



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Court Martial Criminal Appeal 1 of 2006 & 2 of 2006 (Consolidated)

CPL. JOHN MURIUKI MACAKI1ST APPELLANT

SPTE PETER NJOGU2ND APPELLANT

- AND -

REPUBLICRESPONDENT

(An appeal from the judgment of a Court Martial presided over by Lt. Col. W.R. Koipaton sitting at

Eastern Brigade (Defence College, Karen), delivered on 21st December, 2005)

JUDGMENT

Ten separate charges were brought against the appellants herein:

(i) that *Corporal John Muriuki Macaki* (No. 67112) of Signal Battalion and *Corporal Peter Njogu* (No. 61517) of Transport Battalion, both servicemen of the Armed Forces being subject to the Armed Forces Act (Cap. 199, Laws of Kenya), under S. 7(1) (a) of the said Act, are jointly charged with making false entries in a Service document contrary to s. 61(a) of the said Act – in that they at Kahawa Garrison, on or about 14th March, 2003 while working at the pay office as Pay Clerk and Company Clerk of B Company, Transport Battalion respectively, made entries on RTE claim forms in respect of *Corporal Julius Tsuma* (No. 12145) for Kshs. 63,480/=, both knowing that the entries therein were false in a material particular, an act they knew to be an offence;

(ii) that *Corporal John Muriuki Macaki* and *Corporal Peter Njogu* being subject to the Armed Forces Act, under s. 7(1) (a) of the said Act are jointly charged with making false entries in a Service document contrary to s. 61 (a) of the Armed Forces Act in that they at Kahawa Garrison, on or about 14th March, 2003 while working at the Pay Office as Pay clerk and Company Clerk of B Company, Transport Battalion respectively, made entries on RTE claim forms in respect of *Corporal David Kariuki* for Kshs. 60,480/=, both knowing that the entries therein were false in a material particular, an act they knew to be an offence;

(iii) that *Corporal John Muriuki Macaki* and *Corporal Peter Njogu*, both servicemen of the Armed Forces being subject to the Armed Forces Act, under s. 7(1) (a) of the said Act, are jointly charged with making false entries in a Service document contrary to s. 61 (a) of the Armed Forces Act in that they, at Kahawa Garrison, on or about 25th February, 2003 while working as Pay clerk and Company clerk of B Company, Transport Battalion respectively, made entries on RTE claim forms in respect of *Corporal Francis Kiragu* for Kshs. 67, 284/= both knowing the entries there were false in a material particular, an

act they knew to be an offence;

(iv) that *Corporal John Muriuki Macaki* of the Signal Battalion and *Corporal Peter Njogu* of the Transport Battalion, both servicemen of the Armed Forces being subject to the Armed Forces Act, under s. 7(1) (a) of the said Act, are jointly charged with making false entries in a Service document contrary to s. 61 (a) of the Armed Forces Act, in that they, at Kahawa Garrison, on or about 5th December, 2003 while working at Pay Office as Pay Clerk and Company Clerk of B Company, Transport Battalion respectively, made entries on RTE claims forms in respect of *Corporal Adan Mohamed* for Kshs. 92,400/=, both knowing the entries therein were false in a material particular, an act they knew to be an offence;

(v) that *Corporal John Muriuki Macaki* of signal Battalion and *Corporal Peter Njogu* of Transport Battalion, both servicemen of the Armed Forces being subject to the Armed Forces Act, under s. 7(1) (a) of the said act, are jointly charged with making false entries in a service document contrary to s. 61(a) of the Armed Forces Act in that they at Kahawa Garrison, on or about 14th March, 2003 while working at Pay Office as Pay Clerk and Company Clerk of B Company, Transport Battalion respectively, made entries on RTE claim forms in respect of *Corporal Hussein Mohamed* for Kshs. 67,200/= both knowing the entries therein were false in a material particular, an act they knew to be an offence;

