



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL 1 OF 2018

(An Appeal arising out of the conviction and sentence of the Hon. Lucas Onyina (SPM) - Court Martial No.10 of 2015 Sitting at Kahawa Garisson on 6th June 2016)

BERNARD GACHAU MAKARI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant, Bernard Gachau Makari was at the material time a member of Kenya Defence Forces. He was attached to Moi Airbase, and specifically, the motor transport section of the Air Defence Control Unit (ADCU). The Appellant was charged before the Court Martial for the offence of **desertion** contrary to **Section 74(1)(a)** as read with **Section 74(2)(e)** and **74(3)(b)** of the **Kenya Defence Forces Act 2012**. The particulars of the offence were that on 26th November 2013, the Appellant absented himself without leave from his Unit until his arrest by both civilian and military police at St. John's Ambulance offices in Nairobi on 11th January 2016, thus being absent for a continuous 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 was tried despite the fact that the record of the Court Martial does not disclose that he was called upon, before the trial commenced, to plead to the charge. After full trial, he was convicted and sentenced to serve 6 months imprisonment. 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 faulted the Court Martial for sentencing him to serve six (6) months imprisonment without taking into consideration the fact that he had been in pre-trial detention for a period of 134 days and five (5) months respectively prior to his conviction. He accused the Court Martial of failing to properly evaluate the evidence adduced by the Appellant in his defence before arriving at the verdict that he was guilty as charged. He was of the view that his conviction was against the weight of evidence. The Appellant stated that the prosecution failed to establish guilty intent on his part and therefore his conviction could not be sustained. He was finally aggrieved that the trial court had not taken into consideration the fact that he had been ill-treated while in pre-trial detention and denied medical care therefore eroding the Appellant's right to fair trial. He faulted the trial court for handing him a sentence that was harsh and excessive in the circumstances.

During the hearing of the appeal, Mr. Kaimenyi for the Appellant reiterated the contents of the petition of appeal. He submitted that the Court Martial erred in finding the Appellant guilty yet the Appellant's right to fair trial was infringed thereby rendering the entire judicial process tainted with irregularity. He was of the view that the prosecution did not adduce sufficient evidence to establish the Appellant's guilt to the required standard of proof beyond any reasonable doubt. He faulted the Court Martial for failing to consider the Appellant's family circumstances at the time it was claimed that he absented himself without leave before arriving at the verdict that he was guilty as charged. He submitted that the Court Martial did not take into account the Appellant's mitigation before sentencing the Appellant 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.

Ms. Atina for the State opposed the appeal. She submitted that the prosecution had indeed established to the required standard of proof that the Appellant deserted from duty for a period of two (2) years and only returned to his place of work upon his arrest. She submitted that the evidence adduced by the prosecution witnesses was consistent, corroborated and proved that the Appellant was away from duty without permission in the period in question. She disagreed with the Appellant's submission which was to the effect that his defence had not been considered by the Court Martial before it arrived at the verdict that the Appellant was guilty as charged. She explained that the Appellant's defence did not challenge at all the thrust of the prosecution's case which was to the effect that the Appellant had deserted from duty without permission during the specified period. She urged the court to dismiss the appeal and confirm the conviction and sentence of the trial court.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the witnesses before the Court Martial so as to arrive at its own independent verdict whether or not to uphold the decision of the Court Martial. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make

any comments regarding the demeanour of the witnesses. In the present appeal, the issue for determination by this court is whether the prosecution established its case to the required standard of proof beyond any reasonable doubt.

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; or

(b) Persuades or procures any person subject to this Act to desert.

(2) A person deserts if that person-

(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;

(b) being an officer, enlists in or enters the Defence Forces without having resigned the person’s commission;

(c) being a service member, enlists in or enters the Defence Forces without having been discharged from any previous enlistment;

(d) is absent without leave, with intent to avoid serving in any place outside Kenya, or to avoid service or any particular service when before an enemy; or

(e) is absent without leave for a continuous period of more than ninety days

(3) A person who commits an offence under subsection (1), shall be liable upon conviction by a court martial-

(a) to imprisonment for life or any lesser punishment provided for by this Act if-

(i) the offence was committed under subsection (1) (a), the person was an active serve or under orders for active service at the time when it was committed; or

(ii) the offence was committed under subsection (1) (b) the person in relation to whom it was committed was an active service or under orders for active service at that time; or

(a) to imprisonment for not more than two years, in any

other case

(4) in addition to, or without any other punishment, a court-martial that convicts an officer or service member of desertion; other than a reservist called out on permanent service, may direct that the whole or any part of any service proceeding the period of desertion shall be forfeited.”

