REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Criminal Appeal 147 of 2005

SILAS MWANIKI KITHUMBI……...……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

In the court martial sitting at Langata Barracks at Nairobi the Appellant was tried and sentenced on five charges under the Armed Forces Act Chapter 199 Laws of Kenya. (The Act which was applicable to him.)

He was charged with five charges the first of which is desertion contrary to section 31 (1) (a) this charge was later amended.

The second charge was making away with a Rifle make G3 contrary to Section 42 (e) of the Armed Forces Act.

The third charge was making away with a G3. This count was later dropped on the ground that a rifle G3 consists of a magazine as a unit.

On charge four he was charged with making away with 20 rounds of ammunition contrary to Section 42 (e) of the Act.

Charge five was disobedience to Standing Orders contrary to Section 30 (1) of the Act.

The Appellant pleaded not guilty to all these charges and was informed of his right to engage a lawyer but after making an effort he was unable to engage a lawyer because he said there was lack of funds. In his opening speech the prosecutor addressed the court on the progress of the appellant in the force. He was at the material time working as radio operator in Grade of Senior Private Mwaniki.

The first charge is that of desertion under Section 31 of Act headed

"Desertion and Absence without leave". Section 31 (2) (a) defines the offence as" if he leaves the armed forces when it is his duty to join or rejoin the armed forces with intention subsisting at the time of leaving or failure formed thereafter of remaining permanently absent from his duty.

Section 31 (2) (d) provides "or absents himself without leave for continuous period of more than ninety (90) days". The charge therefore under Section 33 (1) (a) must be read with 31 (2) (a) the words with the intention subsisting at the time of leaving or failure or formed thereafter, of remaining permanently absent from his duty and if it is charged under 31 (1) (a), 2 (d) the particulars must be specified that he "without permission absented himself continuously for a period of 90 days" or more. None of these particulars are

stated in the charge sheet and therefore the Appellant did not know how to defend himself. The charge is defective.

The other charges were brought under Section 42 (e) which states:-

"Subject to this Act who-

(a) ……..

(b) ……..

(c) …….

(d) ……..

(e) makes away with (whether by pawning selling or destruction or in any other way) any Service decoration granted to him or any clothing arms, ammunition or other equipment issued to him for his use for service purposes is guilty of an offence provided that it shall be a defence for a person charged that he took all reasonable steps for its care and preservation.

The evidence is that the appellant was issued with personal rifle for his use and therefore was allowed and permitted to keep the rifle and move about with it from place to place. There is no evidence that he did not take reasonable steps for its care and preservation. The same applies to charge 3 and 4.

Regarding charge five contrary to Section 30 (1) of the Act that Appellant is charged with contravened Standing Orders 3 (a) by leaving 4 magazines and 80 rounds of ammunitions (7.62 mm) entrusted to him unattended. It is not certain whether when leaving the camp the appellant had no permission. No investigations were arrived out.

Evidence:- Section 91 (2) of the Act provides that every witness before the court martial shall give evidence on oath. A perusal of the record shows that 4 witnesses namely:-

- Major Chepchir PW11
- Pte Omar PW4
- Ste Mutua PW6
- Major Ali PW7 were not sworn.

The legal effect of an oath is to subject the person swearing to penalties for perjury if he gives false testimony. Therefore in case of these "witnesses" their statements are worthless and unreliable. It is true then to say that the court martial relied on uncredit- worthy and unreliable evidence in reaching the decision to convict the appellant. PW1 in his sworn evidence was not first hand. Although he new Appellant he just assumed that the Appellant was issued with personal weapon like all others in the company. However in his unsworn statement the appellant admitted having taken personal weapon which was G3 rifle with fitted magazine. There was no evidence that the Appellant was with 20 rounds of ammunition of 7.63 mm. His (PW1) evidence was an assumption that this must be so. Assumptions can not secure a conviction. Again his evidence as to how he learnt of disappearance of the Appellant is hearsay. CPl Olengoi did not give evidence. Sgt Anyona gave evidence of assumption that Applicant was given 100 rounds of ammunition and that he kept them. Sgt Anyona got a report from Cpl Olengoi that Appellant was missing with his rifle. By the time he went to the Appellant's tent, appellant was not in and that it was true the rifle was missing. What offence was committed at that time?. The Appellant must have taken his rifle with him out of the camp that is what he said in his unsworn statement. Indeed the appellant has given explanation of what happened to the G3 rifle which must have had its magazine fixed. His explanation could be probable. He names the persons he entrusted with the gun for only a

