



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**COURT MARTIAL APPEAL NO.8 OF 2017**

*(An Appeal arising out of the conviction and sentence of*

*Hon. Benson Ireri – SPM delivered on 6<sup>th</sup> August 2017*

*in Kahawa Garrison Court Martial Case No.83152 of 2016)*

**SPT E CHRISTOPHER MUTINDA KATITU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Christopher Mutinda Katitu was at the material time a member of the Kenya Defence Forces. He was charged before the court martial with the offence of **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**. The particulars of the offence were that on 18<sup>th</sup> May 2015, while on **Operation Maliza Ugaidi** at Garissa, the Appellant absented himself without leave until he reported back to his unit on 12<sup>th</sup> November 2015, thereby being absent for a continuous period of more than ninety (90) days, an act the Appellant knew or ought to have known constituted an offence. When the Appellant was arraigned before the court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged and sentenced to serve six (6) months imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court. The Appellant was released on bail pending the hearing of this appeal.

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 of the charge yet the prosecution had failed to prove that he had the intention of permanently absenting himself from the Kenya Defence Forces. The Appellant faulted the court martial for failing to take into consideration the fact that the Appellant was suffering from mental illness that had kept him from his place of work. The Appellant was of the view that the evidence adduced did not establish that he had deserted from his place of work but rather that he had domestic issues that ought to have been taken into account by the court martial as exonerating him from the charge. The Appellant faulted the court martial for reaching the verdict without taking into consideration the Appellant's defence. In particular, the Appellant was of the view that since he had voluntarily returned to his place of work, this fact should have been considered in his favour. As regard the sentence, the Appellant took issue with the court martial's failure to take into consideration the period of twenty (20) months that he was under lawful custody before sentencing him to serve a further term in prison. The Appellant was of the view that his fundamental rights and freedoms were infringed when he was kept under close arrest by the military while he was awaiting trial. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Mwalimu for the Appellant and by Ms. Atina for the State. It was clear from the arguments made that the issue for determination by this court is whether the Appellant deliberately absented himself from work or whether he was prevented from going back to work on account of his mental health. According to the prosecution's case, the Appellant, a member of the Kenya Defence Forces was on duty in Garissa when his wife went to his place of employment at Gilgil Barracks and complained that the Appellant was not providing for her and their children. This was in April 2015. The Appellant's superiors called the Appellant and inquired from him what the problem was. From the evidence that was adduced, it appeared that the Appellant was not happy that his wife had gone to his place of employment to make the complaint. The Appellant's superiors, who included PW1 WO II John Onyango Nyambuga and PW2 Sgt Paul Anyika Mogaka, recommended to their Platoon Commanders PW3 Lieutenant Antony Manyasi and PW4 Captain Davis Nyabere that the Appellant be given time off to resolve his domestic issues.

The Appellant was granted leave of absence from his duties from 4<sup>th</sup> to 11<sup>th</sup> May 2015. The Appellant was required to report back to work

on 11<sup>th</sup> May 2015. On that day, he called his superiors and told them that he had not resolved his problems and would wish to have the period of his leave extended. His wish was granted. He was told to report back on 18<sup>th</sup> May 2015. The Appellant did not report back to duty as was expected of him on that day. Efforts to contact him were in vain. When his wife was contacted, he told the Appellant's superiors that the Appellant had not gone home. The normal military procedures regarding a member of staff who absents himself without leave from his place of work were initiated. The Appellant did not report to work until 12<sup>th</sup> November 2015.