(vi) that *Corporal John Muriuki Macaki* of signal Battalion and *Corporal Peter Njogu* of Transport Battalion, both Servicemen of the Armed Forces being subject to the Armed Forces Act, under S. 7(1) (a) of the said Act are jointly charged with making false entries in a Service document contrary to s. 61(a) of the Armed Forces Act in that they at Kahawa Garrison, on or about 26th February, 2003 while working at Pay Office as Pay Clerk and Company Clerk of B Company, Transport Battalion respectively, made entries on RTE claim forms in respect of *Corporal Mohamed Adan* for Kshs. 75,600/= both knowing the entries therein were false in a material particular, an act they knew to be an offence;

(vii) that *Corporal John Muriuki Macaki* of Signal Battalion and *Corporal Peter Njogu* of Transport Battalion, both Servicemen of the Armed Forces being subject to the Armed Forces Act, under s. 7(1) (a) of the said Act, are jointly charged with making false entries in a Service document contrary to s. 61(a) of the Armed Forces Act in that they, at Kahawa Garrison, on or about 26th February, 2003 while working at Pay Office as Pay Clerk and Company Clerk of B Company, Transport Battalion respectively, made entries on RTE forms in respect of *Corporal Jackson Tsuma* for Kshs 71,820/= both knowing the entries therein wer false in a material particular, an act they knew to be an offence;

(viii) that *Corporal John Muriuki Macaki* of Signal Battalion, a Serviceman of the Armed Forces being subject to the Armed Forces Act, under s. 7(1) (b) of the said Act is charged with making false entries in a Service document contrary to s. 61 (a) of the Armed Forces Act, in that he at Kahawa Garrison, on or about 19th January, 2003 while working at Pay Office as Pay Clerk, made entries on RTE claim forms in respect of *Corporal Y.M. Ramadhan* for Kshs. 60,480/= knowing the entries therein were false in a material particular, an act he knew to be an offence;

(ix) that *Corporal John Muriuki Macaki* of Signal Battalion, a Serviceman of the Armed Forces being subject to the Armed Forces Act, under s. 7(1) (a) of the said Act is charged with making false entries in a Service document contrary to s. 61 (a) of the Armed forces Act in that he at Kahawa Garrison, on or about 14th March, 2003 while working at Pay Office as Pay Clerk, made entries on RTE claim forms in respect of *Corporal J.M. Njeru* for Kshs. 26, 460/= knowing the entries therein were false in a material particular, an act he knew to be an offence;

(x) that *Corporal John Muriuki Macaki* of Signal Battalion, a Serviceman of the Armed Forces being subject to the Armed Forces act, under s. 7(1) (a) of the said Act, is charged with making entries in a Service document contrary to s. 61(a) of the Armed Forces Act, in that he at Kahawa Garrison, on or about 27th February, 2003 while working at Pay Office as Pay Clerk made entries on RTE claim forms in respect of *Corporal Philip Enkai* for Kshs, 57, 120/= knowing the entries therein were false in a material particular, an act he knew to be an offence.

Summarising the prosecution case, the Judge Advocate remarked that the accused persons (appellants herein) were charged with making false entries in a Service document contrary to s. 61(a) of the Armed Forces Act – which provides that any person subject to the Act who makes, signs or makes an entry on any service report, return, pay-list or certificate or other service document being a document of entry which to his knowledge is false in a material particular, “shall be guilty of an offence and liable to conviction by a Court Martial for a term not exceeding two years or any less punishment provided by the Act.”

The prosecution, consequently, had to prove –

- (i) that the appellants herein were subject to the Armed Forces Act;
- (ii) that the accused had made entries in the Service documents in question;
- (iii) that it was within the knowledge of the accused persons at the time of making such entries, that the same were false in a material particular.

The prosecution called 13 witnesses. PW1 (*Lt. Col. Mugwira*), the Paymaster at Kahawa Garrison, led the Court Martial through the manner of processing RTE forms. The witness gave evidence about several of such forms produced as exhibits: he said these RTE forms had anomalies in relation to the dates shown – dates of signature by claimants, and dates of authentication.

