



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.9 OF 2016**

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

*Martial in Court Martial Case No.7 of 2015 at Moi Airbase Nairobi*

*delivered on 9<sup>th</sup> August 2016)*

**ANTHONY KIMARI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Anthony Kimari was convicted for desertion from duty contrary to **Section 74(1)(a)** as read with **Sections 74(2)(e)** and **74(3)(b)** of the **Kenya Defence Forces Act**. He was sentenced to serve twenty (20) months imprisonment. The Applicant was aggrieved by his conviction and sentence. He has appealed to this court challenging his conviction and sentence. Contemporaneous with filing the appeal, the Applicant filed an application seeking to be granted bail pending appeal. His main ground of appeal is that he was convicted for the offence yet at the time he had been discharged from duty and was no longer a member of the Kenya Defence Forces. It was his case that he could not therefore be subjected to the provisions of the **Kenya Defence Forces Act**. The Director of Public Prosecutions filed grounds in opposition to the application. He stated that the Applicant had not established that his case had an overwhelming chance of success nor that there existed exceptional circumstances to warrant this court to interfere with the findings made by the Court Martial.

During the hearing of the application, Mr. Were learned counsel for the Applicant essentially reiterated the contents of the application and the supporting affidavit. He submitted that the Applicant had already been discharged under **Section 255(1)(g)** of the **Kenya Defence Forces Act** and therefore could not be subjected to the Court Martial. He stated that it was unlawful for the Court Martial to have been convened to try the Applicant when he had ceased to be a member of the armed forces. Ms. Sigei for the State opposed the application. She submitted that indeed the Applicant was a member of the armed forces at the time of his trial before the Court Martial. The Applicant had deserted from duty. The proceedings that the Applicant alleged led to his discharge from service had not been concluded at the time that he was tried before the Court Martial. In the premises therefore, she asserted that the Applicant's appeal did not have an overwhelming chance of success as the prosecution had established to the required standard of proof that indeed the Applicant had deserted from duty without the permission of his superior officers.

This court has carefully evaluated the facts of this application. For the Applicant to be successful in his application for bail pending appeal, he must establish that his appeal has overwhelming chances of success. He must also establish the existence of exceptional circumstances that will enable this court exercise its discretion in his favour. The position of the Applicant is not the same as that of a person who is facing trial. He has already been convicted. The temptation to abscond from the jurisdiction of the court is real. This court is also aware that where there is possibility that the Applicant may be successful on his

appeal, then he should not be deprived of his liberty even for a single day. In the present application, it was clear to the court that the issue as to whether the Applicant was a member of the armed forces at the time he was tried at the Court Martial is a critical and crucial issue. This is because, if indeed the Applicant establishes on appeal that he was not a member of Kenya Defence Forces at the time that he was tried before the Court Martial, then his appeal cannot be considered as lacking in chances of success. This court is of the view that the Applicant established to the satisfaction of this court that his appeal is not frivolous but indeed has a chance of success.

In the premises therefore, this court finds that the Applicant's application has merit and is hereby allowed. The Applicant is hereby released on bail pending appeal on condition that he deposits a cash bail of Kshs.20,000/-. His appeal is admitted to hearing. It shall be heard by this court on 9<sup>th</sup> March 2017. He shall be required to prepared file and serve the record of appeal within thirty (30) days from today's date.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2017**

**L. KIMARU**

**JUDGE**