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

Martial Criminal Appeal 346 of 2002

MAJOR EPHRAIM MURIITHI KANGANGI ….. APPELLANT

VERSUS

REPUBLIC ……...……. RESPONDENT

JUDGMENT

The Appellant was on 13th April, 1999 convicted by the Court Martial sitting at Langata Barracks on one count of stealing public property contrary to Section 38 of the Armed Forces Act. He was upon conviction sentenced to one year imprisonment and dismissed from employment. The Appellant was aggrieved by the conviction and sentence. He therefore preferred this Appeal. However by the time the Appeal came up for hearing, the Appellant had already served the imprisonment term. The Appellant in his petition of Appeal faults his conviction and sentence on 13 grounds. It is not necessary to reproduce verbatim the said grounds.. Suffice to state the Appellant faults his conviction mainly on the question of jurisdiction scant prosecution evidence and defective charge sheet.

The facts giving rise to the case are that the Appellant was a major in the armed forces. He was appointed as the Officer Commanding Planning and Control Department at KAFTEC and his duties entailed directing, controlling and accounting for all the academic programmes at the college, initiating and implementing recruitment of external civilian lecturers. He was also responsible for administering payments of the hired external lecturers in accordance with the approved rates. To facilitate this function, money would be requisitioned from the Department of Defence headquarters and entrusted to the Garrison Paymaster. The Appellant would then prepare payment vouchers in respect of each and every external lecturer, sign it and then pass them on to other authorized signatories. The duly signed vouchers would then be taken to the Garrison Paymaster who would then pay the external lecturers.

During a routine audit exercise it was discovered that on diverse dates between 11th April, 1996 and 29th April, 1997, there was an overpayment to the external lecturers to the tune of Kshs.1,150,700/=. Further investigation revealed that the Appellant fraudulently used to inflate the amounts the external lecturers were entitled to on the payment vouchers. He would then demand for and receive from the said lecturers the difference between the genuine entitlement and the inflated sums and then convert the money to his use. It was then that the Appellant was arrested and Court Martialled.

In support of his petition of Appeal, the Appellant through Mr. Koyoko, Learned Counsel submitted that in convening the Court Martial, rule 25 of the Armed Forces Rules of Procedure was not complied with and in particular the appointment of the Judge Advocate. It was Counsel's submission that the Judge

Advocate should have been appointed by the Chief Justice. However in the circumstances of this case, the Judge Advocate was appointed by the convening officer who was the Commanding Officer of the Appellant. To Counsel, the officer had no jurisdiction to make the appointment. Counsel further submitted that after the Appellant was arraigned before the Court Martial, the proceedings were adjourned and when reconvened a new Judge Advocate was introduced. Counsel pointed out that the presiding officer had no power to amend the convening order so as to include the new Judge/Advocate. Accordingly the Court Martial which came into existence after this amendment was unlawful and a nullity. In support of this submission, Counsel referred this Court to the case of ***CHEROGANY VS THE CHIEF OF GENERAL STAFF & OTHERS, HCCC. NO. 671 OF 1999.***

The next ground of Appeal to be tackled by the Counsel for the Appellant was with regard to procedure of investigation before arraignment. Under rule 7, of the Armed Forces Rules of Procedure, the Appellant was required to Appear first before his Commanding Officer so that charges are read to him and recorded. The Commanding Officer then either deals with case summarily or refers it to the Court Martial. Counsel urged us to find that failure to have the Appellant appear before Commanding Officer first was prejudicial as the Commanding Officer may have perhaps dealt with the matter summarily and given a lighter sentence. To that extent, Counsel maintained the proceedings were a nullity.

On evidence tendered, Counsel submitted that the charge sheet was not supported by the evidence tendered. That the figures in the charge sheet were based on an audit. Counsel submitted that the prosecution should have led evidence to show the scheduling of the lectures, the hours taught by each lecturer as against payments made. No such evidence was led. Counsel maintained that those records should have been produced. Failure to have them produced denied the Appellant opportunity to cross-examine the witnesses on hours that the lecturers were paid to prove whether they were overpaid or not. Counsel also pointed out that the vouchers adduced in evidence were approved by the Appellant's Commanding Officer, Garrison Commander and the Paymaster. Other than the Paymaster, these other two officers did not testify. Counsel further submitted that not all payments were approved by the Appellant. There were occasions when the Appellant was on leave and payment vouchers would be approved by some other officers. In respect of these vouchers, there was an element of overpayment, yet the Appellant was convicted on them, Counsel further submitted. Counsel also faulted the Court Martial for relying heavily on the evidence of PW6, 7, 8 and 10 yet they were accomplices. They were paid more than what they were entitled to and had knowledge. There, evidence according to Counsel required independent corroboration.