PW2 (*Corporal Francis Gitau*) testified that on the suspect claims forms, his service number and name had been used to obtain Kshs. 67,284/= (which relates to charge No. 3), and that it had been so used without his knowledge; he denied getting the money. PW2 identified as other incorrect information given on the said RTE form: his wife’s name and service number; domicile; his children’s names.

PW4 (*Senior Sgt. Onsare*), of the Transport Battalion, said he knew 2nd appellant and had repeatedly communicated in writing with 2nd appellant. He knew that 2nd appellant was in B Company of the Transport Battalion, and he was familiar with the hand-writing of 2nd appellant. PW4 identified the hand-writing on several of the certificates as that of 2nd appellant. PW2 testified that some of the names in relation to which money-claims were made, were not associated with the Transport Battalion – as they did not appear on the nominal roll.

PW5 (*Lt. Col. Philip Wangombe*), the Commanding Officer of Transport Battalion from July 2003, testified that a number of the RTE claim forms were irregular because they were endorsed by Adjutants – and that this was contrary to the applicable rules.

PW6 (*Geoffrey Tisha*) of Nanyuki 1 Kenya Rifles testified that he had never been at Transport Battalion, and he had no knowledge of exh. 10 which showed the service number of the claimant as his; and, even though the service number indicated was his, all other details recorded did not relate to him. Such was also the testimony of PW7 (*Awadh*) who said although his service number was recorded on one of the RTE forms, all the other details recorded were alien to him. It was the same with PW8 (*Corporal Masinjila*) of 2nd Brigade, Lanet; although his service number had been used in one of the RTE claims, he had no relation to the Transport Battalion.

PW9 (*Major Mwenyekombo*), and Administrative Office with the Military Intelligence testified that both service numbers and serial numbers used in the Armed Forces were unique to individual Servicemen or officers, and no two persons had the same number.

The 1st accused, *Cpl. Macaki*, said he was Pay Clerk at Kahawa Garrison, and he is the one who made entries on Exhibits 1,2,5,9,10,11. He denied any knowledge that some of the entries were false. He denounced some of the signatures on the RTE claim forms which were being attributed to him. He said there were some 40 Pay Clerks in the Pay Office, and some of them may well have known and used his Service number. He denied committing the offence.

The 2nd accused, *Cpl. Njogu*, denied having authenticated any document, apart from Exhibit 33A and 33B which were his specimen hand-writing. He denied having committed the offence.

The Judge Advocate stated that both accused were certainly subject to the Armed Forces Act. He next considered certain aspects of the evidence, paying special attention to the evidence of PW13, *Antipas Nanjwa*, who is attached to CID Headquarters as a Forensic Document Examiner – a holder of Masters degree in Forensic Science, from the University of Saga in India. PW13 had examined the sample signatures of the appellants herein, against the writings and signatures appearing on the RTE claim forms, and, in his opinion, the writings in question and the signatures were those of the same person. The Judge advocate noted the impropriety of the hand-writing expert's coming to a conclusion in such broad terms, without identifying *specific features in the hand-writing*, and then stating the *basis for his opinion*, and leaving it to the Court to make up its own mind. The Judge Advocate, after advising the Court Martial as necessary, left, to enable the Court Martial to come up with its verdict.

The Presiding Officer of the Court Martial thereafter stated that deliberations had taken place, and a verdict had been arrived at. The said verdict was set out as follows:

“For 1st accused, G7112 *Corporal John Muriuki Macaki* of Signal Battalion, oncharge 1, the Court has found him guilty [of] making entries on RTE claim form in respect of 12145 *Corporal Julius Nzuma* for Kshs. 63,480/=. For count 2 the Court found the accused guilty of making false entries on RTE claim form in respect of 56120 *Corporal David Kariuki* for Kshs. 60,408/=. For count 3, this Court found the accused not guilty for entries on RTE claim form in respect of 60894 *Corporal Francis Kiragu* for Kshs.57, 284/=. For count 4, this Court found the accused guilty of making false entries on RTE claim form in respect of 54562 *Corporal Adan Mohammed* for Kshs. 92,400/=. For count 5, the Court found the accused guilty of making false entries on RTE claim form in respect of No. 11218 *Corporal Hussein Muhammed* for Kshs. 67,200/=. For count 6, the Court found the accused guilty of making false entries on RTE claim form in respect of No. 60226 *Corporal Mohammed Adan* for Kshs. 75,600/=. For count 7 the Court found the accused guilty of making false entries on RTE claim form in respect of 58186 *Corporal Jackson Nzuma* for Kshs 71,820/=. For count 8, the Court finds the accused not guilty of making false entries on RTE claim form in respect of No. 65805 *Corporal Y.M. Ramadhan* for Kshs. 60,480/=. For count 9, this Court find the accused not guilty of making false entries on RTE claim forms in respect of No. 66112 *Corporal J.M. Njeru* for Kshs. 26,460/=. For count 10, this Court finds the accused not guilty of making false entries on RTE claim form in respect of No. 67302 *Corporal Phillip Ekai* for Kshs. 57.120/=. Second accused, No. 61517 *Corporal Njogu* of Transport Battalion – count 1: the Court finds the accused guilty of making false entries on RTE claim form in respect of No. 12145 *Corporal Julius Nzuma* for Kshs. 63,480/=. Count 2: the Court finds the accused guilty of making false entries on RTE claim form in respect of No. 56120 *Corporal David Kariuki* for Kshs. 60,480/=. Count 3: the Court finds the accused guilty of making false entries on RTE claim form in respect of No. 54562 *Corporal Adan Mohammed* for Kshs. 92,400/=. Count 5: the Court finds the accused guilty of making false entries on RTE claim form in respect of no. 11218 *Corporal Hussein Mohammed* for Kshs. 67,200/=. Count 6 the Court finds the accused guilty of making false entries on RTE claim form in respect of no. 60226 *Corporal Mohammed Adan* for Kshs. 75,600/=. Count 7: this Court finds the accused guilty of making false entries on RTE claim form in respect of No. 58186 *Corporal Jackson Nzuma* for Kshs. 71,820/=”

As to sentence, the Court Martial first considered: length of service of the appellants herein; their family situation; their mitigation statements.

The 1st appellant was sentenced as follows:

- (i) one year's imprisonment in respect of charges 1,2,4,5,6 and 7;
- (ii) the sentences to run concurrently.

The 2nd appellant was sentenced as follows:

- (i) six months' imprisonment in respect of charges 1,2,3,4,5,6 and 7
- (ii) these sentences to run concurrently.

The effect of imprisonment in both cases was: automatic loss of service benefits, and dismissal from the Armed forces.

The grounds of appeal, in the case of 1st appellant, were set out as follows:

- (i) that conviction was based on insufficient evidence;
- (ii) that the charges as laid, were defective;
- (iii) that the Court Martial failed to give a reasoned judgment, as it did not analyze the evidence in support of each charge;
- (iv) that the documents in question were false, and so the appellant could not have made false entries on them;
- (v) that conviction had been based on uncorroborated circumstantial evidence;
- (vi) that the conviction was based on irrelevant evidence;
- (vii) that there was no evidence to show that the appellant knew the impugned evidence to be false;
- (viii) that the Court Martial had shifted the burden of proof from the prosecution to the defence;
- (ix) that the Court Martial erred in fact, in sentencing the appellant to dismissal, in addition to the jail term imposed;
- (x) that the one-year term of imprisonment imposed on the appellant was severe and excessive in the circumstances – and was in error, in point of law and fact;
- (xi) that the Court Martial erred in law and in fact, in failing to take into account the appellant's long service with a good record, and other mitigating factors, in sentencing;
- (xii) that the finding and sentence by the Court Martial was, in the circumstances, illegal and unreasonable;
- (xiii) that the Court Martial erred in law and in fact, in failing to take into account the lesser punishments provided for in s. 102 of the Armed Forces Act.

