REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL 4 OF 2016

(An Appeal arising out of the conviction and sentence of the Hon. Members of Court Martial No.6 of 2015 Sitting at Embakasi Garisson on 21st June 2016)

SPTE GEORGE ONYANGO MAKOKHA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The Appellant, George Onyango Makokha is a member of The Kenya Defence Forces. He was charged with three (3) counts before the Court Martial. The 1st count was that he was **unlawfully found in possession of ammunition** contrary to **Section 89(1)** of the **Penal Code** as read with **Section 133(1)(b)** of the **Kenya Defence Forces Act 2012**. The particulars of the offence were that on 3rd April 2015 at Klique Bar in Nakuru Town, the Appellant was unlawfully found in possession of 19 rounds of 7.62mm ammunition. In the 2nd count, he was charged with **conducting himself in a manner prejudicial to the good order and service discipline** contrary to **Section 121** of the **Kenya Defence Forces Act**. The particulars of the offence were that between 23rd March 2015 and 26th March 2015, the Appellant, on completion of military shooting exercises, deceitfully declared that he had no ammunition while being in possession of the same. The 3rd count was that he **disobeyed standing orders** contrary to **Section 77(1)** of the **Kenya Defence Forces Act**. The particulars of the offence were that on 5th April 2015, the Appellant was found in possession of military items listed in the charge sheet in his private residence within Gilgil town without lawful authority. When the Appellant was arraigned before the Court Martial, he pleaded not guilty to the charges. After full trial, he was found guilty as charged. He was sentenced to serve four (4) years imprisonment for the 1st count, one year imprisonment for the 2nd count and 1?2 years imprisonment for the 3rd count. In addition, he was ordered dismissed from the Kenya Defence Forces. The sentences were ordered to run concurrently. 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 he had been convicted on the basis of hearsay, contradictory and uncorroborated evidence of prosecution witnesses. He took issue with the fact that he was convicted on the basis that he was in possession of ammunition which had not been properly identified. The Appellant was aggrieved that he was convicted on the basis of unproven evidence based on mere suspicion. He faulted the Court Martial for failing to take into consideration the fact that no evidence had been adduced to connect him with the ammunition in question. He accused the Court Martial of relying on circumstantial evidence that was not established to the required standard of the law. He took issue with the fact that the Court Martial had not taken into account his defence before reaching the verdict that he was guilty as charged for the offences which he was charged. He faulted the Judge-Advocate who moderated the trial for giving a lopsided summation which did not include the evidence that the Appellant had adduced in his defence. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Wangira for the

Appellant and by Ms. Atina for the State. Mr. Wangira submitted that the prosecution failed to establish the charges brought against the Appellant to the required standard of proof. He stated that the evidence adduced was insufficient to warrant the conviction of the Appellant. The investigating officer was not called. None of the people who were alleged to be at the bar with the Appellant were called to testify. There was no evidence that the Appellant was found with the box that allegedly contained the ammunition. The police failed to properly identify the alleged ammunition because no serial numbers of the same were noted. The prosecution did not call any witness to corroborate the testimony of the police officer who testified that he had found the Appellant in possession of the ammunition in question. He faulted the Court Martial for failing to take into consideration the Appellant's defence which was to the effect that he had fought with a police officer on the day in question hence their determination to frame him with the charge by planting the ammunition in his person.

In respect of the 2nd charged, learned counsel submitted that the prosecution failed to adduce sufficient evidence that the Appellant failed to declare that he had no ammunition in his person. Evidence was adduced which showed that the Appellant had nothing in his person when he declared that he had no ammunition in his possession. Learned counsel explained that this evidence was ignored by the Court Martial hence reached the erroneous determination that he had acted in a manner that was prejudicial to good discipline of the service. As regard the 3rd count, the Appellant submitted that the prosecution failed to prove that he was the owner of the house where the military items were found. No photographs were taken to establish that indeed he was the owner of the house. In the absence of such evidence, the charge brought against him in the 3rd count could not be sustained. He was of the view that the evidence adduced against him by the prosecution witnesses left many gaps which should leave this court with no option but to reach the verdict that the prosecution failed to prove its case to the required standard of proof. The Appellant was aggrieved that the trial court failed to take into consideration his mitigation before sentencing him to serve the custodial sentence, which, in his opinion, was harsh and excessive. In the premises therefore, he urged the court to allow the appeal in totality.

Ms. Atina for the State opposed the appeal. She submitted that the prosecution adduced sufficient evidence to establish the Appellant's guilt on all the three counts that he was charged with. The evidence of prosecution witnesses was cogent and did not require corroboration. In respect of the 1st count, Ms. Atina submitted that the Appellant was found in possession of ammunition after he was found behaving suspiciously in a bar. He was searched. Ammunition was found in his possession. An inventory was taken. The material evidence found in the Appellant's possession corroborated the prosecution witness's oral evidence. In respect of 2nd and 3rd counts, the prosecution adduced evidence which proved to the required standard of proof beyond any reasonable doubt that the Appellant took into his possession 19 rounds of ammunition contrary to the regulation that required him to make a declaration that he did not have any ammunition with him at the end of the training exercise. The military items were found in the Appellant's house when the military police went to his house to search it. It was the Appellant who took the military police to the house and therefore he cannot deny that the house in question did not belong to him. Learned state counsel submitted that the Court Martial took into consideration the Appellant's defence before arriving at the verdict. She submitted that the prosecution proved to the required standard of proof beyond any reasonable doubt all elements of the charges brought against the Appellant and therefore his conviction was sound. On sentence, she urged the court not to interfere with the same. It was legal. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the Court Martial so as to reach 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 did not have the opportunity of seeing or hearing the witnesses as they testified and therefore cannot make any comments regarding the demeanour of the witnesses. As the first appellate court, this court must take care that it does not substitute the opinion of the Court Martial with its own opinion where the findings made by the Court Martial is consistent with the evidence adduced before that court. In the present appeal, the issue for determination by this court is whether the prosecution proved, to the required standard of proof beyond any reasonable doubt, the three counts that were brought against the Appellant.

