



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

CRIMINAL DIVISION

CRIMINAL APPEAL 135 OF 2014

SAMSON KAZUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence of Court Martial delivered on 15th September, 2014 at Kahawa Garrison Nairobi Court Martial No.5 of 2014)

JUDGMENT

The Appellant **SAMSON KAZUNGU** was a Senior Sergeant Number 55274 with the Kenya Army until his conviction on 15th September 2014 by a Court Martial sitting at Kahawa Garrison Nairobi. He was convicted in respect of charge 2 and sentenced to six months imprisonment and dismissed from the Armed Forces. In addition, his rank was also reduced from that of a Senior Sergeant to Private. Aggrieved by the conviction and sentence, he has now appealed to this court.

In the first charge he was accused of losing public property contrary to Section 96(1) of the KDF Act 2012. Particulars of the offence were that between 21st December 2013 and 22nd December 2013, within Nairobi County in the Republic of Kenya, he lost service vehicle registration number 79KA75 bearing registration number KBM 487B Toyota Corolla valued at Kshs.1,470,633.00 which he had unprocedurally handed over to 103881 Warrant Officer Class II Athumani Zani.

In the second charge, he was accused of disobedience to standing orders contrary to Section 77 (1) of the KDF Act 2012. Particulars were that on 21st December 2013 at defence headquarters camp administrative unit failed to book out the service vehicle registration number 79KA 75 (KBM 487B) Toyota Corolla at the vehicle register book stationed at the defence headquarters camp administrative unit main gate while proceeding on official detail contravening defence headquarters camp administrative unit security standing orders Section 6 paragraph 601.

In the alternative to charge two, he was accused of neglect of duty contrary to Section 65 of the KDF Act 2012. Particulars were that on 21st December 2013, at defence headquarters camp administrative unit failed to book out the service vehicle registration number 79KA75 (KBM 487B) Toyota Corolla at 'the vehicle register book stationed at the defence headquarters administrative unit gate while proceeding on an official detail contravening defence headquarters camp administrative unit security standing orders Section 6 paragraph 601.

The Appellant raised 8 pertinent grounds which we have reproduced verbatim hereunder:-

1. THAT the presiding members erred in law and in fact in convicting the appellant on a charge of disobedience to standing orders while there was clearly no evidence at all to support the conviction.
2. THAT the presiding members erred in law and in fact in convicting the appellant when it was clear that the charge in question was not supported by any evidence presented in court.
3. THAT the presiding members erred in law and in fact in ignoring all the legal authorities and precedents supplied to the court.
4. THAT the presiding members erred in law by confirming a conviction on the basis of suspicion without cogent evidence.
5. THAT the presiding members erred in law and in fact by failing to consider plausible defense presented by the appellant.
6. THAT the presiding members and Judge Advocate misunderstood the facts, misdirected himself, applied wrong legal principles and drew wrong inferences to the prejudice of the appellant.
7. THAT the presiding members erred in law by shifting the burden of proof to the appellant contrary to the law.
8. THAT the presiding members erred in law and in fact in giving a sentence that was manifestly excessive under the circumstances.

The Prosecution called a total of five witnesses.

The facts of the case were that sometime on the 21st December 2013, the appellant herein was assigned a military motor vehicle registration number 79KA75 bearing a civilian registration number KBM 487 B by his immediate supervisor Warrant Officer II Athumani Zani for purposes of picking the Assistant Chief of Defense Major General Nthenge from his home to Jomo Kenyatta International Airport.

PW1, Major Felix Mbithi testified that the appellant who was one of the four drivers deployed at the Assistant Chief of Defence Forces Administrative Unit Pool was supposed to book the motor vehicle at the administrative unit main gate before proceeding for the detailed task which he did not. When PW1 returned from leave on 20th he was informed that the appellant did not return the motor vehicle after taking Major General Nthenge to the airport on 21st December 2013. Instead, he gave it to Warrant Officer II Athumani Zani at South B without following the proper handing over procedures as envisaged in Chapter 9 of the Motor Transport and Camp Standing Orders. PW1 was informed that the motor vehicle had disappeared between 21st December and 22nd December 2013 in unclear circumstances.

