REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NOS. 153 OF 2014, 17 OF 2015, 175 OF 2014, 174 OF 2014, 173 OF 2014, 8 OF 2015, 9 OF 2015, 10 OF 2015, 2 OF 2015, 3 OF 2015, 4 OF 2015, 5 OF 2015, 6 OF 2015, 7 OF 2015, 168 OF 2014, 171 OF 2014, 181 OF 2014, 176 OF 2014, 13 OF 2015, 169 OF 2014, 172 OF 2014, 18 OF 2015, 19 OF 2015, 21 OF 2015 AND 22 OF 2015

LT. JEFFERY OKURI PEPELA & 25 OTHERS ….....….APPELLANT

VERSUS

REPUBLIC …….…….....…RESPONDENT

(From the Original Conviction and Sentence in the Court Martial Case of Mtongwe Navy Base - Mombasa).

JUDGMENT

All the appellants in the above mentioned Criminal Appeals were Convicted and Sentenced to life imprisonment for the offence of desertion contrary to section 74(1)(a) of the Kenya Defence Forces Act 2012.

Brief Introduction

All the appellants were servicemen in the Kenya Navy as provided for under the Armed Forces Act now repealed and replacedby the Kenya Defence Forces Act No. 25 of 2012.

They served as such for various periods till the years between 2007 and 2008 when they singularly and individually decided to terminate their services by way of resignation and wrote letters to their respective superiors to that effect.

They were in turn directed to hand over all military stores int their possession to their Departmental Heads in the Navy. They filled forms 7110 for purposes of handing over the said military properties, handed over the said stores and they were issued with clearance forms which they filled and presented to the relevant authorities and subsequently they left the Armed Forces on various dates.

However, sometimes between the months of January and March 2014 the appellants received directives from the Defence Forces Council requiring them to present themselves at their respective former bases for documentation and payments of their terminal dues, but upon reporting as duly requested, they were placed under close arrest, till the 5th day of April, 2014 when they were served with charges of desertion contrary to section 74(1) of the Kenya Defence Forces Act and convening orders for Court Martial proceedings on 10th April, 2014 for the hearing of their cases.

Subsequently, upon the hearing and determination of the Court Martial proceedings they were convicted and Sentenced to life imprisonment.

Being dissatisfied with both the conviction and sentence the appellants have now filed these appeals whose grounds in the main are:-

1. That at the time of the prosecution there was no substantive holder of the office of Director of Military Prosecution as set out under Section 213 (2) (a) of the the Kenya Dfence Forces Act.
2. That the prosecution was carried out by legal officers who ought to have been appointed by the Defence Council acting under the office of the Director of Military prosecution as required under section 214 (1) of the Kenya Defence Forces Act.
3. That the Court Martial applied rules and regulations falling under the Armed Forces Act Cap 199 (repealed) against the Kenya Defence Forces Act Section 310 (1) (2) that ought to have conformed with the current Constitution.
4. That the Conviction was against the weight of evidence in that the applicants had applied to be discharged from the Armed Forces. They had returned all the stores that had been supplied to them. They genuinely believed to have been discharged.

   They had re joined the Arrmed Forces through a process known as ***"rejab"*** and as such no desertion or absenteism could be attached.

   Further, that between the period of 2007 to 2014 the Armed Forces never tried to trace, the appellants who were readily available.

5. That the prosecution failed to adduce evidence to the effect that the appellants had the requisite ***"mens rea"*** for desertion.
6. The Sentence was harsh and manifestly excessive.
7. Charge was defective as the particulars of the charge were based on Kenya Defence Forces Act 2012 section 74 (1) (a) which was in variance with the evidence before the Court.
8. That the Court Martial erred in finding that the appellants were in active service under section 2 of the Armed Forces Act Cap (199) yet the charge had been preferred under the Kenya Defences Act 2012 where the definition of active service is radically different under the two acts and the same applies to the definition of an enemy.