In respect of the 1st count, it was the Appellant's appeal that the prosecution had not established its case to the required standard of proof. The issue for determination by this court is whether the Appellant was indeed found in possession of the ammunition in circumstances that was put forward by the prosecution. PW1 Inspector John Omollo, the then Head of Crime, Nakuru Police Station testified that on 23rd April 2015 at about 4.30 p.m., he received information that there was disturbance in a bar called Klique. The bar was about 500 metres from the police station. He went to the bar accompanied by several police officers. He found many patrons at the bar in various stages of intoxication. His attention was drawn to the Appellant. According to him, the Appellant was behaving in a suspicious manner. He was attempted to escape from the bar. He had him arrested and taken to police station. A search was conducted. In his pocket, he found a small box. When he opened it, there were 19 rounds of 7.62 mm ammunition. PW1 also established that the Appellant was a member of the Kenya Defence Forces. He had him detained at the police station that night before handing him over to the military police on the following day. This version of events by PW1 was disputed by the Appellant. It was his defence that the ammunition was planted on him by the police after he fought with one police officer at the said bar. In essence, the Appellant was saying that the charge brought against him was an act of revenge for his assault of a police officer.

This court has carefully re-evaluated the evidence adduced in this regard. Where there are two competing versions of what is alleged to have occurred, this court must carefully analyze the evidence and reach a determination which version the court should uphold. In the present appeal, it was clear to this court that the prosecution's version of events is more credible. The prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant came in possession of ammunition in the course of his work. PW3 Lt Munyasa testified that the Appellant was a member of his platoon. They had gone on target shooting training exercise at Isiolo in the weeks leading to the week that the Appellant was arrested. They had just returned from Isiolo two days before the Appellant was arrested. In the course of training, the Appellant was issued with ammunition similar to the ones he was found in possession. The number of ammunition that the Appellant expended during the training exercise was not limited. However, the Appellant was required to declare, each time he left the shooting range that he did not have any ammunition in his possession. The Appellant was required to make this declaration every day that he came in possession of the said ammunition. The ammunition used at the range was supplied by the Americans. Some of the ammunition was manufactured in Hungary. PW3 explained that the ammunition that was usually used by the Kenya Defence Forces was manufactured in Kenya.

From the evidence of PW3, it was clear that if the Appellant was found in possession of such ammunition, then it implied that he made a false declaration when he informed PW3 that he had surrendered all ammunition in his possession. It is this ammunition that was found in Appellant's possession when he was arrested by PW1. Upon re-evaluation of the evidence adduced in that regard, this court holds that the prosecution proved that the Appellant had the opportunity to be in possession of the ammunition, and therefore, the prosecution proved to the required standard of proof beyond any reasonable doubt that he was unlawfully found in possession of the ammunition by PW1 when a search was conducted on his person. The Appellant's defence to the effect he had been framed by the police does not hold in view of the fact that the ammunition that was found in his possession was of the type that was used in the shooting range during his training at Isiolo. The Appellant's appeal in respect of the 1st count therefore lacks merit and is hereby dismissed.

In respect of the 2nd count, the fact that the Appellant was found in possession of the ammunition clearly showed that he deceitfully declared that he had no ammunition while in actual fact he was in possession of the same. The Appellant breached military discipline by carrying with him ammunition from the shooting range when he knew that he was required to surrender all ammunition in his possession after the shooting exercise. This court holds that the prosecution proved this charge to the required standard of proof beyond any reasonable doubt. As regard the 3rd count, the prosecution adduced evidence which established that after the Appellant's arrest, the military police escorted him to his house at Gilgil where they found military items in his house. Although the Appellant denied that the house that the items were found was his house, upon re-evaluation of the evidence, it was clear to the court that it was the Appellant who escorted the military police to the particular house, he had the key to the door of the house, he

opened the house, and some of the items found in the house had his name branded on them. The Appellant's denial that the house was his is therefore incredible. This court therefore holds that the Appellant was indeed found with military items in circumstances that were in disobedience of the standing orders of the Kenya Defence Forces. His appeal against conviction in the circumstances lacks merit and is hereby dismissed.

On sentence, this court considered the entire circumstances of the case and the mitigation of the Appellant. This court agrees with the Appellant that the sentence that was meted on him was harsh and excessive in the circumstances. The court also noted that the Appellant was found in possession of the said ammunition in circumstances that clearly pointed to lack of discipline that was required of a Kenya Defence Forces officer. The Appellant has been in prison for one (1) year. This court has also taken into account the period that the Appellant was in lawful custody before his arraignment before the Court Martial. This court is of the view that the Appellant has been sufficiently punished. In the premises therefore, the custodial sentences that were imposed on him by the Court Martial are commuted to the period served. He shall however remain dismissed from the Kenya Defence Forces as provided under **Section 181(4) of the Kenya Defence Forces Act 2012.** The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JUNE 2017

L. KIMARU

JUDGE