PW2, Captain Gideon Chelal Tuisang the Motor Transport Officer produced the motor vehicle log book and informed the court of the procedure followed by drivers when taking and driving military motor vehicles in and out of the military camp. The officer told the court that before a driver leaves the camp for any assignment, the in-charge of motor transport and in this case Warrant Officer II Athumani Zani was supposed to authorize the assignment by signing the work ticket. In his absence any commissioned officer or warrant officer class one would do so. After that, a driver is supposed to book the motor vehicle at the gate by signing the motor vehicle register in accordance with Chapter 9 of Camp Standing Orders Paragraph 2. He also cited paragraph (1)(a) of the Chapter which provides that whenever a driver accomplishes the task assigned, he is supposed to hand over the motor vehicle keys and work ticket to the motor transport duty non-commissioned officer which the appellant did not do, hence the offence of disobedience to camp standing orders. He however clarified that no handing over was done of the same motor vehicle to the appellant.

PW3, Corporal Geoffrey Selede Vilembwa was manning security at the main gate on 21st December 2013 between 0900 hours to 0900 hours on 22 December 2013 in the morning when he signed out and handed over the duty to someone else.

PW4, Victor Ouko Bosire was a security guard at the residence of Major General Nthenge. He testified that between the 21st and 22nd December 2013 he was on duty at the Major General's residence. He said that on 21st December 2013 at 04.45 in the morning, the accused who was known to him came and he opened for him the gate whereupon he picked his boss. He was driving motor vehicle registration

number KBM 487B Toyota Corolla to the airport as the Major General was travelling to Somalia. He did not see the appellant again that day or the motor vehicle.

PW5, Warrant Officer One Moffat Wangombe the investigating officer herein told the court that on 22nd December 2013, he was told that a military motor vehicle registration number 79KA75 (KBM 487B) was reported missing from the defense headquarters car park on 21st December 2013. Upon conducting investigations, the appellant allegedly told him that after he took the Major General to the airport, he returned to the camp and parked the motor vehicle but later his boss Athumani Zani requested him to take the motor vehicle to South B estate where he was for purposes of using it to go and conduct a market survey of spares for Mercedes Benz 911 belonging to the Major General. The vehicle was however not booked in or out.

The appellant in his submissions challenged the sentences that were meted out by the Court Martial. He argued that they were excessively punitive under the circumstances and unconstitutional. He also argued that his age was not taken into account during sentencing.

The Appellant challenged the Prosecution witnesses' testimony as not credible. He submitted that the prosecution and the court strictly relied on circumstantial evidence and failed to call the alleged Warrant Officer II, Zani who was his boss and superior to him and who gave the directions and command to him. He submitted that a junior officer could not ignore the commands and orders of a superior whether it conformed to the standing orders or not. His actions could not therefore be interpreted to amount to disobedience of standing orders and to warrant such harsh and severe sentence to the extent of losing his job and career.

The appellant argued that all the prosecution witnesses' testimonies were hearsay evidence and therefore inadmissible as provided under Section 63 of the Evidence Act. He also submitted that no exhibits were produced in support of the prosecution's case. He pointed out that PW1 was not present at the time the offence was allegedly committed; and that PW2 had confirmed that he (appellant) could not disobey or question any orders given by his superior. He further argued that the court wrongly shifted the burden of proof to him despite having noted that he surrendered the motor vehicle procedurally.

The respondent submitted that the case was proved beyond any doubt. Learned state counsel Miss Aluda submitted that indeed PW3 who was at the gate stated in evidence that he did not see the appellant leaving the headquarters with the vehicle and coming back with it. She observed that PW3 confirmed that there was no handover report to show that the motor vehicle in question was handed over to the appellant. Therefore, it beat logic to convict the Appellant on ground of not following the procedure of handing over vehicles and yet Warrant Officer II Zani did not follow the procedure in the first place. She submitted that PW4 did confirm that Warrant Officer II Zani who was in charge of managing vehicles gave orders that no one under him dared question. She stated that PW5 had confirmed that there was some form of collusion in the way the motor vehicle was handed over to Warrant Officer II Zani who in any event never testified.

Regarding the call data produced by PW5, Miss Aluda submitted that the same confirmed that the appellant took the motor vehicle to Warrant Officer II Zani. PW5 in his evidence in chief confirmed that the motor vehicle was left with the said Warrant Officer II Zani who was senior to the appellant and who took the vehicle back to the Headquarters. The work ticket produced in court was signed by somebody else and not the appellant. Further, there were two different statements produced in court made by PW5 in relation to the subject matter. This contradicted the witness' other version of evidence that the vehicle was not at all booked. She added that DW1 and DW3 in their evidence confirmed that the vehicles with civilian number plates were never booked which evidence was not questioned on cross examination which then vindicated the Appellant's case that he did not disobey the standing orders.

