



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**COURT MARTIAL APPEAL NUMBER 215 of 2015.**

**WAKO GUYO NURA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(An appeal from the original conviction and sentence delivered on 10<sup>th</sup> August , 2015 at Moi Airbase  
Nairobi Court Martial No. 4 of 2015.)*

**JUDGMENT**

**BACKGROUND**

The Appellant, Wako Guyo Nura, was charged, in the first count, with committing the offence of desertion contrary to **Section 74(1)(a)** as read with **Section (2)(e) and (3)(b) of the Kenya Defence Forces Act 2012**. The particulars of the offence were that the Appellant at 12 ENGRS BN on 18<sup>th</sup> June, 2013 at about 0800HRS absented himself without leave until he reported back on 9<sup>th</sup> January, 2015 at 1000HRS an act he knew or ought to have known constituted an offence. Total time absent was five hundred and seventy days two hours (570 days 2 hours).

In count two the Appellant was charged with committing a civil offence contrary to **Section 133(1)(b) of the Kenya Defence Forces Act 2012**, that is to say, uttering a false document contrary to **Section 353 of the Penal Code** as read together with **Section 349 of the same Act**. The particulars of the offence were that at DFMH within Nairobi County on 25<sup>th</sup> February, 2015 while undergoing psychiatric assessment, knowingly and fraudulently uttered a false document purporting to be a letter dated 28<sup>th</sup> May, 2013 from Marsabit District Hospital confirming treatment he purportedly received at the said hospital.

The Appellant was arraigned in court and a trial conducted at the end of which he was convicted in the first count and acquitted in the second. He was thereafter sentenced to 20 months imprisonment and he was also dismissed from the Kenya Defence Forces. Being dissatisfied by the decision he has lodged this appeal. *In his Petition of Appeal the Appellant set out the following grounds of appeal.*

- 1. That the members of the court martial erred in convicting the Appellant for desertion while the evidence of PW5, PW6 and DW 6 showed that he was unwell at the time.***
- 2. That the members of the court martial erred in convicting against the weight of evidence adduced.***

**3. That the members of the court martial erred in failing to notice that the evidence supporting the first charge was based on a document whose authenticity formed the basis of the second charge which was dropped.**

**4. That the members of the court martial erred by failing to recognize that the prosecution failed to adduce evidence proving the necessary mens rea was formed on the part of the Appellant.**

**5. That the court martial failed in finding the Appellant guilty of desertion contrary to section 74(1)(a) as read with section 74(2)(e), (3)(b) of the Kenya Defence Forces Act, 2012 contrary to the definition of desertion in the Act and other legal sources.**

**6. That the members of the court martial handed out a harsh and manifestly excessive sentence given the circumstances and mitigating factors.**

**7. That the members of the court martial erred while sentencing by not taking into consideration the fact that the Appellant had spent 42 days in custody before the trial commenced.**

**8. That the members of the court martial erred in not taking ample consideration of the evidence of the doctor who examined the Appellant while he laboured under the disease and only took into consideration the evidence of the military doctor.**

**9. That the Judge Advocate erred in failing to allow the evidence of DW6, Dr. Sereti and erred further by asking the members of the court martial to ignore the same and further had the evidence not recorded contrary to the principles of a fair trial as envisioned in Article 50 of the Constitution.**

**10. That the members of the court martial erred in failing to note that the military did not use the information at its disposal to establish the whereabouts of the Appellant during his absence contrary to their duty of care.**

**11. That the members of the court martial erred, under the direction of the Judge Advocate, in failing to take into consideration the expert evidence of PW6 and only took into account that of PW 5 to the Appellant's detriment.**

**12. That the Judge Advocate erred in making a lopsided summation to the members of the court martial ignoring evidence given by defence witnesses and some of the prosecution witnesses further eroding the Appellant's right to a fair trial.**

## **SUBMISSIONS**

In his written submissions the Appellant coalesced the grounds to three, namely; that mens rea to commit the offence was never proven, that there were conflicting findings at the trial and finally that the Appellant was convicted on insufficient and disregarded evidence. He relied on the case of **Jeffrey Okuri Pepela & 25 others v Republic [2015] eKLR** to support the submission and concluded by praying that the appeal be allowed,.

The Respondent, represented by learned State Counsel Ms. Maina, opposed the appeal. She submitted that the evidence on record was sufficient to support a charge of desertion and further that the fact that the Appellant was suffering from a mental illness, as evidenced by the doctor from Marsabit, did not discount the fact that the Appellant had never sought permission to seek medical attention contrary to the rules of the armed forces. She therefore prayed that the appeal be dismissed and the conviction and sentence upheld.