The appellants were convicted under section 74 (1)(a) of the Kenya Defence Forces Act for the offence of desertion in that they absconded themselves without leave on various dates and returnee thereafter.

Under section 74 of the Kenya Defence Forces Act the offence of desertion is defined in the following manner;

1. ***A person who is subject to this Act commits an offence if that person-***

   (a) Deserts; or

   (b) Persuades or procures any person subject to this Act to desert.

2. ***A person deserts if that person -***

   (a) with the intention, either at the time or formed later, of remaining permanently absent from duty -

i. ***Leaves the Defence Forces;***
ii. ***Fails to join or rejoin the Defence Forces when it is the persons duty to join or rejoin them.***

(b) Being an officer enlists in or enters Defence Forces without having resigned the persons commission.

(c) ……..

(d) Is absent without leave, with intent to avoid serving in any place outside Kenya, or to avoid service or any particular service when before an enemy; or.

4. ***Is absent without leave for a continuous period of more than ninety (90) days.***

3. ***A person who commits an offence under sub section (1) shall be liable upon conviction by a Court Martial-***

(a) To imprisonment for life or any lesser punishment provided for by this Act if

I. ***The offence was committed under sub section (1) (a), the person was on active service or under orders for active service at the time when it was committed; or***
II. ***The offence was committed under sub section (1) (b) the person in relation to whom it was committed was on active service or under orders for active service at the time; or***

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

The Court Martials convicted the appellants and sentenced them to life imprisonment. Their decisions ought to have been informed by their being satisfied that at the time the appellants left the Defence Forces, they were in active service.

Under section 22 of the Kenya Defence Forces Act to be ***"on active service"*** is provided as follows;

(a) When used in relation to a person means that the person is serving in or with a unit of the Defence Forces engaged in operation against an enemy.

(b) When used in relation to a Unit of the Defence Forces, means that the Unit is engaged in operations against an enemy?

Who is an enemy?

Section 22 of the Kenya Defence Forces Act defines an ***"enemy"*** to mean -

"***(a) Any person or Country committing external aggression against Kenya.***

(b) Any person belonging to a Country committing such aggression

(c) Such other country as may be declared by the cabinet secretary to be assisting the Country committing such aggression.

(d) Any person belonging to the country referred to under paragraph (ii)".

In a bid to prove that the appellants were in active service at the time they left the Defence Forces, the prosecution introduced and produced as an exhibit a document with the title of ***"Operation Linda Mpaka"*** dated the 31st day of December, 2006.

A reading of that document shows that its a planning directive, assessing the security situation obtaining in Somalia at the time and spelling out what measures ought to be put in place to counter that situation. Same was to be distributed to various commands.

The appellants in their defence produced a magazine titled, ***"Majesi Yetu"*** celebrating **"Kenya Defence Forces *Heroes"*** where the Chief of Defence Forces (then) in his message observed, "

"14th October, 2011 is the day the Kenya Defences Forces were ordered to cross the

Kenya Somalia border in pursuit of Al Shabaab and where we remain to date".

This brings us to the issue as to whether there was communication to the appellants to the effect that their units were engaged in operations against an enemy and at what time did these operations commence or start.

I have perused the record of proceedings and I find that there was scant communication if at all and there is very little to show that the appellants were aware that they were on active service at the time of leaving.

Desertion is not strict liability case. I have had the opportunity to peruse the authority relied on by the appellants ***"Criminal Law Desk book Volumee II crimes and Defences. The Judge Advocate General's School, US Army Charlottesville Virginia Summer 2010,*** which extensively deals with matters concerning military offences. Its not binding on this Court but I find it of persuasive value owing to the lack or scarcity of homegrown jurisprudence on matters of military law.

At pages 3–11 paragraph G. There is a discussion on ***"mens rea for desertion"*** it is observed, the offence of desertion and absence without leave are similar in most respects, except for the ***intent*** element involved in desertion.

