



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 1 of 2004

JULIUS KIPTESOT SOIAPPLICANT

- AND -

REPUBLICRESPONDENT

(An appeal against conviction and sentence by Court Martial sitting at Langata Barracks in Court Martial No. 2 of 2004 delivered on 1st December, 2004)

JUDGMENT OF THE COURT

Several charges had been laid against the appellant, including the following:

- (i) That, the accused, **Major J-K. Soi** 19259 of DOD an officer of the armed forces being subject to the Armed Forces Act under s. 7(1) (a) of the said Act is charged with making a false entry in a service document contrary to s. 61(a) of the Armed Forces Act (Cap. 199, Laws of Kenya).
The particulars were that the accused, while deployed as Paymaster Kenbat 8 in Sierra Leone during the accounting period October 2002, made a false entry in a service document, to writ, AB69 Cash Book Kenbat 8 Imprest Account Book, inserting the figure Kshs. 16,197,060/40 instead of Kshs. 16,392,060/00 as the subsistence allowance received - an act he knew or was expected to know was false in a material particular.
- (ii) That the accused stole property contrary to s. 38(a) of the Armed Forces Act.
The particulars in this regard were that the accused, while employed as Paymaster Kenbat 8 in Sierra Leone, on divers dates between 28th October, 2002 and 31st October, 2002 at DOD stole Kshs. 195,000/- being public funds, an act he knew or was expected to know was an offence.

In respect of the *two* charges and *three other* charges, the appellant was convicted and sentenced respectively as follows:

(a) six months' imprisonment; (b) three years' imprisonment; (c) six months' imprisonment; (d) three years' imprisonment; (e) three years' imprisonment.

In the petition of appeal, the appellant contended that the several charges on which he was convicted, had not been proved beyond all reasonable doubts; that the ingredients of the offence of theft had not been proved; that the verdicts were arrived at without making reference to the recorded proceedings; that the testimonies made in the Court Martial had material contradictions; that the burden of proof had been improperly shifted to the accused; that the Court Martial had taken into account extraneous factors in arriving at its decision; that the conviction went against the weight of the evidence adduced through witnesses; that the Court Martial failed to

consider the submissions made in defence by the appellant.

Learned counsel **Mr. Bosire** urged that proof of the case against the appellant had not complied with certain rules of evidence: notably the failure to call a hand-writing expert. Counsel also submitted that the testimonies made before the Court Martial lacked corroboration.

Counsel submitted that the charge of making a false accounting document could not stand, because the accounting documents had not been audited. The record of proceedings shows that the defence counsel had sought to know if there was an auditor's report showing the manner in which the funds released to the appellant had been expended. The witness, **Major Raphael Mitau Kingathia** (PW1), the current Paymaster, said he did not know about it; in his words:

"I don't know that one because I am not an auditor."

Mr. Bosire submitted that the testimony on the charge of making a false document, needed corroboration by witnesses who had knowledge of accounts; and in the absence of such witnesses, there was no proof beyond reasonable doubt.

The appellant had also faced a charge of desertion contrary to s. 31(1) (a) of the Armed Forces Act - in respect of which he had been convicted and awarded a six-month term of imprisonment. Counsel contested this conviction - because desertion meant staying away from place of employment for 90 continuous days; and the appellant had been granted *leave*, and only returned to his place of work upon recall; whereas it was alleged the said desertion was for a period of *115 days*, this duration had also included 42 days during which the appellant was on leave.

It was learned counsel's contention that none of the charges had been proved beyond reasonable doubt, and that the presiding Judge-Advocate should have guided the Court Martial accordingly. Counsel asked that the charges be set aside.

Learned respondent's counsel, **Mr. Makura** conceded to this appeal - on the ground that the charges before the Court Martial were not proved beyond any reasonable doubts. Counsel urged that since Court Martial proceedings are in the nature of criminal proceedings, proof of charges should have been strictly conducted; and for the charge of stealing, there was no proper proof so long as the taking of another's property with *animus furandi* (the intention to steal) had not been proved. On the stealing charge, moreover, even the amounts said to have been stolen, were not proved.

As for the desertion charge, this term, desertion, is defined in s. 31 of the Armed Forces Act; it is realized when an officer is not at his work-station and is not, at the same time, on leave. But from the documentation on file, the appellant had been on leave for 42 days; so he could not have deserted.

As regards the charge of making a false document, **Mr. Makura** urged that this subject was covered by s. 61 of the Armed Forces Act; and an independent document examiner should have been called as a witness.

It is quite clear to us that the Court Martial, in a matter such as that which has led to this appeal, operates as a *criminal tribunal*, for the consequences of the charges may entail, as happened in this case, quite typical criminal penalties. The process of the criminal law is regulated by strict procedures, necessary for the protection of the accused's trial-rights. Proof, in the circumstances, must be conducted on a beyond-

reasonable-doubt basis. This kind of proof, it is clear to us, was not achieved in respect of any of the several charges; and we are in agreement with counsel on both sides that the conviction handed down in respect of the several charges, was not safe. These convictions, therefore, cannot be upheld.

This appeal is allowed in its entirety, and the convictions and sentences imposed by the Court Martial are set aside.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 20th day of January, 2009.

J.B. OJWANG
JUDGE

M. WARSAME
JUDGE

Coram: Ojwang & Warsame, JJ

Court Clerks: Huka & Erick

For the Appellant: Mr. Bosire

For the Respondent: Mr. Makura