Finally, Counsel submitted that once lecturers taught and were paid, the money ceased to be the property of the Armed Forces and accordingly the charge could not hold.

Mr. Makura, Learned State Counsel opposed the Appeal on behalf of the Respondent. On the question of jurisdiction, the Learned State Counsel submitted that the Court Martial had jurisdiction to try the Appellant. Under rule 25 (2) of the Armed Forces Rules of Procedure the Presiding Officer of the Court Martial had authority to replace any member of the Court Martial if such member is unable to perform his duties. Counsel further submitted that the Appellant did not object to the replacement of the Judge Advocate. To Counsel therefore for the Appellant to raise such issue now is clearly an afterthought. With regard to ***CHEROGONY'S CASE (SUPRA***), Counsel submitted that it was not binding on this Court and in any event it arose out of a judicial review application.

With regard to the submission that rule 7 of the Armed Forces Rules of Procedure not having been adhered to in charging the Appellant, Counsel in response submitted that Section 80 and 81 of the Armed Forces Act override rules made under the Act. Counsel further submitted that even if there was contravention of rule 7, the same was not fatal to the prosecution case.

As for the evidence adduced, it was Counsel's position that overwhelming evidence was adduced to support the charge against the Appellant. Although there was failure to produce the timetables showing the lectures and the lecturers, Counsel submitted the said evidence was documentary and that the lecturers themselves testified to such evidence orally. On the argument that the Appellant was convicted on accomplice evidence, Counsel countered that submission by stating that a Court can still convict on

accomplice evidence provided there is ample corroboration and such corroboration was to be found in the evidence of PW3 & PW4.

On sentence, Counsel submitted that the Appellant was convicted and sentenced to one year imprisonment and in addition dismissal from service. The maximum sentence that can be imposed for the offence is 7 years. According to Counsel therefore the 1 year imprisonment imposed on the Appellant was actually lenient. Further under Section 102 (6) of the Act, once an officer is imprisoned he is automatically liable for dismissal from service. Finally Counsel submitted that the sentence was proper and should not be disturbed.

As the first Appellate Court, it is our duty to subject to fresh scrutiny the evidence tendered during the trial so as to determine whether the conviction and sentence should be upheld or upset. In doing so we must bear in mind that unlike the trial Court we did not have the advantage of seeing the witnesses as they testified and consequently able to assess their demeanour. We must therefore give due allowance for that See ***OKENO VS REPUBLIC (1972) E.A. 32.***

The conviction of the Appellant was predicated upon the evidence of PW1, PW3, PW4, PW6, PW7, PW8, PW10 and PW11. PW1 was the chief instructor, PW3 the Paymaster, PW4 was the assistant to the Paymaster. PW6 to PW10 were external lecturers who were sourced and paid on the approval of the Appellant. The evidence of all these witnesses taken in totality establishes the culpability of the Appellant beyond reasonable doubt. All these witnesses gave cogent credible and truthful evidence. Though subjected to intense cross-examination by the Appellant's Counsel, they were not at all shaken.

The Appellant took issue with failure by the prosecution to produce documents that gave the details of the lectures and lecturers to buttress their argument of deliberate inflation of payments due to the lecturers by the Appellant. Although this was desirable we do not think however that failure to avail the documents was fatal to the prosecution case. In any event there was direct evidence from some of the lecturers regarding the overpayments. They gave a detailed account as to how the Appellant would pursue them to recover the overpayment. The Appellant deliberately and fraudulently caused the lectures – PW6, PW7, PW8, and PW10 to be overpaid, and then demand from them the amount in excess of what was legally due to the lecturers. He advanced all sorts of reasons why the amount in excess should be paid to him ranging from greasing the hands of the boss to assistance to a non-existent academic programme.

It is also noteworthy that although the said documents were initially available, they mysteriously disappeared in the course of the investigation. However the auditors had occasion to examine them and it was upon that examination that an audit question arose. If the documents disappeared, the prosecution could not have been expected to tender them in evidence. To our mind, the issue is not so much about the availability of the supporting documents. To us, the issue is whether the Appellant caused the lecturers to be overpaid. The lecturers in their testimony admitted that they were at times overpaid and the Appellant will come calling for the amount in excess. The Appellant himself did not deny having raised the payment vouchers that led to the overpayments. Indeed even PW12, the document examiner testified that in his expert opinion, the Appellant filled out and countersigned payment vouchers (Exhibits 10-14). The Appellant himself admitted having authored the impugned payment vouchers but demurred that he did so pursuant to orders from above. However, the Appellant did demonstrate to the satisfaction of the Court that indeed there were such orders. In any event a person accepting an office of trust concerning the public especially if attended with profit, is answerable to the state for his omissions. Yes, it may have been desirable for the other signatories to the payment vouchers to testify. However their failure was not fatal to the Prosecution case. It is the Appellant who initiated the payment process. Those other signatories merely acted on the information given on the payment vouchers by the Appellant. They could be accused of negligence but was not Criminal negligence.