short time and that he believes they stole his rifle, P.C Kivuti and P.C Makanga. He also stated the effort he made to recover the gun and it is only that when he could not recover it that he got pass from his section commander who suggested to him to go home. The officer who gave him the pass Cpl Ibonge was not called to give evidence although he was very much involved according to the evidence of PW1.

It is my finding that the explanation given as to the failure to return the G3 rifle and the magazine is possible or probable. In criminal cases the appellant needed only to throw doubt in the prosecution evidence. If his explanation could be true or possible the doubt should benefit, the Appellant an accused person has no burden of proof. Again as Judge Advocate pointed out the G3 rifle is together with the magazine therefore only due charge should be on the charge sheet. On Count 4 there is no evidence that the Appellant was issued with 100 rounds of ammunition. It was just an assumption by PW1. The evidence of PW2 ws unsworn and therefore not reliable regarding 20 rounds of ammunition. The same with PW6 he was not sworn their unsworn statements are not evidence. On charge numbered 5 the evidence is that the Appellant left 4 magazines and 80 rounds of ammunition entrusted to him unattended. It is to be noted that these items are said to have been found in his (appellants) tent. It is also said that these items were issued to the Appellant for his own personal use. Where else were they to be kept except in his tent. I find the evidence not satisfactory no proof by prosecution as to where he was expected to keep them. Law Society Cap 18 court makes no comment to this Act.

There is the issue of the statement made by appellant before Kibera Magistrate Kibera.

Firstly, the evidence was that the Appellant was taken from hospital bed to Kibera Law Courts by PW7 before Magistrate to make statement. It is already in evidence that the Appellant was suffering from malaria, TB, effects of HIV and effects of drugs. It cannot be said he went voluntarily. Section 25 A of Evidence Act a new amendment (Act 5/2003) which was enacted to ensure that a confession or admission of a fact tending to the proof of guilt by an accused person is not admissible in criminal proceedings. If the making of the compression or admission appears to court to have been caused by any inducement, threat or promise having reference against an accused person, proceedings from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. In this case the Appellant was sick and HIV positive. On 30/8/2004 he was found to be sick with Tuberculosis both life threatening illnesses. This evidence is given by PW7 in cross-examination by Appellant (Page 107). He was taken from Hospital bed. Asked by Judge advocate whether he was forced to make statement he replied that he thought he would be transferred to another hospital. This is inducement. He was taken to Kibera by PW7 Major Ali the investigating officer. It is to be noted that the Judge Advocate responded that she was there and that the Appellant should have said he was sick but instead recorded the statement all the same. Therefore this statement is not admissible in evidence. It is clear Appellant expected to get some benefit after making the statement in view of his illnesses. The other issue is whether the Appellant was attached at Lokichogio Military Camp illegally. The evidence was that the Appellant had completed his Colour Service in 1999. Colour Service is defined as service in the armed forces other than service in the reserve or in a cadet force. This issue was not pursued by prosecution. If the Appellant was not re engaged after the termination of colour service he was then illegally in Lokichogio Camp and the Act may not apply to him. On the issue of handwriting PW5 said the appellant found him in the Signal Department and he was acquainted with his signature he said he is used to the appellant's signature. That evidence was admitted under Section 50 of Evidence Act Cap 80. However the witness did not have specimen of any of his colleagues signatures and signature of the Appellant, and when the signature in question was made the witness was not around. The storeman who issued the arm was not called to give evidence to reinforce the evidence of PW5. There was contradictory evidence of the number of rounds of ammunition missing see PW1 and PW4 private man Omar who said one round of ammunition was missing. This was contrary to the charge that it was 20 rounds that were missing. PW4 also said one round of ammunition. Also it is said that the ammunition issued to Appellant was issued on 8/2/2001 which is 2 years after Musyoka was given the same. There is no evidence how the ammunition was issued to the Appellant on 8th February, 2001. Regarding this issue Sgt Anyona is said to have given 100 rounds of ammunition to each group. There is no evidence that the Appellant was given any, it was only an assumption.