## **EVIDENCE**

This is a first appellate court whose duty is to reanalyze and reevaluate the evidence on record and come

up with its independent decision but take due consideration that it has not had the opportunity to hear the evidence and see the demeanor of the witnesses. See: **Okeno v Republic [1972] EA32.**

*The prosecution's case was that the Appellant had absented himself from service, without official leave for a period of 570 days and 2 hours without permission from his superiors. It was alleged that he offered a defence of sickness, specifically that he was suffering from a mental illness but that this was all a ruse as he had presented false medical documents to support this defence.*

**PW1, Sgt BENARD KITTAINKAR** testified that in 2013 he was the section commander of the 3<sup>rd</sup> Construction Squadron's Troop 7 and that on 18<sup>th</sup> June, 2013 while at parade he noticed that 82799 Spr Guyo Wako, the Appellant, was not present. He reported this fact immediately to the command troop sergeant, Sgt Njoroge and they also searched around but could not find him. They checked with Thika Barracks and they could not locate him there as well. They also established that he had not been granted leave. The Appellant did however come back on 9<sup>th</sup> January, 2015 but the witness was on official leave and returned on the 26<sup>th</sup> January, 2015 on which date he was informed of the return of the Appellant.

On cross examination he testified that he had tried to reach the Appellant through his mobile phone and that during the period in question the rest of their squadron was in Lokichogio.

**PW2, Ssgt NJOROGI KARIUKI** testified that he knew the Appellant who was a soldier in his troop (number 8) in the 3<sup>rd</sup> Construction squadron. He testified that in June 2013 he was at the master parade in the morning when the section commander reported to him of the absence of Spr Guyo. He confirmed the absence before taking the message to the Squadron Sergeant Major, a Sergeant Loduboi. After reporting they tried to find the Appellant using his phone to no avail. He concluded by testifying that he never gave the Appellant permission to be absent and that the Appellant finally returned on 9<sup>th</sup> January, 2015.

**PW3, Ssgt PETER LODUBOI** worked with the 3<sup>rd</sup> Construction Squadron and his evidence entirely corroborated that of PW1.

**PW4, Lt FREDRICK MUKANDA**, worked with the 12<sup>th</sup> Engineers Battalion where he was the unit adjutant. He played the role of a records officer while also performing other administrative duties in the unit. He looked at the attestation form belonging to the Appellant which contained his terms of service which he testified was 6 years from 27<sup>th</sup> April 2009. The nature of the Appellant's engagement was 9 years colour service and 3 years reserve. He testified that the Appellant had been posted to 12 Engineers Battalion in 3<sup>rd</sup> Construction Squadron and that the particulars of his posting were in the Qualification and Record Card. He testified that on 18<sup>th</sup> June, 2013 the Appellant went absent without leave. After 90 days he was declared a deserter. The Appellant finally reported back on 9<sup>th</sup> January, 2015.

On cross examination the witness stated that the Force has tried to trace the Appellant using his home address. He further stated that the Appellant had been brought back by his mother who informed him that he had been at home.

**PW5, Col (Dr.) JAPHETH NDEGWA**, was based at Defence Forces Memorial Hospital as the Chief Psychiatrist. He testified that he examined the Appellant and created a report on 25<sup>th</sup> February, 2015. The Appellant had been brought to him for psychiatric and physiological assessment premised on his desertion of duties. He testified that the service member claimed to have lost memory in June 2013 and he was taken to Marsabit County Hospital for treatment. He produced a letter dated 28<sup>th</sup> May, 2013 which was purportedly done by a medical doctor to that effect. The diagnosis from that document was Post Traumatic Stress Disorder (PTSD). He testified that when he looked at the symptoms listed in the said document they did not point to a diagnosis of PTSD and also the diagnosis was not from a psychiatrist. He however added that such a diagnosis can be done by any other health worker. He testified that Marsabit County Hospital had no psychiatrist and the document in question had not come from one. He testified that the next County, Isiolo, did not also have a psychiatrist as well and that all patients from

these hospitals were referred to Meru Level 5 Hospital. A letter from Meru Level 5 hospital showed that the Appellant had been referred but did he not go for the follow up treatment.

