



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISCELLANEOUS CRIMINAL APPLICATION NUMBER 165 OF 2018.**

**LT. COL. ROBERT TOM MARTINS KIBISU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Lt. Col. Robert Tom Martins Kibisu, hereafter the Applicant brought the present application seeking leave to file a Notice of Appeal out of time under Section 7 and Rule 38(1)(a) of the Appellate Jurisdiction Act, Section 186 of the Kenya Defence Forces Act and Articles 10, 27, 25(c), 48, 50(2) & 259(9) of the Constitution of Kenya, 2010. In his letter to the court dated 6<sup>th</sup> April, 2018 he enunciates that his appeal to the High Court was dismissed by a judgment delivered on 7<sup>th</sup> December, 2006 by Hon. Lessit & Makhandia.,JJ. That at that time the law did not allow a second appeal which is no longer the case. That he was therefore applying beyond the stipulated 14 days from the date of the judgment as a result of a change in the law and pursuant to the Supreme Court judgment dated 28<sup>th</sup> February, 2018 in **Petition No. 3 of 2014 LT. Col. Robert Tom Martins Kibisu v Republic** held that a. He was aggrieved by the judgment of the High Court and now wishes to appeal to the Court of Appeal. He avers that the intended Notice of Appeal shall be filed pursuant to Rule 58(1).

2. It is his case that the delay in filing a second appeal is not inordinate as the Respondent will not suffer any prejudice and the matter is of great public importance to the administration of justice under the Kenya Defence Forces Act. He urges that the need to serve the interest of justice to an accused person overrides the need of finality in litigation. He further urges that the court allows certified proceedings in Misc. Appl. No. 365 of 2005 as evidence in the instant application. Finally, that nothing has been presented that fetters the principles on which this application should be allowed.

3. He annexed to the application is a copy of the Notice of Appeal, a draft memorandum of appeal and the judgment of the Supreme Court in Petition No. 3 of 2014. He also referred the court to a ruling of the Supreme Court made subsequent to the judgment in Petition No. 3 of 2014 being **The Board of Governors Moi High School Kabarak and others v. Toroitich Arap Moi & others[2013] 2 EA 393** to support the submission that this court had jurisdiction to entertain the application. More so that the application is not filed in abuse of the court process.

4. The Respondent filed grounds of opposition dated 4<sup>th</sup> June, 2018 which were; (i) that the application was incompetent, frivolous and improperly before the court and therefore an abuse of the court process, (ii) that the issues raised in the draft petition of appeal were *res judicata* and therefore the court was *functus officio*, and (iii) that the application lacked merit.

5. Miss Atina for the Respondent submitted that the case of **The Board of Governors Moi High School Kabarak** (Supra) defined what constituted abuse of the process of the court. She submitted that the fact that other courts had addressed the facts of the case implied that the Applicant could not raise them again and doing so amounted to an abuse of court process. She submitted that Rule 38(1)(9) of the Appellate Jurisdiction Act provides for the mode of approaching the court which is that an application can be made ex-parte. That according to Supreme Court Petition No. 3 of 2015 the Applicant was to file a Notice of Appeal out of time which would commence the court process. This was an indication that the matter was *res judicata* and the only redress the Applicant had was to file an appeal in a superior court. That unfortunately only a revision application had been filed.

6. Ms. Atina submitted that the Applicant was convicted and sentenced by the Court Martial in 2004 and appealed to the High Court in 2005. That the Applicant had been charged under the repealed Armed Forces Act and the High Court was then the final appellate court. The Applicant therefore did not have a right to appeal further. She submitted that Section 4 of the Kenya Defence Forces Act defines to whom the Act applies and the Applicant did not fall within that definition as he was dismissed from the forces in 2004. That Section 3 of the Kenya Defence Forces Act is the transitional clause which does not open matters closed within the Armed Forces Act. Further, that the right to appeal is a substantive issue and cannot apply retrospectively. She submitted that Section 186 of the Kenya Defence Forces Act simply applies to matters that were undertaken under the new statutory regime. She therefore submitted that the application was incompetent, frivolous and an abuse of the court process.

7. It was Miss Atina's further submission that the Applicant's reliance on a filed Notice of Appeal was false as the Notice annexed to the application was not stamped by the court. She submitted that the Applicant had filed a litany of applications in all courts and litigation must come to an end. She concluded by stating that the Applicant was wasting the court's time and misusing the court process. She urged the court to dismiss the application.

8. The Applicant, in reply, submitted that his applications before the Court of Appeal and Supreme Court succeeded with regards to the jurisdiction of the High Court to reopen a matter pursuant to Article 50(6) of the Constitution. That before the Supreme Court he also succeeded with regards to the aspect of *res judicata*. He submitted that the Armed Forces Act continued to operate until it was repealed in 2012. That the transitional provisions under Section 310 of the Kenya Defence Forces Act brought all provisions under the Armed Forces Act under the new Act. That the purpose of the new Act was to bring the Armed Forces Act into conformity with the new Constitution and not to repeal the former Act. That given that he was a member of the Armed Forces he automatically became a member of the Kenya Defence Forces. He emphasized that his prayer before the court was merely to file the Notice of Appeal out of time.