It is dangerous to convict a person on the evidence of an accomplice. The lecturers were ideally accomplices. However their evidence was corroborated sufficiently by the evidence of PW3, the Paymaster, PW4, Deputy Paymaster, PW2, the auditor and PW12 the document examiner. On the basis of the foregoing, we are satisfied that the Court Martial was right in accepting and acting on the evidence

of the lecturers although they were accomplices.

With regard to the appointment of Judge Advocate it would appear that prior to the ruling in Cherogony's case the law had not been amended. It was therefore the duty of the Chief Justice to appoint the Judge Advocate. Since then the law seems to have been amended and it is not a mandatory requirement that the Chief Justice should appoint the Judge Advocate. This was the position obtaining during the Court Martial proceedings. Indeed we are supported in this conclusion by the convening order for the Court Martial. In the order the section stating "…..***The Judge advocate has been appointed by the Chief Justice…..***" has been erased. That being the case we doubt whether the submission by the Appellant that the Judge Advocate ought to have been appointed by the Chief Justice is sustainable. It would appear that at this stage, a Judge Advocate would be appointed by the convening officer of the Court Martial.

Initially the Judge Advocate was one Mr. Ish P. Yator. However when the Court Martial reconvened after some recess, the said Judge Advocate was replaced by one Ajah Olubayi. The Presiding Officer explained why it had become necessary to replace Mr. Yator by Mr. Olubayi. We do not think that the Presiding Officer can be faulted for taking the action he did. Clearly under rule 25(2), the Presiding Officer has the duty to replace any member of the Court Martial who is unable to perform his duties. It is also clear from the record that the defence did not object to the replacement of the Judge Advocate. In any event we do not think really that the Appellant suffered any prejudice by such replacement. We are convinced that by the Appellant rising the issue now it is clearly an afterthought. The case of Cherogony is therefore of no assistance to the Appellant either. The case arose out of a Judicial Review application and is also a decision of the High Court which is not binding on us. In any event and as already stated by the time the decision was rendered, the situation was not the same as at the time the Appellant's Court Martial was ongoing.

The other ground of Appeal advanced by the Appellant was that the procedure of investigation before arraignment of the Appellant was not exhausted. Under Rule 7 of the Armed Forces Rules of Procedure, the Appellant was supposed to appear first before his Commanding Officer so that the charges are read to him and recorded. The Commanding Officer then either deals with the same summarily or refers to superior authority. Section 80 and 81 of the Armed Forces Act are in the same vein. From the record it is difficult to tell with certainty whether or not the Sections and rule was complied with. However from the convening order of the Court Martial, it is clear that the Court Martial was convened by Major General, L. Leshan, Commander of the Kenya Air Force. Major General Leshan was not the Appellant's Commanding Officer. It can therefore be safely assumed that the Appellant's commanding officers having investigated the charges and realized that it was not a matter he could deal with summarily referred, the case to the superior authority which in this case was the Commander of the Airforce. We also note that the Appellant raised the issue of the Preliminary Investigation when the Court Martial commenced its sittings and having listened to the Appellant and the prosecution, the Presiding Officer overruled the objection. We entirely agree with the ruling. We cannot fault it in any way. In any event we do not think that failure to comply with rule 7 or Section 80 and 81 of the Armed Forces Act if at all was fatal to the prosecution nor did it prejudice the Appellant. The submission by Counsel for the Appellant that failure to comply with aforesaid denied the Appellant the possibility of a lighter sentence is purely speculative.

For all the foregoing reasons we are satisfied that the Appellant was properly convicted. In the result, we dismiss the Appeal.

Dated at Nairobi this 14th day of December, 2006

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LESIIT

JUDGE

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MAKHANDIA

<u>JUDGE</u>

Judgment read, signed and delivered in the presence of:

Appellant - present

Miss Gateru for State

Mr. Kayoko for Appellant

Ann/Eric Court Clerks

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LESIIT

<u>JUDGE</u>

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MAKHANDIA

<u>JUDGE</u>