Some of the above-listed grounds of appeal are also to be found in the 2nd appellant's petition of appeal, but with additions such as the following:

- (i) that the Court Martial erred in law and in fact in relying wholly on the opinion of the hand-writing expert which was not corroborated;
- (ii) that the Court Martial erred in law and in fact in failing to do an independent examination of the hand-writing on the documents produced as exhibits;
- (iii) that the Court Martial erred in law and in fact in finding that PW4 knew the hand-writing of the appellant, when evidence showed that he had no opportunity to know the appellant's hand-writing, as they had never worked in the same office;
- (iv) that the Court Martial erred in law and in fact in failing to appreciate that the documents from

which the information on the RTE forms was sourced was alterable, as the entries therein were made in pencil;

(v) that the Court Martial erred in law and in fact in sentencing the appellant to six months' imprisonment, which sentence was severe and excessive in the circumstances.

The foregoing grounds of appeal were canvassed on behalf of the appellants by learned counsel *Mr. Mageto*, who contended that the Court Martial had not given a *reasoned judgment*; had failed to analyse the evidence adduced by both the prosecution and the defence; and had failed to show the process of reasoning which led them to their verdict. The effect, counsel urged, was that the entire judgment was bad in law – and on that ground alone, the appeals had clear merits.

Counsel contested the manner in which the evidence of hand-writing had been presented before the Court; that there was no compliance with the manner in which a hand-writing expert is required to present evidence.

Counsel relied on the Court of Appeal decision in *Wainaina v. Republic* [1976] KLR 11, in which it had been thus held (p. 11):

“While a handwriting expert may, in an appropriate case, say that he does not believe that a particular writing is by a particular person, the most that he should ever say on the positive side is that two writings are so similar as to be indistinguishable. He might, moreover, comment on unusual features which make the similarity the more remarkable. However, there is no rule requiring the corroboration of the evidence of a handwriting expert.”

Also relevant in that respect is the persuasive authority of the High Court of Tanganyika, *Hassan Salum v. Republic* [1964] E.A. 126.

Counsel submitted that the handwriting expert's evidence, in the instant case, carried certain *conclusions*: but the expert did not as much as refer to the technical aspects of the relevant writings, the proof-points, which led him to his conclusions. It is precisely that evidence of the handwriting expert, and little else, that led the Court Martial to the verdict it reached – counsel urged.

Now although counsel urged that “corroboration was required for the hand-writing expert's evidence, but there was none,” that contention would not fall on all fours with authority; for it is clearly stated in *Wainaina v. Republic* [1976] KLR 11 that such corroboration is not a requirement.

Counsel submitted that, of all the witnesses, only PW4 gave testimony in relation to 2nd appellant – saying he was familiar with this appellant's hand-writing; but he also admitted that he was not working with 2nd appellant in the same department. Counsel urged that there was no direct evidence of witnesses saying they were familiar with the handwritings of the appellants.

Learned counsel urged that the Court Martial had been in breach of the terms of the Armed Forces Act (Cap. 199, Laws of Kenya), as the verdict had followed hard on the heels of the prosecution case – and the appellants had not been given an opportunity to make a no-case-to-answer submission.

Mr. Kivihya, learned respondent's counsel, however, urged that overwhelming evidence had been adduced against the appellants. As already noted in this judgment, the substantial part of the transitional record towards the verdict, was that of the Judge Advocate who was giving his opinion on points of law and evidence; but from the point where he ended, there was only the verdict, which was accompanied by a restatement of the charges, concluded with findings of guilt in most instances. Indeed, *Mr. Kivihya* had remarked:

“I wonder if there's a judgment on record [at pp. 460 – 462 of the proceedings]; it's just the verdict of guilty. It is not shown how this was arrived at.”