#### **DETERMINATION.**

9. The present application seeks leave to file an appeal out of time and thus calls into question whether the Applicant has the locus standi to file the appeal. The Applicant submits that under Section 186 of the Kenya Defence Forces Act, he has a right to a further appeal to the Court of Appeal. In response the Respondent submits that the Applicant was tried and convicted under the Armed Forces Act and subsequently exhausted all avenues of appeal available to him. In that case he could not rely on the Kenya Defence Forces Act as the same did not apply to him pursuant to Section 4.

10. No doubt the Kenya Defence Forces Act outlines to whom it applies at Sections 4 and 5. Section 4, which is titled "Application of the Act" states:

***"This Act applies to the following persons—***

***(a) every member of the regular forces;***

***(b) an officer or service member of the reserve force, whether of the regular or volunteer reserve who is called out for service or is in training;***

***(c) auxiliary reserve force;***

***(d) any person who, though not otherwise subject to this Act, is serving with the Defence Forces under an engagement, and has agreed to be subject to this Act;***

***(e) cadets;***

***(f) an alleged spy of the enemy;***

***(g) a person who, though not otherwise subject to this Act, is in civil custody or in service custody in respect of any service offence committed or suspected to have been committed by the person;***

***(h) a person who, pursuant to a treaty or agreement between Kenya and the State in whose armed forces the person is serving, is attached or seconded as an officer or non-commissioned member to the Defence Forces, subject to such exceptions, adaptations and modifications as may be prescribed by regulations;***

***(i) a person, not otherwise a member of the Defence Forces, who accompanies any unit or other element of the Defence Forces that is on active service in any place; or***

***(j) a person attending a Defence Forces institution of the Defence Forces established under this Act or any other written law, subject to such exceptions, adaptations and modifications as may be prescribed by regulations."***

11. Section 5 which is titled "Application to Civilians" states:

***"(1) The application of this Act to a civilian shall be limited to a person, other than a member of the Defence Forces, who—***

***(a) with the authority of an authorized officer, accompanies a part, unit or formation of the Defence Force that is—***

***(i) outside Kenya; or***

***(ii) on operations against the enemy; and***

***(b) has consented, in writing, to subject himself or herself to this Act while so accompanying that part of the Defence Forces.***

***(2) The Defence Council shall, by regulations, prescribe the form and manner in which the consent under subsection (1)(b) may be obtained.***

**(3) For the purposes of this Act and subject to any limitations prescribed by the Defence Council, a person accompanies a unit or other element of the Defence Forces that is on service or active service if that person—**

**(a) participates with that unit or other element in the carrying out of any of its movements, maneuvers, duties in aid of a State organ, duties in a disaster or warlike operations;**

**(b) is accommodated or provided with rations at the person's own expense or otherwise by that unit or other element in any country or at any place designated by the Defence Council;**

**(c) is a dependant outside Kenya of an officer or non-commissioned member serving beyond Kenya with that unit or other element; or**

**(d) is embarked on a vessel or aircraft of that unit or other element.”**

12. The two sections cut out two broad and distinct situations in which the Act can apply to a party, namely; as a member of the armed forces or as a civilian. The Applicant in this matter submits that the Act applies to him as a member of the armed forces under the Armed Forces Act. Ms. Atina, in reply, submits that the Applicant was expelled from the armed forces at the conclusion of his court martial and was therefore not a member of the forces. I entirely concur with the submission by the learned counsel. Firstly, because the moment the Applicant lost the appeal before the High Court, the court confirmed his dismissal from the Armed Forces as ordered by the Court Martial. Secondly, Section 311 of the Kenya Defence Forces Act is instructive as the Act only transferred all members of the Armed Forces to the Defence Forces service. The same reads’

**“A person who immediately before the commencement of this Act was serving as an officer or a service member of the Armed Forces shall, at the commencement of this Act, be deemed to be an officer or service member of the Defence Forces.”**

13. Thirdly, the only person(s) entitled to a second appeal under the new Act are the members of the Defence Force, of which the Applicant had ceased to be. In a nutshell therefore, the Applicant is not entitled to the relief he seeks as his dismissal took place when the Kenya Armed Forces Act was operational. He cannot therefore rely on the Kenya Defence Forces Act as he was effectively not a member of the Defence Forces.

14. However, Section 4(g) of the Kenya Defence Forces Act offers an avenue for parties who are normally not subject to the Act in cases of civil or service custody. It is clear that the Applicant had been sentenced to one year imprisonment by the Court Martial but that the High Court on appeal commuted this sentence to the time served in custody. Consequently, the provision would not apply to the Applicant as he is no longer in custody.

15. The next question the court must ask itself is whether the Act could apply to the Applicant as a civilian in view of Section 5 of the Act. The answer is clearly in the negative as it relates to persons who are embedded with the Defence Forces or spouses to members of the Kenya Defence Forces. In the circumstances, I hold the view that the Applicant has not demonstrated how the Act applies to him.

16. In sum, there is no doubt that the Applicant not having proved that he has a *locus standi* to file the instant application, is not entitled to the reliefs sought. I accordingly dismiss the application with no orders as to costs. It is so ordered.

**DATED and DELIVERED this 26<sup>th</sup> day of July, 2018**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Applicant present in person.

2. Mr. Momanyi for the Respondent.