REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL CRIMINAL APPEAL NO. 3 OF 2009

SGT.JOSPHAT OPATA NABWERA ……APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence imposed by the Court Martial on the 22nd of October 2009 at Langata Barracks and confirmed on 25th October 2009 against No. 67429 SGT: Josephat Opata Nabwera.)

JUDGMENT

The appellant was charged and convicted by a Court Martial held at Langata Barracks for committing a civil offence contrary to section 69 of the Armed Forces Act, chapter 199, Laws of Kenya, that is to say, five counts of obtaining money by false pretense contrary to section 313 of the Penal Code chapter 63 Laws of Kenya, and one count of absence without leave contrary to section 32(a) of the Armed Forces Act. He was convicted of all counts and sentenced to 3 months imprisonment on count one to four, one year imprisonment on count five and in count six he was dismissed from the armed forces

Aggrieved by the conviction and sentence, the appellant has appealed to the High Court. In his appeal to this court, the appellant has challenged the decision of the Court Martial on several grounds as captured in his petition of appeal filed on 4th December 2009 by his learned counsel Mr. Gicheha Kamau. These grounds can be summarized as follows;

a. That the appellants rights under sections 72, rule 6 of the Armed Forces Act, Sections 72 and 77 of the repealed Constitution and Articles 47(i) and 50(2)(e) of the constitution of Kenya 2010 were violated.
b. That the appellant was convicted on evidence tendered that was at variance with the charges.
c. The prosecution case was not proved beyond reasonable doubt
d. That the Court Martial totally ignored the appellant's defense.

In his submissions before us, Mr. Gicheha contended that the appellant was held in closed arrest for a period of 149 days without any justifiable reason. This was not only in breach of section 72 Rule 6 of the Armed Forces Act, but also Articles 47(i) and 50(2)(e) of the Constitution and a violation of his right to fair trial. On the count of obtaining money by false pretence contrary to Section 312 of the Penal Code, he submitted that the prosecution had failed to prove the false representation made by the appellant and intention on his part to defraud even though the issue of the appellant having received money was not in dispute. In conclusion, he urged that the appellant's defense was plausible and well corroborated by the

evidence of the prosecution witnesses. He added that he had demonstrated good standing and impeccable conduct during his years of service in the military that was evident from his record and the court should have taken cognizance of these.

Ms. Irene Maina on behalf of the state opposed the appeal. She submitted that the appeal lacked merit as the evidence in support of the conviction and sentence was sufficient. On the issue of delay and violation of the appellant's rights tried duly, she submitted that if the court in any event found that the appellant's constitutional rights had been violated, then the remedy would be compensation which would only be granted by the constitutional court.

That notwithstanding, the state counsel urged that the appellants rights were not violated as members of the armed forces could stay in custody for 72 days and after the said 72 days had lapsed, an extension of time could be sought and granted should a plausible reason be given. The prosecution indeed did seek an extension of time which was granted.

In his submissions the first ground, counsel for the Appellant contended that contrary to Section 72 and Rule 6 of the Armed Forces Act and articles 47(i) and 50(2)(e) of the Constitution which provide for the right to expeditious, efficient, lawful and reasonable administration of justice as well as the right to have the trial begin and conclude without unreasonable delay, he was held for 149 long days which was not only a breach of his constitutional rights, but also more than double the statutory duration of period allowed i.e. the 72 days allowed under the Armed Forces Act before being charged.

The only exception to this duration under Rule 6 of the Armed Forces Act is if reasons are given in writing by the responsible officer. The said rule 6 of the act provides that:-

"An accused shall not be held in arrest for more than seventy-two consecutive days without a court martial being convened for his trial, unless the officer who would be responsible for convening the court martial directs in writing that he shall not be released from arrest; and when giving such a direction the officer shall state his reasons for giving it."

The question is whether any reasons were stated in writing for the delay. We have perused the record at pages 7 and 8 and the only reference made as to reasons given in writing is the official request made to the Chief Justice to appoint a Judge Advocate on 23rd July 2009 by the Ministry of State for Defense and the Chief Justices response thereto. This was a request to convene a court martial. We do not see with any absolute certainty where the officer convening the court martial directed in writing that the appellant shall continue being held in custody beyond the 72 day period or any reasons stated or advanced for such continued detention.