He testified that PTSD was life threatening with sufferers constantly on fight or flight mode and suffered nightmares. He testified that the document that the Appellant had was a referral to a psychiatrist at a facility of his choice and it also showed that he had been put on Chlorpromazine and Amitriptyline, an antipsychotic and antidepressant respectively. He testified that the doctor made the wrong diagnosis as the clinical features of PTSD were never shown. He testified that medical records from the Appellant's unit, 12<sup>th</sup> Engineers, did not show him as a patient there. He carried out physical and mental assessments and they were both normal. A full haemogram examination showed normal results. His conclusion was therefore that the Appellant was of sound mind and from his history he did not get any evidence of any obvious recent mental disorder. He also asked for the documents produced by the Appellant authenticated.

**PW6, MUKAMBA ANDREA** was a consulting psychiatrist at Meru Level 5 General Hospital. She testified that she had never seen the Appellant or interacted with him. She however had written a letter dated 29<sup>th</sup> January, 2015 which was a referral note with regards to the Appellant who had been examined at Marsabit District Hospital on 28<sup>th</sup> May, 2013. She made the note to enable the Appellant access psychiatric evaluation treatment. This was because she was aware that the army had a psychiatrist and they could access the same. She wrote a further letter on 9<sup>th</sup> March, 2015 in which she indicated that the Appellant had been treated at Marsabit District Hospital with a mental disorder and that he had a history of absconding from work without a valid or good reason. **PW7, Dr. JOHN MWANZIA** was a medical doctor working at the Marsabit District Hospital. He testified that he had been summoned with regard to the Appellant specifically regarding letters dated 9<sup>th</sup> March, 2015 and 28<sup>th</sup> May, 2013. The letters indicated that the Appellant had been seen at the hospital but they could not trace the letters from the record at the facility and they could therefore not authenticate the author of the letter in question. He testified that he wrote a letter on 9<sup>th</sup> March, 2015 confirming a referral dated 28<sup>th</sup> May, 2013 which confirmed that the Appellant was at the psychiatric clinic. He could however not trace the same from the documents stored in their computers. He further testified that the Appellant had never been seen at their facility.

In cross examination he stated that there were seven doctors at the facility and that he did not know whether a Dr. Sereti had seen the Appellant on the day in question.

**PW8, Sgt JOSEPH OTIENO** worked with the military police investigations. He recalled that on 12<sup>th</sup> January, 2015 he was tasked with investigating the Appellant who had deserted his duties. He recorded necessary statements and preferred the charges herein.

After the close of the prosecution case the court ruled that the Appellant had a case to answer. He was accordingly called to defend himself. Four witnesses testified for him. He was DW2. **DW1, Capt. (Dr.) SARO** testified that he was based at the Base Medical Centre, Moi Air Base where he was charged with treating service members and their families. He testified that from his records, the Appellant was seen at the centre on the nights of 19<sup>th</sup>, 20<sup>th</sup> and 27<sup>th</sup> of July, 2015. He had also been seen on 13<sup>th</sup> July during the day. He said that the Appellant had complained of nosebleeds and nightmares and that amitriptyline, an anti-anxiety drug and sedatives were prescribed with a dosage period of between 3-5 days. He was next seen on 27<sup>th</sup> July, 2015 when he complained of headaches, insomnia and nightmares. He had psychiatric issues. He was again given Amitriptyline. He also testified that the drug in question when used over a long time could lead to dependency. He confirmed that the drugs prescribed at Marsabit Hospital were the same as the ones he gave the Appellant.

**DW2, the Appellant** testified that during the time in question as he awaited dispatch to Lokichogio, was living outside the camp in a residential house with a cousin. He was told that he became mentally unwell and his cousin took him home to his parents. His parents informed him that he was then taken to Marsabit District Hospital where he was treated and referred to Meru Level 5 Hospital where he was taken and admitted. After a while his parents realized that the treatment was not working and they took

him home and resorted to the use of a herbalist and church prayers.

When he was well again he asked why he was not at work and was informed that the mother had tried to report his status but at the gate the soldiers had denied her access to the bosses and had informed her that he had been sacked. His mother later handed him over to Lt. Sande. He put in custody after writing a statement. He testified that the investigating officer had never interrogated him and had only brought him an abstract to sign. He further testified that he received the letters from Marsabit and Meru hospital from his mother who informed him they were treatment notes and he could use them if the army decided to take action against him.

He testified that the letters from the chief, village elders, nyumba kumi elders and other medical letters had been taken from him by Cpl. Njenga of the Military Police during his incarceration. They were returned after a month but the medical records were not.

**DW3, SAKEL DINDA** was the Appellant's mother. She corroborated the testimony of the Appellant.

**DW4, HUKA KANA** hailed from Matarwa village, Lakabarichi location in Marsabit where he was an elder of Nyumba Kumi. He testified to knowing the Appellant was a soldier who hailed from the same village. He recalled seeing him when he was home very sick and even tied up with ropes. He testified that he talked to the family and they took the Appellant to a herbalist for medication and then to church. When he recovered his mother took him back to work.

