had deserted from duty. All efforts to trace him by his superior officers were in vain hence the decision for AWOL to be raised. She reiterated that the Appellant's defence to the effect that he was at Kahawa Barracks at the material time was not supported by evidence in that he was not performing any duties on behalf of his mother Unit at the said Barracks. In the premises therefore, she urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced by the prosecution witnesses so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must always bear in mind that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any finding on the basis of the demeanour of the witnesses.

In the present appeal, the issue for determination is whether the prosecution established the charge of **desertion** contrary to **Section 74(1)(a)** and **Section 74(2)(e)** of the **Kenya Defence Forces Act** to the required standard of proof beyond any reasonable doubt. For the prosecution to establish the charge, it was required to establish that the Appellant was a member of the Kenya Defence Forces and further that as such the Appellant is subject to the disciplinary procedures of the Kenya Defence Forces. The prosecution is further required to establish that the Appellant deserted from the Kenya Defence Forces either with the intention of permanently leaving the Kenya Defence Forces or permanently being absent from duty. Another ingredient is that the Appellant must have been absent without leave for a continuous period of more than 90 days.

In the present appeal, the prosecution was able to adduce evidence which established to the required standard of proof that the Appellant was at the material time a member of the armed forces having been enlisted to join the Kenya Defence Forces on 25th October 2010 on a 12 year contract. This fact was not disputed by the Appellant. The prosecution was also able to establish to the required standard of proof that the Appellant was at the time attached as a Storeman to the 10 Engineers Battalion Nanyuki. It was common ground that the Appellant was deployed to Kahawa Barracks, Nairobi to assist PW4 Senior Sergeant James Halowe who had been posted there to assist in Push-up duties of supplies for the Unit. The prosecution adduced evidence to the effect that the Appellant was verbally deployed to Kahawa Barracks and was verbally recalled back to Nanyuki.

PW2 Captain C.C. Kiriongi testified that at the material time, she was sitting in for the Commanding Officer. She was informed in September 2014 that the Appellant had deserted from duty. The officer who gave her this information was PW3 Warrant Officer II Peter Nyanchama. They tried to raise the Appellant but they could not get him. That is the time she raised the AWOL. According to the prosecution witnesses, the Appellant was absent from his place of work from 8th September 2014 to 25th March 2015 which is a continuous period of more than 90 days. The Appellant was arrested by the military police on 25th March 2015. The Appellant's defence was to the effect that he was, during this entire period, at Kahawa Barracks undertaking Push-up duties on behalf of his Unit.

Having re-evaluated the evidence adduced by both the prosecution and the defence in this regard, it was clear to this court that the prosecution indeed established to the required standard of proof that the

Appellant deserted from duty at the material dates. That period was more than a continuous period of 90 days. The Appellant's defence to the effect that he was on duty during the entire period is incredible since at the material time he could not be traced or raised by his immediate superiors. It was also evident that the Appellant made no effort to contact his mother Unit so that the AWOL, which had been raised, could be lifted. That being the case, this court holds that the prosecution established its case to the required standard of proof. The Appellant's defence did not dent the otherwise strong evidence that was adduced by the prosecution in support of its case. In the premises therefore, the appeal against conviction is thereby dismissed.

As regard sentence, according to the prosecution, the Appellant spent 42 days in close arrest and 449 days in open arrest. The Appellant disputed this assertion and claimed that during the entire period he was under close arrest. The Appellant was sentenced to serve 18 months imprisonment. Prior to his release on bail pending appeal on 21st December 2016, the Appellant was in prison from 28th July 2016. This is a period of approximately 4 months. Taking into consideration the period that the Appellant was under close arrest and the period that he was in prison prior to being released on bail pending appeal, this court is of the opinion that the Appellant has been sufficiently punished. In the premises therefore, the custodial sentence that was meted out by the Court Martial is set aside and substituted by a sentence of this court commuting the custodial sentence of the Appellant to the period served. The Appellant is therefore set at liberty forthwith unless otherwise lawfully held. The cash bail that he paid to secure his release on bail pending appeal shall be refunded to him. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF JANUARY 2018

L. KIMARU

JUDGE