



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
COURT MARTIAL APPEAL NO. 7 OF 2017
SPTE JOHN KWIRICH.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT
RULING

Spte. John Kwirich, herein the Appellant, filed the present application by way of a Notice of Motion filed on 27th July, 2017 and brought by way of a Certificate of Urgency. In it he sought orders that he be granted bail pending the hearing and determination of the instant appeal and for any other order the court deems fit. The application is brought under **Section 357 of the Criminal Procedure Code**. It is based on the grounds that; first, the Appellant was charged of committing an offence that carries a maximum sentence of 24 months imprisonment and that by the time the sentence was passed he had already spent twenty five months and 14 days in custody. This meant that the sentence of 12 months imprisonment was extreme and illegal in the circumstances. Secondly, that based on the excessive sentence the appeal was likely to succeed. Thirdly, owing to the time the appeal was likely to take to be heard, he will have served the entire sentence or a substantial part of it. Fourthly, that the appeal was meritorious and had a high chance of success.

The application was supported by an affidavit sworn by Charles M. Mwalimu, the Appellant's advocate who reiterated the grounds on which the application is premised.

The Application was canvassed before me on 1st November, 2017 with Mr. Kaimenyi holding brief for Mr. Mwalimu while Ms. Akunja represented the Respondent. Mr. Kaimenyi submitted that the offence carries a sentence of 24 months imprisonment and that the Appellant had already spent 25 months and 14 days cumulatively in custody. In the circumstances, the sentence was harsh and given the time it may take before this appeal is heard and determined the appeal may be rendered nugatory.

Ms. Akunja partly conceded to the application on ground that the Appellant was likely to serve the sentence before the appeal is heard and determined. With regard to the illegality of the sentence, she submitted that the maximum sentence provided by the law is 24 months and that the Court Martial had considered the period the Appellant had spent in custody before sentencing him. She submitted that taking into account that the Appellant had deserted service for 4 years the sentence imposed was sufficient.

No doubt the Appellant had spent 25 months and 14 days in close arrest before he was sentenced on 6th August, 2017. The penalty provided under **Section 74(3)(b) of the Kenya Defence Forces Act** is a

maximum of two years, which equates to 24 months. The proviso to Section 333 of the Criminal Procedure Code states that:

“Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

The question that follows is whether ‘close arrest’ is custodial in nature. It is defined under the Kenya Defence Forces Act as;

“...a person who is confined and in the care and custody of an officer, guard, picket, patrol, sentry or a member of the military police.”

Needless to say then is that the twenty five months that the Appellant was under close arrest were custodial and ought to have been taken into account when passing the sentence. Record of proceedings shows that the Court Martial was aware that the Appellant had been in custody for 25 months. This exceeded the maximum sentence provided by the law but the Court still went ahead and sentenced him to 12 months imprisonment. Taking into account that the offence is a misdemeanor and the Appellant had exceeded the period of the maximum sentence provided in law by the number of days in close arrest, the Court martial ought to have set him free. This is pursuant to **Section 7.12 of the Sentencing Policy Guidelines**.

Accordingly, the appeal is likely to succeed on ground that the sentence imposed was harsh and excessive. I allow the application. I admit the Appellant to a cash bail of Kshs. 20,000/-. The appeal should be listed for admission and a hearing date taken in the normal manner. It is so ordered.

Dated and Delivered at Nairobi this 22nd 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.