**DW5, OMAR JIRO** was the Assistant Chief at Eakabaricha Location in Marsabit District. He knew the Appellant who was a resident of his location. He acknowledged a letter he had written concerning the Appellant. He recalled witnessing the Appellant being treated by a herbalist. In cross examination he stated that he found the Appellant being treated of confusion.

**DW6, Dr. STEPHEN SERETI** was based at Marsabit District Hospital. He recalled seeing the Appellant in 2013. He examined him and found that he was suffering from hallucinations, poor sleep and was in low mood. He testified that based on his findings he prescribed some medicine and referred the Appellant to Meru District Hospital. He testified that Dr. Mwanzia, PW 7, informed him that the origin of a letter he had written concerning the Appellant's illness was being investigated and that subsequently no investigations were done. He testified that it was true that he had treated the Appellant at the facility.

### **DETERMINATION**

Having considered the evidence and the submissions I find the main issue for determination is whether the prosecution proved beyond reasonable doubt that the Appellant was guilty of desertion. The first issue to delve into is whether the Appellant was shown to possess the relevant *mens rea* to commit the crime of desertion. *Mens rea* is defined in **Black's Law Dictionary, 9<sup>th</sup> Edition** as:

**“The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness.”**

It does then appear to be critical to show a criminal intent to carry out the offence in question. It is therefore proper to interrogate what constitutes a criminal intent with regards to the offence of desertion. For that it is important to relook at the relevant charging sections of the Kenya Defence Forces Act which in this case were 74(1)(a), (2)(e) and (3)(b). They provide that:

**“74. (1) A person who is subject to this Act commits an offence if that person—**

**a) deserts**

**(2) A person deserts if that person-**

**e) is absent without leave for a continuous period of more than ninety days.**

**(3) A person who commits an offence under subsection (1), shall be liable, upon conviction by a court martial—**

**(b) to imprisonment for not more than two years, in any other case.**

Under the charge, the elements constituting the desertion are defined under Section 2(e); that is *being absent without leave for a continuous period of more than ninety days*. The question then is, were these elements proved?

According to the Appellant, he was at his home outside the barracks, when he suffered what can be described as a mental disturbance and his cousin, who was living with him, decided that the best course of action was to take him to his parents who would get him help. This evidence was never contradicted by the prosecution and was corroborated by the Appellant's mother, DW3 and Dr. Sereti, DW6. From the evidence of the two witnesses, it is clear that the Appellant was not in control of his faculties and could, as such, not have possessed the necessary *mens rea* to desert duty. However, given the aforementioned Section 2(e) a person is deemed to be a deserter when he is continuously away without official leave for more than 90 days. It is clear that the Appellant was away for 570 days and 2 hours. That said it appears that the desertion that is envisioned under the provision is one that takes the form of a more stringent form of being away without official leave and may therefore not be subject to the usual requirement to show specific intent. See **R v Morgan [1975] 1 All ER** at pg 13:

***“What reason is there why, in like manner, a criminal mind, or mens rea, must not ultimately ... justify a conviction, the distinction always being observed, that in some cases the proof of the committal of the acts may prima facie, either by reason of their own nature, or by reason of the form of the statute, import proof of mens rea? But even in those cases it is open to the prisoner to rebut the prima facie evidence, so that if, in the end, the [court is] satisfied that there was no criminal mind, or mens rea, there cannot be a conviction ... for that which is by law considered to be a crime.”***

In this case, from a reading of the relevant Statute, it is clear that the offence occurred by the operation of the law, that once the Appellant had been missing continuously for 90 days. The Appellant did not deny that he had been missing for 570 days so the ground of appeal that he did not desert duty has no merit.

The second issue that this court will look at is in a way contingent to the first, exploring what permutations led to the Appellant being away for over 90 days without the Army finding him and effecting an arrest as set out in the Act. It questions what duty of care the Army has to its soldiers. A perusal of the evidence leaves this court with no doubt that the Appellant laboured under a disease of the mind, as evidenced by DW6, leading to his absenteeism and therefore desertion. This is vindicated by his acquittal on the second charge, uttering false documents, which related to his medical records during his time away. Even the prosecution's own witness, Dr. Ndegwa confirmed that the Appellant, before returning to the Barracks was known as a mental sickness patient. This court having come to that conclusion was both astounded and perturbed by the fact that the investigations as to the Appellant's whereabouts were only brought about after he returned. Unfortunately, the employer did no more than try to call the Appellant to find his whereabouts which was a gross abdication of its duty of care to the service member.