The explanation given by the Appellant for his absence was that after he was granted leave of absence by his superiors he fell ill. He told the court that he suffered a mental illness. He sought treatment for about five months from a traditional doctor. When he regained his health, he went back to work. He denied that he had voluntarily absented himself from work. He attributed his absence to a mental illness that incapacitated him and prevented him from returning to work. During the trial before the court martial, a witness Major T.M. Mugunda, a doctor and psychiatrist working for the Kenya Defence Forces testified as PW6. He stated that he saw the Appellant and assessed his mental fitness to stand trial. In his testimony, PW6 was asked whether the Appellant, in his assessment, suffered from any post-traumatic stress disorder. This is what PW6 stated:

***“Defence counsel: How come that the accused person told the Investigating Officer that he had some psychiatric issue and yet you never investigated?”***

***PW6: That is what he told me.***

***Defence counsel: Can you explain what is post traumatic disorder?***

***PW6: It is a disorder that affects an individual who has been subjected to a stressful condition, potential life threatening, they manifest with particular symptoms which will include hyperarousal (sic) avoidance and particular conditions hyper vigilant.***

***Defence counsel: When you talk of avoidance can you explain that? What does that person?***

***PW6: He will avoid situations which will make him remember that particular situation that he underwent.***

***Defence counsel: Did you encounter such cases of post traumatic disorder in the accused person?***

***PW6: Yes, your honour.”***

From further questions that PW6 was asked, it was clear that the Appellant's mental health issue was not properly addressed by the Kenya Defence Forces. In fact, the Appellant's mental illness was mishandled. The Appellant should have been treated from the post-traumatic stress disorder that he suffered from by the Kenya Defence Forces instead of subjecting the Appellant to a criminal process.

As the first appellate court, this court is required to re-consider and to re-evaluate the evidence adduced before the court martial so as to arrive at its own independent determination whether or not to uphold the decision of the court martial. In doing so, this court is required to always bear in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (See **Okeno –vs- Republic [1972] EA 32.**)

On re-evaluation of the evidence adduced before the court martial, and on consideration of the submission made by the counsels for the parties to this appeal, it was clear to this court that the charge that was brought against the Appellant that he deserted from his place of employment was not established to the required standard of proof beyond any reasonable doubt. The Appellant in this appeal, from the evidence that was adduced before the court martial served with distinction on three tours of duty in the war zone in Somalia. This was between March 2011 and December 2014. This was under the auspices of **AMISOM** and **Operation Linda Nchi**. During this period, it was apparent from the evidence that the Appellant's family life was affected. He was granted leave upon his return to the country. Upon resuming work from leave, he was sent to Garissa to man a roadblock under **Operation Maliza Ugaidi**.

It was during this period that his family problems came to head. It was also during this period that the post-traumatic stress disorder that the Appellant suffered while he was in Somalia became a mental illness. The Appellant's superiors should have noticed that the Appellant was not in a position to be sent in an operation zone in his mental condition. The record that was produced before the court martial indicated that the Appellant gave exemplary service to the nation when he was on duty in Somalia. Unfortunately when he returned home, his mental health condition was not accorded the treatment that it deserved. The Appellant's failure to return to work should have been considered by the Kenya Defence Forces in the context of his mental health. Again, tragically, instead of the Appellant's medical problem being resolved by medical intervention, a decision was made to look at his absence from work as a criminal matter.

That the Appellant saw it fit and appropriate to seek medical intervention from a traditional doctor from an illness that he got while serving this country is a bad reflection on how he was treated by his employer. When PW6 testified before court, it appeared that the prosecution wanted him to testify on the Appellant's then mental health status and not previously when he had sought medical intervention from a traditional medical doctor. PW6 was prevented by the prosecutor's intervention from giving a detailed mental health status of the Appellant. It is therefore the finding of this court that the Appellant established that he was not in a healthy state of mind to return to work when it is alleged that he absented himself without leave.

In the premises therefore, this court holds that the prosecution failed to establish to the required standard of proof beyond any reasonable doubt that the Appellant absented himself without leave in accordance with **Section 74(1)(a)** as read with **Section 74(2)(e)** and **Section 74(3)(b)** of the **Kenya Defence Forces Act**. The Appellant's appeal is allowed. His conviction is quashed. All the orders issued pursuant to the said conviction are set aside. The Kenya Defence Forces is ordered to consider the Appellant's case with a view to giving an appropriate and satisfactory remedy to the Appellant. It is so ordered.

DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JUNE 2018

L. KIMARU

JUDGE