1. Desertion is a specific intent crime – **United States - Vs Holder, 22 CMR 3 (CMA 1956).**
2. Evidence of intent may be based upon all facts and circumstances of the case, length of absence (apprehension or voluntary surrender) are some factors to be considered.

The determination of whether an Accused intend to avoid hazardous duty or shirk important service is subjective, and whether the service is ***"important "*** its an objective question dependent on the totality of circumstances ***United States -Vs– Gonzales 42 MJ 469 (1995).***

That intent element or ***mens rea*** is also found in the Kenya Defence Forces Act itself.

Section 74 (2) of the Act provides:- A person deserts if that person:-

> ***(a) With the intention, either at the time or formed later, of remaining permanently absent from duty (1) leaves the defence forces ……. ".***

Therefore it was incumbent upon the prosecution to prove beyond reasonable doubt that the appellants had formed the intention of permanently remaining absent from duty and secondrly, whether its an offence ***per se*** to leave the Defence Forces.

It is not in dispute that all the appellants in the Court Martial cases held at Mtongwe Navy base which forms the basis of these appeals were desirous of leaving the Defence Forces.

Section 247 of the Kenya Defence Forces Act provides for termination of service of members or regular service thus:-

> ***"The service of a member of the regular force is terminated upon:-***
>
> ***(a) Retirement***
>
> ***(b) Resignation***
>
> ***(c) Termination of Commission***
>
> ***(d) Dismissal from service or***
>
> ***(e) Discharge from service ".***

There is evidence, which is not controverted that they had embarked on the process of resignation by way of processing the necessary documents, returning military stores belonging to the Defence Forces, they were issued with clearance forms which they filled and presented to the relevant authorities and left in the belief that they had been discharged.

This was in the year between 2007 and 2008. Things went quiet and they assumed that everything was in order. They were not contacted during that period and the one between January and March 2014 when they were directed by Defence Council to present themselves at their former bases.

The conduct of the appellants in following the right channels so as to obtain the requisite authority/ permission to leave service was consistent with a desire to follow the rules and the law governing termination of their services. Their superiors received their correspondence and acted upon it, the only grave mistake which they did, is that they did not await for a discharge from the service commander as required under section 255 and 257 of the Kenya Defences Act.

Section 257 of the Act provides for the mode of discharge thus,

> ***"(1) Subject to this part, every service member becoming entitled or liable to be discharged shall be discharged immediately but shall until discharged, remain, subject to this Act***

1. **…….....**
2. ***A service member shall not be discharged been authorized by order of the service commander or an officer authorized in that behalf.***
3. ***Every service member shall be given, on discharge, a certificate of discharge containing the prescribed particulars".***

Is the offence of desertion a continuous one?

It is the contention by the prosecution that it is, in that the appellants deserted on a particular date and returned on a specified one. Further at the time of leaving service it was the Armed Forces Act which was in force and when they returned it was the Kenya Defence Forces Act which was in force and it was open to the prosecution to charge the appellants under whichever Act they deemed proper

Section 74 (2) (e) of the KDF Act provides:-

"A person deserts if that person – is absent without leave for a continuous period of more than ninety days.

It therefore follows that after the expiry of ninety (90) days the offence of desertion crystallizes and cannot be said to be continuous.

If the offences took place between the years 2007 and 2008 they crystallized 90 days thereafter.

<u>Were the appellants on active service?</u>

In section 2 of the KDF Act the interpretation given is that of a unit engaged in operation against an enemy.

The the word ***"enemy"*** under the Act is defined to mean "Any person or Country committing external aggression against Kenya.

It is noted that in the charge sheet in regard to Lt. Jeffery Okuru Pepela which was Court Martial No. 1 and is now subject of Criminal appeal No. 153 of 2014 the words ***"on active service"*** were not included yet the Court proceeded to sentence him to life imprisonment.