On the issue of whether the rules of evidence were contravened this primarily revolves around the evidence of DW 6, Dr. Sereti. His evidence does not appear in the main record of Appeal but as a supplementary annexure. The Appellant in his submission contended that this evidence had not been considered and that in fact quite to the contrary the Judge Advocate had, in her direction, directed the members of the Court martial to ignore it. Having looked at the record it is clear that this was not the case. The Judge Advocate framed the issues for determination and in issue 5 she drew to the attention of the members of the Court the contradictory nature of the evidence by Dr. Ndegwa and that of Dr. Sereti calling on them to make a determination. This being the case this court must state that the evidence of DW6 flies in the face of the prosecution's case and that the Judge Advocate's direction seemed to shift the burden of proof on a balance of probabilities as opposed to beyond a reasonable doubt. This was

definitely detrimental to the rules of criminal justice.

The Appellant submitted that the fact that the evidence adduced by Dr. Ndegwa and Dr. Sereti was contradictory meant that the Court should not be relied on either as a basis of the conviction. It is clear that the doctors carried out their examinations of the Appellant at various points, one at the height of the Appellant's sickness and the other after he had healed. According to DW6 his recommendation was that a detailed psychiatric evaluation, personal history and taking of a drug history and consequently putting the same down in a very detailed report needed to be under-taken together with a psychological test to determine whether the Appellant had recovered from a disease of the mind. In the respect of Dr. Ndegwa it appears that no psychological test was carried out. This leaves the court guessing whether either of the doctors was negligent in giving their evaluations of the Appellant's sickness. And if this were the case, whether the two medical evaluations should be considered a nullity. In **Hunter v Hanley[1955] SLT 213**, the court held:

***“[T]here is a simple scope for genuine difference of opinion and one man is not negligent because his conclusion differs from that of other professional men nor because he displayed less skill and knowledge than others would have shown.”***

Given the above, this court is confident that Dr Sereti, although not a psychiatrist, had the skills and knowledge necessary to assess and examine the Appellant and prescribe medication and refer the Appellant to a Psychiatrist. This is corroborated by the fact that when the Appellant suffered similar symptoms during his incarceration, DW1 stated that the same medication as prescribed by DW6 had been administered. Furthermore, DW1 worked for the armed forces and he confirmed that the Appellant had a history of a mental disorder. He too was categorical that a mentally ill patient can also be treated by a health worker other than a Psychiatrist. It follows then that the mental evaluation medical examination done by Doctor Sereti could not be ignored and was valid for purposes of confirming the nature of the illness the Appellant suffered from. These are facts the court does not understand why they were ignored by the Court Martial. My view is that had the said Court properly evaluated all the medical evidence tendered before it, it would have arrived at a conclusion that the Appellant did not deliberately desert duties and that his dismissal was unwarranted. This was because the Appellant's primary defence was that of insanity. As such, evidence proving or disproving the same was necessary. In my view, it is clear that the prosecution did not demonstrate that the Appellant was not suffering from a disease of the mind at the material time. The evidence of Dr. Ndegwa focused on an examination after the Appellant was healed. It was also focused on proving that the Appellant did not see a doctor as he tried to demonstrate. The latter assertion which formed the basis of the second charge was disproved leading to the acquittal of the Appellant. The actual evidence left no doubt that the Appellant had seen a doctor, DW6 himself. ***CAPTAIN DOCTOR PETER NDICHU of Moi Air Base testified that he examined him and found him fit to stand trial. He also observed that there was a time the Appellant had been suffering from hallucinations and had been admitted at Defence Memorial Hospital where he had been seen by a Colonel Doctor Ndegwa, a psychiatrist. A report to that effect was presented to the court. As such, the defence of insanity was available to him. I then conclude that he did not deliberately absent himself from duty and his dismissal from employment was totally unwarranted.***

In sum, I find that the prosecution did not prove its case beyond a reasonable doubt. I quash the conviction and set aside the sentence. I order that the Appellant be and is hereby set free. The Appellant has since fully recovered and is able to resume his duties. He shall forthwith be reinstated back to service on his previous rank of Senior Private before the dismissal on 10<sup>th</sup> August, 2015. In addition, he shall be paid all the salaries and allowances due to him since the date of the dismissal to the date of this judgment. His terms of service including decorations, if any, are hereby restored. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF AUGUST, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Mr. Wangira for the Appellant.*

2. *Miss Atina for the Respondent.*