



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL APPEAL NO. 8 of 2017

SPTE CHRISTOPHER MUTINDA KATITU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Spte. Christopher Mutinda Katitu, herein the Appellant, brought the present application by a Notice of Motion filed on 27<sup>th</sup> July, 2017. It was brought under **Section 357 of the Criminal Procedure Code** and was supported by an affidavit sworn by Charles M. Mwalimu, his advocate on 3<sup>rd</sup> August, 2017. The main order sought is that he be admitted to bail pending the hearing of the appeal. The application was founded on the grounds that the Appellant was sentenced to six months imprisonment whereas he had spent 20 months in custody pending his sentencing. Thus, given that the offence carries a maximum sentence of 24 months imprisonment, the sentence imposed was harsh and illegal. That he was dissatisfied with the judgment and sentence of the court martial against which he has filed the instant appeal. Further, given the time it shall take to hear the appeal he was likely to serve the entire sentence before the appeal is heard and determined hence rendering the appeal nugatory. It is his view therefore that the appeal has a high chance of success. The gist of the supporting affidavit is the basis on which the application is premised.

The application was canvassed before me on 1<sup>st</sup> November, 2017 the Appellant was represented by learned counsel, Mr. Kaimenyi who was holding brief for Mr. Mwalimu whereas the Respondent was represented by Learned State Counsel, Ms. Akunja. Mr. Kaimenyi submitted that the offence which the Appellant was charged with and convicted for carries a maximum sentence of 24 months imprisonment and that he was in custody for 20 months pending the conclusion of the trial. He submitted that in the circumstances the sentence was harsh and excessive. He was of the view that by the time the appeal was heard and determined the Appellant shall have served a substantial part of the sentence. He submitted that in view therefore, the appeal had a high chance of success. Further, the Appellant shall demonstrate in the appeal that he did not deliberately desert duty but was at the time suffering from a mental illness.

Ms. Akunja had no objection to the application on ground that the Appellant was likely to serve the entire sentence by the time the appeal is heard and determined.

The Appellant was sentenced to serve six months imprisonment on 6<sup>th</sup> August, 2017 after being under close arrest since 12<sup>th</sup> November, 2015. Therefore, if he served the entire sentence, he shall have been in custody for a total of 26 months. The proviso to **Section 333 of the Criminal Procedure Code**, states that:

***“In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”***

The Court Martial therefore ought to have taken into account the fact that the twenty months the Appellant was in custody prior to sentencing exceeded the sentence imposed; and should have accordingly discharged him pursuant to **Section 7.12 of the Sentencing Policy Guidelines**. Furthermore, under **Section 74(3)(b) of the Kenya Defence Forces Act**, the maximum sentence provided is two years

which translates into twenty four months. Again, if the Appellant were to serve the sentence he would be in custody for twenty six months which are in excess of the maximum sentence provided by law. On this basis alone, the appeal is likely to succeed on account that the sentence imposed was harsh and excessive. Other issues on whether or not he willfully deserted service shall be canvassed at the main hearing.

I accordingly allow the application. I admit the Appellant to a cash bail of Ksh. 20,000/-. The appeal shall be listed for admission and a hearing date taken in the normal manner. It is so ordered.

**Dated and Delivered at Nairobi this 22<sup>nd</sup> day of November, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

- 1. Mr. Kaimenyi h/b for Mwalimu for the Appellant*
- 2. M/s Sigei for the Respondent.*