Article 50 (2)(b) of the Constitution provides,

> ***"Every Accused person has the right in a fair trial which includes the right (b) to be informed of the charge, with sufficient detail to answer it".***

A perusal of the charge sheet does not show that the particulars of desertion were disclosed.

There is no reference to ***"Operation Linda Mpaka"***. There is no indication as to who was the enemy in the year 2007. Was it Somalia, Al Shabaab or militias? The charges facing the Accused persons did not contain sufficient details to answer them.

It is the prosecutions case that at the time of leaving service the appellants were on active service which would mean in lay mans language that this country was facing an aggression from Somalia at the time. What did the Kenya Defence Forces do in reaction to the appellants request to be permitted to leave the Defence Forces? They embarked on the processing of their documents, accepted the return of the military stores in possession of the appellants. Thereafter they went into a slumber from the years 2008 to 2014 when they caused the appellants to be summoned back to their bases.

Are these actions consistent with a force which was facing an aggression from an enemy? Or was there some element of lethargy or dereliction of duty.

I am not satisfied that the prosecution proved beyond reasonable doubt that the appellants were in active service at the time they left the Defence forces.

The appellants have questioned the impartiality of a Court Martial bearing in mind that the investigations are carried out by military personnel, the prosecution is done by Military officers and the Court Martial is comprised of military officers. The role of the Judge Advocate is said to be peripheral inconsequential.

In Constitutional Petition No. 22 of 2002 and 8 of 2002 in the Constitutional Court of Uganda Kavuma Judge had this to say,

> ***"The existence of military Court system complementary to the civil Court system, staffed by members of the Military who are aware of and sensitive to ,military concerns even when not all of them may be professionally trained lawyers, is not necessary in contravention of the Constitution. The existence of such a system, for purposes of enforcing discipline and efficiency in the army is very central to the aspirations of the people and is supported by very compelling reasons ".***

At page 41 paragraph 25 of the same Judgment he also observed,

> ***"Among the cardinal principles of the Army is one that the armed forces depend upon the strictness discipline in order to function efficiently and that all alleged instances of non- adherence to the rules of the military need to be expeditiously dealt with within the chain of command and punishment and therefore administered without delay".***

Our Constitution under article 169(1) (c) recognizes ,the Court martial as a subordinate Court.

Under sub article 2 parliament was donated with power to enact a legislation conferring jurisdiction functions and powers of the courts established under clause I.

The Kenya Defence Forces Act 2005 of 2012 is such legislation. It in turn creates the Court Martials.

Under Article 165 (6) of the Constitution the High Court has supervisory jurisdiction over the Court Martial.

Was the fact that there was no Judgment as envisaged under the Criminal Procedure Code prejudicial to the appellants?

As argued ***Supra*** the existence of Court Martials is crucial for discipline and efficiency in the Defence Forces .

The roles of a Judge Advocate are clearly spelt out in the Act. His/Her role is not peripheral. He advises the Court in matters of of law and after submissions by all parties, sums up the case.

This summing up brings out the issues in controversy and the law for determination by the Court, whose determination is by voting. I find the procedure to be expeditious and in line with ensuring expeditious determination of cases.

Sentencing.

In all the appeal cases before this Court for determination emanating all the Court Martials held at Mtongwe Navy base all the Accused/Convicts were Sentenced to life Imprisonment including one where the Accused, was not charged with absenting himself, wether leave ***"while on active service".*** This is the maximum sentence under the Act.

In all the Court Martials the defence did put in their mitigating factors and service history of each appellant from this blanket sentence, its abundantly clear that mitigating factors were not considered at all and the principles of Sentencing were thrown out of thee window.

The appellants were charged separately, they did not leave the Defence Forces at the same time. They were not of the same rank, hence their duties and responsibilities were not the same. One may understand the Wisdom of ensuring discipline is enforced in the Armed Forces and the need to discourage and deter other would be deserters but a blanket life sentence was clearly uncalled for bearing in mind the circumstances surrounding the charges of desertion.