We have appraised ourselves with the evidence on record and the respective submissions. We have narrowed down the issues for determination as follows.

1. Whether the Prosecution adduced sufficient evidence to support the charges preferred against the

- appellant for disobedience of standing orders.
2. Whether the Prosecution relied only on hearsay and circumstantial evidence.
 3. Whether the sentences meted out to the appellant were excessive and punitive under the circumstances and whether his mitigation was considered during sentencing.

We shall amalgamate issues 1 and 2 as they are inter-twinned.

PW5 who was the investigator in this case testified that service vehicle 79KA 75 (KBM487B) had been assigned to the Appellant on 21st December 2013. He did produce a call data exhibit number 9 (page 58) that indeed confirmed that the Appellant took the motor vehicle to Warrant Officer II Zani. He confirmed that the motor vehicle was left with Warrant Officer II Zani who was senior to the Appellant and who took the vehicle back to the headquarters. No documentary evidence was produced to show that the Appellant was the one with the car at the time it was reported to have been lost. This evidence in our view clearly puts Warrant Officer II Zani as the person who was required to give an explanation in regard to the loss of the motor vehicle. We then grapple with the question of whether the evidence adduced was hearsay evidence.

The appellant in his submissions specifically challenged PW1's evidence as hearsay evidence as he was not present at the time of the commission of the alleged offence. The appellant also questioned the failure to call Warrant Officer II Zani who was the in charge of transport at the time and superior to the appellant to come and testify as he is alleged to have given him the directions and command which he could not ignore.

Hearsay is defined in the Black's Law Dictionary 9th Edition at page 739 as:-

“Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and is therefore dependent on the credibility of someone other than the witness.”

Bearing that definition in mind, one would then ask, did the court martial rely on hearsay evidence? PW1 was indeed on leave at the time and only received information that the appellant after taking one Major General Nthenge to the airport on 21st December 2013 failed to return the motor vehicle back to the camp. Instead he gave it to Warrant Officer II Athumani Zani while at South B without following the proper handing over procedures. His evidence indeed qualifies as hearsay evidence as he reported that which he was told. He was the administration officer and when challenged by the defense counsel to produce any document to show that the appellant had indeed been assigned the vehicle he did not have any. We are, in the circumstances, unable to rely on his evidence.

On failure to call Warrant Officer II, Zani to testify, we note that this officer was authorized to issue a work ticket when detailing a vehicle or deploying one. PW5 produced Forces form 7110 which however was signed by one Sergeant Kamau a driver even though the one deployed on duty was the appellant. There was no document in place to show that the vehicle was handed over to the appellant. PW2 testified that Warrant Officer II Zani is the one who was charged in ensuring the hand over of the vehicle. There was however no handover report to prove that the vehicle under Zani's instructions was handed over from Sergeant Kamau to the appellant. Again, PW3 who was manning the gate on the date the vehicle got lost also testified that he did not see the appellant leave or come in through the defense headquarter's gate on 21st December 2013. We are in the circumstances, unable to fathom how and why the appellant was found culpable when nothing linked him to the handling of the motor vehicle. In that case, we conclude that Warrant Officer II Zani was not called to testify because his evidence if adduced would have been adverse to the prosecution's case. See the case of **Bukenya and Others vs. Uganda [1972] E.A.** the court pronounced itself as follows:-

“The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

The appellant however did not deny the fact that he was assigned the subject motor vehicle. He however claimed that he took the motor vehicle to his boss Warrant Officer II Zani who never returned it to him. The appellant therefore cannot be said to be the one who lost the motor vehicle as the boss never returned it to him again. His Boss being the last one to have had the vehicle, should have been called to account for it. The Appellant cannot be found culpable for doing what was required of him. There is no evidence to connect him with the loss of the motor vehicle.

In the sum, we find that the prosecution did not prove its case in count II beyond all doubts. The Appellant was charged as a scape-goat for mistakes done by others. We quash the conviction and set aside the sentences. We order that the Appellant be and is hereby set free. He shall forthwith be reinstated back to service on his previous rank of Senior Sergeant before the demotion with effect from 15th September 2014. His terms of service including decorations, if any, are hereby restored. It is so ordered.

DATED and DELIVERED this 22nd day of **October**, 2015.

L. KIMARU

JUDGE

G.W. NGENYE MACHARIA

JUDGE

In the presence of:

Appellant present in person

M/s Aluda for the Respondent.