



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL APPEAL NO. 6 OF 2017

NICHOLAS MUNENE NDIRE.....APPLICANT

REPUBLIC.....RESPONDENT

RULING

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**. It was alleged that on 4<sup>th</sup> July, 2015 at Kenya Navy Base Mutongwe at about 0800 hrs absented himself without leave and remained so absent until he reported back on 9<sup>th</sup> December, 2015 at 1400 hrs thereby absenting himself for a continuous period of 159 days. He was tried, found guilty and convicted accordingly. He was sentenced to four months imprisonment. In addition, he was dismissed from service. Being dissatisfied with both the conviction and sentence, he filed the instant appeal. In the meantime, he has moved the court by way of Chamber Summons dated 25<sup>th</sup> July, 2017 seeking to be released on bail pending the hearing and determination of the appeal. The main ground argued in the application is that the sentence imposed being a four month jail term is too short that the Appellant may serve the entire sentence before the appeal is heard and determined.

The application was canvassed before me on 15<sup>th</sup> August, 2017 by way oral submissions. Learned counsel for the Applicant, Mr. Kaimenyi was of the view that the Appellant was likely to serve the sentence before the appeal was heard and determined. He submitted that before and during the trial, the Appellant was throughout in custody of which 158 days were spent in closed arrest. He submitted that the entire period the Appellant spent in custody mitigated for a release not only on bail but in the appeal. Furthermore, the court ought to consider that in addition to the conviction, the Appellant was dismissed from service thereby being subjected to double jeopardy.

Learned State Counsel, Miss Sigei opposed the application submitting that the Appellant had not demonstrated that the appeal had chances of success or that there existed any unusual circumstances to warrant his release on bail pending the hearing and determination of the appeal. It was her view that the prosecution witnesses discharged the burden in establishing that the Appellant deserted duty for a period of more than 90 days without leave. In addition, although he left the Base to check on a sick person, he did not adduced evidence that he had asked for permission to leave the Base. He also did not demonstrate that he had a sick relative or friend or that he fell sick after leaving the Base, a fact that would have incapacitated him to resume duty as expected. On sentence, counsel submitted that the four months jail term was not only lenient but reasonable. Furthermore, the Court Martial in imposing the sentence had considered the period that the Appellant spent in custody before and during the trial. It was her case that the application lacked merit and urged that the case be dismissed.

I have accordingly considered the respective submissions and I take the following view of the application. The Court of Appeal in the case of **Jivraj Shah vs Republic [1986] eKLR** laid down the principles to be considered in an application for bail pending appeal. The court held that :

- “1. The principle consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.**
- 2. If it appears prima facie from the totality of the circumstances that the appeal is likely to be**

**successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.**

- 3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”**

In the present case, the only ground argued to justify the release of the Appellant on bail is that he is likely to serve the sentence before the appeal is heard and determined. In my view, as the court of appeal held in the cited case law, that consideration would only apply where on totality of the circumstances of the case, the appeal has chances of succeeding. I have in detail looked at the evidence adduced before the Court Martial. I have no doubt in my mind that the same established the offence. However, the Appellant was arrested on 9<sup>th</sup> December, 2012 and the sentence passed on 19<sup>th</sup> July, 2017. For the entire period between his arrest and the sentencing, he remained in custody. This was a period of more than one and a half years. Under **Section 181(4) of the Kenya Defence Force Act**, upon conviction, he was liable to an imprisonment not exceeding two years. In principle, a court should not impose the maximum sentence. It is also a cardinal principle in sentencing that a court should take into account the period spent in custody which should be deducted from the sentence imposed. Therefore, considering the period spent in custody, of which 158 days were under closed arrest, I have no doubt that the Appellant stands a high chance of succeeding in the appeal with respect to the sentence. For this reason, it is my view that the appeal has a high chance of succeeding.

In the result, I allow the application. I admit the Appellant to a cash bail of Kshs. 50,000/= and in the alternative may deposit a surety bond of Kshs. 100,000/=. The surety shall be assessed by the Deputy Registrar of this court. It is so ordered.

**Dated and Delivered at Nairobi this 17<sup>th</sup> August, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

- 1. Mr. Kaimenyi for the Appellant/Applicant.*
- 2. M/s Aluda for the Respondent.*