Notwithstanding his position that overwhelming evidence had been adduced by the prosecution, learned counsel submitted that the decision had a serious defect; and on that account he would concede to the appeal; counsel noted that the “judgment does not even state what was said on both sides.”

Although the several grounds of appeal are on record, counsel have not devoted much attention to them, preferring to view as the main point of contention, the nature of the decision which was made by the Court Martial: does it qualify as a *judgment*?

“Judgment” is thus defined in *Black’s Law Dictionary*, 8th ed. (2004) (at p. 858):

“A court’s final determination of the rights and obligations of the parties in a case. The term *judgment* includes an equitable decree and any order from which an appeal lies.”

From the decision of the Court Martial in this instance, certainly, an appeal lies. Section 115 (1) of the Armed Forces Act (Cap. 199, Laws of Kenya) thus provides:

“Subject to this Part, where a person has been convicted by a court martial –

(a) *the person convicted may, with the leave of the High court given pursuant to section 116, appeal to the High Court against the conviction, or against the sentence, or against both;*

(b) *the Attorney-General may, in any case, within forty days of the promulgation of the conviction, appeal to the High Court against the sentence.”*

From the foregoing provisions, it is clear that judgment in the Court Martial sense, is not necessarily the kind of judgment associated with civil Courts; such judgment may not necessarily carry all the common ingredients of a civil Court judgment, but may come as only a *promulgation of conviction*, or as just an *order*: none the less it will still be subject to appeal, as contemplated by the Armed Forces Act.

It follows that the one ground which both counsel have relied on, in the contention that the appeal be allowed, is not a valid one.

Section 119 of the Armed Forces Act specifies the approach to be taken by the High court, when an appeal such as the instant one comes up. The High court is to consider matters such as –

(i) whether the appellant was not properly convicted on a particular charge; (ii) whether the sentence passed was lawful; (iii) whether conviction should have been for a lesser offence; (iv) whether the Court Martial was satisfied of the probative facts adduced before it; (v) the mental status of the appellant at the time of committing the offence; etc.

Such are the principles which have guided this Court, in considering the merits in law and evidence, of the convictions which were entered against the appellants by the Court Martial.

The real question lying at the core of all the charges was falsification in RTE claim forms – a mischief which, without doubt, had caused the loss of very considerable amounts of public funds. That fact, by itself, shows that there are *systemic weaknesses in the financial control procedures of the Armed Forces*, and the same are being exploited to personal advantage, and for unjust enrichment, by fraudsters. These are *policy and management questions which the responsible offices within the Armed Forces must deal with*.

As for the appellants, they come before this Court on very limited and specific questions of law and evidence; and it is squarely on that narrow basis, that their grievance is to be resolved. We are particularly concerned with the crucial role of the *handwriting evidence*, in the finding that the appellants had been rightly convicted. That area of evidence is well regulated by case-authority. We do not find the evidence of *Antipas Nanjwa (PW13)*, the handwriting expert, to have been properly admitted; and we hold that this evidence should not have been found to prove the complicity of the appellants, in the

several incidents of forgery appearing in the charges. Rather than technically and professionally describe the features of the relevant handwritings, and then express his opinion thereon, PW13 spoke as if he was the *ultimate voice* on the probative force of the handwritings in question; the effect was to lead the Court Martial to make a decision which it had no basis for making.

We allow both appeals, quash conviction in each case, and set aside all the terms of imprisonment imposed in respect of each charge, and for each appellant.

It is so ordered.

DATED and DELIVERED at Nairobi this 12th day of May, 2009.

J.B. OJWANG

H.A. OMONDI

JUDGE.

JUDGE.

Coram: Warsame, J

Court Clerks: Huka & Erick

For the Appellants: Mr. Mageto - present

For the Respondent: Mr. Kivihya

Court – Judgment delivered in chambers in the presence of *Mr. Mageto* for the two appellants and appellants present and no appearance for the state on behalf of *Justice Ojwang* and *Omondi JJ.*

M. WARSAME

JUDGE.