This Court has found that the offence of desertion while on active service was not proved beyond reasonable doubt.

Under powers conferred to the Court under section 189 of the KDF Act the Court finds that the offence of absence without leave contrary to section 75 of the Act was proved.

This sentence carries a maximum sentence of two years imprisonment. The appellants were placed under close arrest between the months of January and March, 2014. They were arraigned in Court in the month of April, 2014. They applied for bonds at the High Court which application was granted but before they could be released an application was made in the Court of Appeal which allowed the appeal and they were remanded in custody. Thereafter they were convicted on various dates and Sentenced to life imprisonment.

The Court has taken into consideration that they have been in remand custody as well as serving sentence for a period which is close to one and half years. That period is deemed to be enough punishment and is accordingly to the term already served.

The upshot is that all the appellants in the criminal appeals now before this Court emnating from the Court Martials held at Mtongwe Navy Base are hereby set at Liberty forthwith, unless otherwise lawfully held. And for avoidance of doubt, these Criminal Appeals are the ones set out on the first page of the Judgment.

Judgment delivered dated and signed in open Court this ***21st*** day of ***August, 2015.***

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M. MUYA

JUDGE

21ST AUGUST, 2015

In the presence of:-

Magolo for appellants in 153 of 2014, Mwanyale Kamunda and Ondieki for appellants Nos. 171, 173, 174, 175, 176, 181 of 2014 2, 3,4, 5, 6, 7 and 13 of 2015 Mr. Odhiambo No. 9 and 10 of 2015.

Gikandi for appeals Nos. 117 of 2015.

Miss Angawa for appelants in Appeals No. 8 of 2015 holding brief Gekonde for Criminal Appeals Nos. 18, 19, 21 and 22 of 2015.

Nabwana for appeal No. 172 of 2014

Muteti, Kiprop, Masila Wangila for the Director of Public Prosecution

Kamunda Mwanyala holding brief Mutua in CRA No. 168 and 169 of 2014.

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M. MUYA

JUDGE

21ST AUGUST, 2015

Mr. Muteti:

Under article 3 of the Constitution of Kenya we wish to move this Court for an interim of stay for fourteen (14) days. Under article 3 of the Constitution every person has to defend the Constitution. That duty falls to the appellants.

Article 157(11) of the Constitution commands us to ensure that the interest of Justice are safe guarded. As we stand before the Court section 361 of the Criminal Procedure Code gives us room of appeal against any decision of the High Court in appellate jurisdiction. That appeal would be purely on matter of law.

Amongst the grounds we are raising are that the appeals though separately argued were consolidated on the illegality of sentence. The Court has power under section 179 of the Criminal Procedure. The period of remand cannot amount to service of imprisonment. Court of appeal to interprete the meaning of the term desertion and when does it crystallize.

Once its is crystallizes is it extinguished. We shall also be posing whether the sunset clause saves the offences committed in the former Act.

Whether a charge that was lawfully entered in light of section 82 of the Criminal Procedure Code can be invalidated.

In the event its invalidated can the Court invoke section 179 of the Criminal Procedure Code. We are moving this Court purely on the interest of justice. The celebratory mood will affect other deserters. Where a party under article 50 of the Constitution is entitled to a fair resolution the overriding objection to do Justice prevails. This would not be the first moment in time where the Court would be staying its

orders. We are urging for a fourteen (14) days window to ventilate our grievances

Mr. Gikandi:
I will make the reply. We strongly oppose the application made by the Director of Public Prosecution. The starting point is the jurisdiction of the Court. Motor ***Vessel Liliax Vs Caltex Oil Ltd***. Jurisdiction is everything. The question is has Mr. Muteti cited a section of any law where this Court is given jurisdiction where is has heard an appeal. This Court does not have the power to stay that order. Section 356 of the Criminal Procedure Code where the Court after convicting can grant bail or stay of execution pending appeal.