Regarding the issue of miscarriage of justice the record does not show which language was used by the witnesses. The Kenya constitution provides that an accused person in the criminal proceedings must understand the proceedings in a language he understands (ref. Section 72 (2)). At page 109 of the record it will be seen that the appellant was speaking in Kiswahili. What language were others speaking?. The issue of the admissibility of court martial proceedings is raised by appellant who submits that these proceedings were not certified. The heading of proceedings at page 1 appears that the record was prepared on 14th November 2004 but the proceedings took place in October 2004 being not certified there is probability of tampering with evidence. Another issue is that the prosecutor failed to call essential witnesses. Cpl Olengoi was very involved at the material time but he was not called. Also Major Keitany in charge of Lokichogio military camp was not called. The only conclusion to be reached here is that the prosecution was hiding from the court evidence not in their favour. No arms storeman was called to give evidence as to how arms are stored. After above comment on evidence, I now examine the grounds of appeal. The Appellant amended his petition with leave of court and filed the same on 27/11/2006.

1. The first ground is that the trial court erred in law by making the finding that the prosecution had proved the case beyond reasonable doubt awarding stiff sentence on desertion offence contrary to laws of Kenya.

2. The trial court relied on flimsy and defective charges which were not supported by particulars of the offences.

3. The trial court erred by placing unduly heavy reliance on unsafe and uncreditworthy evidence.

4. There occurred manifest miscarriage of natural justice and violation of rights.

5. That the admission of confession statement was contrary to the laws of Kenya.

6. The prosecution failed to call essential witnesses thus keeping away from the court evidence that may be against their case

Conclusion

According to the evidence the first charge is defective for not specifying and proving the particulars o the charge either under Section 31 (1) (a) (2) (a) and (d). Therefore it is incompetent. Also the Appellant left the camp with a pass issued by the officer in chage of his camp. However on reaching his home in Mbeere, it was discovered he was HIV positive and he stayed at home. There is also evidence that he may have been attached at Lokichogio illegally having finished his colour service in 1999 and there was no evidence that he had re-engaged. There was no investigation in this case whatsoever.

Regarding the sentences he was given, they are specified in the Act if it was proved that he absents without leave the sentence is under section 32 imprisonment not exceeding 2 years the sentence of 5 years which was given is unlawful. For offences under Section 42 (e) the maximum is 2 years and on offences under Section 30(1) disobedience of orders is punishable by imprisonment not more than two years. It is to be noted that if the offences were proved the sentences given were maximum prescribed. The trial court did not consider the mitigation and the circumstances surrounding lesser terms of imprisonment should have been given. The punishment was harsh and excessive. Particularly as the Appellant was in addition dismissed from the Armed forces. On the issue of proof beyond reasonable doubt, it is my finding that the first charge was fatally defective and not proved. And on the whole the evidence before the court was not sufficient to convict on any of the charges it being unreliable hearsay and not sworn 4 witnesses were not sworn. The prosecution also failed to called important witnesses and it can only be assumed that there was effort to hide from court unfavourable evidence. In the circumstances such evidence can not be said to have supported the charges beyond reasonable doubt. This is answer to ground 2, 3, and 6. On ground 4, it is clear the issue of language used is not disclosed. Therefore the rights of the appellant under the constitution were violated. On ground 5 the alleged confession was taken in circumstances that appears to this count not to have been voluntary but induced by expectation of some benefit or gain. It should not have been admitted.

I have reached the conclusion that the conviction is unreasonable and cannot be supported by evidence. I therefore allow the appeal and quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith.

Dated this 25th January, 2008.

J. N. KHAMINWA

JUDGE

Mr. Omwega: I apply for certified copies of proceedings and Judgment.

J.N. KHAMINWA

JUDGE

25/1/2008

Khaminwa – Judge

Njue – Clerk

Mr. Omwega for State

Appellant present in court.

Read in open court.

J. N. KHAMINWA

JUDGE