In the present appeal, the Appellant was charged with **desertion** contrary to **Section 74(1)(a)** as read with **Section 74(2)(e)** and **74(3)(b)** of the **Kenya Defence Forces Act, 2012**. The prosecution was required to establish the following:

- (I) That the Appellant was a member of the Kenya Defence Forces.
- (II) That the Appellant deserted duty or was absent from duty for a continuous period of more than ninety days.
- (III) That the Appellant did not have permission from his superiors to be away from duty.
- (IV) That there was no lawful excuse or reason for the Appellant to absent himself from duty.

From the proceedings of the Court Martial, it was clear that the trial of the Appellant started on the wrong footing. There is no evidence from the record that the Appellant was called upon to plead to the charge that was brought against him. **Article 50(2)(b)** of the **Constitution** requires that the accused be informed of the charge with sufficient details to answer to it. There can be no valid criminal proceedings where an accused has not been asked to plead to the charge. In the present appeal, it was clear to the court that the Appellant was not given an opportunity to plead to the charge and therefore any subsequent proceedings were invalidated by this grave error. For that reason alone, the Appellant's appeal may be allowed by this court.

However, for completeness of record, this court will re-evaluate the evidence that was adduced by the prosecution witnesses. According to the ingredients of the charge, there is no dispute that the Appellant was a member of the Kenya Defence Force at the time the offence was committed. The Appellant was therefore subject to the **Kenya Defence Forces Act**. As regard to whether the Appellant deserted from duty, it was the prosecution's case that the Appellant deserted from duty on 26th November 2013 and was continuously absent for a period of more than 90 days until his arrest on 11th January 2016. The seven prosecution witnesses, including PW1 Captain Joseph Muli and PW2 Warrant Officer I D.M. Kyalo, the officers who were directly supervising the Appellant at the time, testified that the Appellant absconded from duty on November 26th, 2013 and did not return to work until he was arrested by the Military Police on 11th January 2016. The Appellant did not dispute the fact that he was away from duty during this period. His explanation was that he had sought permission to attend to his sick relatives but was denied such permission. Presumably, this was the reason why he decided on his own to leave work without the permission of his superiors. Upon re-evaluating the evidence adduced in that regard, this court formed the firm opinion that the prosecution proved to the required standard of proof beyond any reasonable doubt that indeed the Appellant deserted from duty for a continuous period of more than 90 days without the permission of his superiors. In the premises therefore, the Appellant's appeal on conviction lacks merit and is hereby dismissed.

As regard sentence, there was uncontroverted evidence that the Appellant was kept under closed arrest for 134 days before he was presented before the Court Martial. Subsequent thereafter due to a problem that arose from a Judge-Advocate ceasing to have jurisdiction in the case, the Appellant stayed in custody for five (5) more months while awaiting to be sentenced. While in custody, the Appellant fractured his hand. It is not clear from the proceedings how the Appellant sustained such an injury while in custody of the Kenya Defence Forces. This court is of the view that an inquiry ought to be undertaken to establish the circumstance under which the Appellant fractured his hand while in the custody of the military. It would be a sad day for this country which holds the Kenya Defence Forces in high esteem, if it emerged that the Appellant fractured his hand as a result of deliberate action by military officers and not by an accident. Such inquiry would put to rest the court's concern. Although **Article 24(5)(f)** of the **Constitution** limits the application of the right and fundamental freedoms to arrested members of the Kenya Defence Forces as provided under **Article 49** of the **Constitution**, this court is of considered view that for the Kenya Defence Forces to have held the Appellant for 134 days pending his production before the Court Martial was not only unreasonable but in breach of the Appellant's right not to be deprived of his freedom arbitrarily or without just cause as provided under **Article 29(a)** of the **Constitution**. The Appellant's further detention for five months while awaiting sentencing was also unreasonable and unjustified in the circumstances.

The Appellant's plea that the period that he served in pre-trial detention ought to have been considered by the Court Martial is valid. It was clear to the court that the Court Martial fell in error when it failed to consider this period when sentencing the Appellant to serve the custodial sentence. This was contrary to **Section 333(2)** of the **Criminal Procedure Code** that requires a court to take into consideration the period a convict has been in pre-trial detention before sentence. In the premises therefore, this court finds the Appellant's appeal on sentence to have merit. The sentence of the Appellant is commuted to the period served. He is ordered set at liberty forthwith unless otherwise lawfully held. The order that he be dismissed from the Kenya Defence Forces is upheld. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF MARCH 2018

L. KIMARU

JUDGE