Our law did not contemplate a situation where an appellant has succeeded on appeal to be subject matter of stay.

Section 356 of the Criminal Procedure Code would have a proviso that conversely where an appellant has been released there will be a right to be released. Rule 5 (2) (a) of the Court of Appeal Rules.

Its only a person who has been convicted and sentenced who can appeal. We submit that, it can never be the case.

A ruling by Odero Judge and the Court in the case of Sheikh Kadir. Those two ruling related to application for bail Those are different matters. The question is will the Accused persons turn out for hearing of the appeal. The appellants turned up for hearing of their appeals

Celebrations are fair gone. If it is a question of security these are only 25 men. There is no evidence that they will pose insecurity.

Identified grounds of appeal. This is not the right Court. We would say that the appellants have been punished and more than punished. We urge the Court to reject the application to be done so on a summary basis.

Mr. Magolo:
Right to appeal is under section 361 of the Criminal Procedure Code all other question are to the Court of appeal. Section 357 of the Constitution. There should be no abuse of Court process.

Mr. Mwanyale:
A stay of execution cannot be granted on acquittal. That is the preserve of the Court of Appeal. The court releases and acquits and then it detains yet the appeal has not been interrogated by Court of Appeal.

The application is an abuse of the Court process.

Mr. Odhiambo:
On the issue of consolidation is a mater to be taken before the Court of appeal. We had a meeting on consolidation. The state rejected. Appeals were not consolidated.

Mr. Muteti:
Mohamed Hershi case. Stay was granted after making a finding. We were given time to raise that the issue to court of appeal.

Mr. Magolo:
That was a civil matter. The application is made purely on public interest. Our desire is to have certain matters settled. Mr. Odhiambo acknowledges that there were attempts to have the matters consolidated in public interest this application is not merited.

Mr. Wamotsa:

This court has jurisdiction to grant stay pending appeal.

This in not exceptional. That jurisdiction can be exercised to grant stay. The Court has already found that the appellant were guilty.

Its desirable that the stay be granted. The appellants have been in custody through out.

Judicial Review is a special jurisdiction its neither civil nor criminal.

All the issues of law raised by parties can be made in the Court of Appeal.

We pray for a stay pending appeal. Decision ***Republic -Vs- Issa*** of stay being

Mr. Gikandi:
Under Article 157 (11) of the Constitution. Need to prevent abuse of legal process.

The authority cited of Mohamed Hershi was a case dealing with a judicial review application. We stand on a criminal jurisdiction. What happened, in Mohamed Harshi is not relevant to this case. The other Case is of stay of proceedings. The 25 appellants have been acquitted forthwith. Public interest article 10. There is a duty on every public officer to uphold good governance, integrity and transparency. The appellants have been acquitted. Judgment of this Court ought to be respected. Why should tax payers money be spent on the appellants who the Court has acquitted them.

Mr. Kamunda:
The Akasha case was an authority premised on application for bond. This matter was in the Court of Appeal and it was held that there were no proceedings. The Court should not allow an illegal precedent. This is the High Court. The Court decision will be relied on by other Courts.

There is no reason for the stay of acquittal. The appellants walked into the military base. They had not been apprehended by a period of 5 years.

This is a core issue.

Court:
Upon Counsels for the appellants and the Director of public Prosecution. I find no good grounds to stay this Courts decision. Any application for stay may be made before the Court of Appeal. I will give reasons for this ruling on 24th August, 2015.

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M. MUYA

JUDGE

21ST AUGUST, 2015

Mr. Kamunda:
We pray for release of the appellants documents.

Mr. Muteti:
I am not aware of those documents

Court:
Certified copies of the proceedings and the Judgment to be supplied to all parties, Director of pubic Prosecution and the appellants. Documents belonging to the appellants to be released to be released to them within fourteen (14) days from today.

….....

M. MUYA

JUDGE

21ST AUGUST, 2015.