Section 72 of the Armed Forces Act on the other hand provides as follows:-

(2) Wherever any person subject to this Act is arrested and remains in custody for more than eight days without his being tried by court martial or dealt with summarily-

(a) a special report on the necessity for further delay shall be made by his commanding officer to the prescribed authority in the prescribed manner; and

(b) a similar report shall be made to the prescribed authority and in the prescribed manner every eight days until a Court martial sits or the offence is dealt with summarily or he is released from arrest:

This Section essentially provides that a person arrested for suspicion of having committed an offence under the Act shall be investigated and tried without unnecessary delay. The Respondent thus cannot have any valid reason as to why the appellant was not arraigned in any Court within the time stipulated by law.

The question therefore that arises in our instant case is whether there has been unnecessary delay in the taking of steps for investigating the allegations, reporting and commencing trial against the appellant and whether there was a plausible reason explaining the delay? We have examined the court martials record

and note that the delay was attributed to the appointment of the Judge Advocate. A request had been made to the Chief Justice on 23rd July 2009 and it was only until 26th August 2009 that the Judge Advocate was appointed. We do not see any special report that was made necessitating this delay as is required by the section 72 of the said act. Further, no report was made as was required under Section 72(2)(b). This section requires that a report be made every 8 days until a court martial sits. The Prosecution admitted this as the position when it indicated thus:- "…***Your honour the requirement was rather the furnishing of 8 day delay reports becomes the omission since we could not have sought the extension after the expiry of the 72 days if the same were not been filed***" This Section in our view was clearly not complied with.

It is apparent from the above that the Respondent failed to ensure that the provisions of Section 72 and rule 6 of Cap 199, relating to avoidance of delay after arrest were complied with. The appellant was held in detention for 108 days without charge although he was later charged and tried in the Court martial contrary to the provisions of Section 72(3)(b) of the Repealed Constitution. The appellant was supposed to be brought before the court as soon as was reasonably practicable. The burden of proving or justifying the delay rested upon the prosecution. We find that there was no justification for the said delay and no persuasive reasons have been advanced. The marginal notes to Section 72 of the repealed constitution reads, "**Protection of right to personal liberty**". We find in the circumstances of this case that the appellant's rights were violated by the respondent.

The second ground was that the appellant was convicted on evidence tendered that was at variance with the charges. In his submissions, the appellant urged that the fact that money was received by him was never in dispute. He urged that that in itself did not constitute an offence. His argument was that there was no intention to defraud. The issue then is whether or not intention was established. Intention can be inferred from words and in certain cases conduct.

We do note that DW2 testified that he had assisted quite a number of people but had not requested for anything in return. The nature of assistance advanced in this instance was never explored or even queried further, yet the same would have shed more light on the scope of assistance envisaged and whether the same was employed in this case. He again admitted having previously assisted people we have also noted that PW1 during cross examination by the appellants' counsel stated that the money she deposited in the appellants' account was meant for his sons' fees, and this in our view impeaches the argument that this money was inducement. The appellant also testified of a lack of knowledge of the funds deposited in his account but did not raise it up with either the bank, police or his employer. It is not difficult to read in between the lines and infer intention from both words and conduct that this was a tripartite deal gone sour between the DW2, PW1 and the appellant for which the appellant ended up being the sacrificial lamb. It was a deal tainted with illegalities by three parties who did all they could to cover their trails and employed every reason to exonerate them from blame.

PW1 provided the money and paid the appellant hoping to secure her son's enlistment into the army but failed hence the turning against the appellant.

Even though the prosecution case was riddled with gaps which no doubt weakens it, the issue here is whether they would resolve in the appellants favor? Even if we were to accept the appellant's defense that he was acting on behalf of DW2 who turned his back on him, and in aid of PW1, what is not in doubt here is that money was deposited in his account. There is ample evidence to show that the appellant was deeply involved in this fraudulent deal. The evidence from the mobile money transfer service provider confirmed this. His defence could not dislodge the prosecution case.

We are satisfied that there was overwhelming evidence to support the appellant's conviction. Consequently we dismiss his appeal against conviction and sentence.

SIGNED DATED and **DELIVERED** in court this 8th day of April **2014**.

A.MBOGHOLI MSAGHA **L. A. ACHODE**

JUDGE **JUDGE**