



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 1 of 2005**

(From Original Conviction and Sentence of the Court Martial Held at Langata Barracks)

LT. COLONEL ROBERT TOM MARTIN KIBISU APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Appellant **ROBERT TOM MARTIN KIBISU** who was Lt. Colonel Number 18449 with the Kenya Army until his conviction on 7th April 2005 by a Court martial sitting at Langata Barracks was aggrieved by the conviction and sentence of one year imprisonment together with dismissal from the Kenya Army as meted against him. He had been charged with the offence as stated below:

“conduct prejudicial to the good order and discipline of the Armed Forces contrary to section 68 of the Armed forces Act”.

The particulars of the offence were:-

“The accused person at School of Signals (SOS) Kahawa Barracks on 11th November 2004 mischievously and without authority caused to be published School of Signals Part II Orders Officers Serial No. 14/2004 dated November 11 2004 in respect of Lt. Col. R.T.M. KIBISU (18449) citing authority of the President and Commander-in-Chief’s Regulations in particular 5166 (2) (a) and his letter of reference CONF/D/72/1 dated 11th November 2004 an act he knew or was expected to know to be an offence.”

The Appellant raised 8 pertinent grounds which reproduce hereunder verbatim:-

- a) That the court-martial erred in fact and in law in failing to uphold the accused’s objection to the charge on the ground that there was an error on the face of the record, the charge not having been investigated and laid before the court-martial in accordance with Rule 7-12 of the (Armed Forces) Rules of Procedure.
- b) The court-martial erred in fact and in law in not finding that the accused was authorized to make, amend or cancel Part II orders as provided by the Armed Forces Standing Orders.
- c) The Court-Martial erred in fact and in law in failing to find that paragraph 5166 of the President and Commander in Chief Regulations expressly forbade the entering of records in Forces Form 120 and 199 while there was a redress pending and further by implication Part II Orders which are the source and origin of the aforesaid forms.
- d) The Court Martial erred in fact and in law in failing to find that Part II Order is invalidated when a redress is pending by operation of paragraph 5166 aforesaid.

- e) **The Court Martial failed to consider that the cancellation of the Part II order was made in the honest belief that paragraph 5166 aforesaid.**
- f) **The finding and sentence by the court martial is in the circumstances unreasonable.**
- g) **The finding and sentence cannot be supported by the evidence adduced.**
- h) **The Court Martial in passing sentence failed to take into consideration the accused's long service, good record and mitigating factors.**

The facts of the case are that following disciplinary proceedings against the Appellant on 26th August, 2004, PW3 Col. **MUMO** Corp of Signals Commandant gave authority by a letter produced as exhibit 6 for the publication of Part II Orders Serial No. 10 of 2004 on 14th September 2004. The Part II Order No. 10 was Exhibit 5. The said Part II Orders reflected 8 charges and the respective awards following the said disciplinary proceedings. However, PW1, **Captain Rogers Akaki**, in-charge of Publishing Part II Orders, noted a mistake in Part II Orders No. 10 of 2004 whereby the Force No. of the appellant was reflected as 19449 instead of 18449. Consequently on 14th September 2004 Part II Orders No. 11 of 2004 was published correcting the error on the Appellant's force No. On the 11th November 2004, two months later, the Appellant drafted another Part II Order and gave it to PW2 Cpl. Benjamin Muchemi to type. The Appellant then called PW1 to sign the Part II Order. This revised Part II order became Part II Order No. 14 of 2004. It was tendered in evidence as Exhibit. In effect this Part II Order No.14 cancelled Part II Order No. 10 of 2004 which is Exhibit 6 in the case. As a consequence of the publication of Part II Order No. 14 of 2004, the penalties awarded against the Appellant following the Court Martial proceedings were not effected. The Appellant also wrote a letter Exhibit 10 dated 11th November, 2004, to Kenya Army Headquarters informing them of the cancellation action taken by himself and giving reasons for the action. The reasons he gave in the letter are same as his defence when he was charged with this offence. It was the prosecutions case that the Appellant had no authority to cancel the Part II Order No. 10 of 2004 and that the cancellation could only be effected either by Kenya Army Corp of signals Commandant. PW3 who had caused its publication or a higher authority Col MUMO promptly cancelled Part II Order No. 14 of 2004 by another No. 15 of 2004 on 22nd November, 2004 and which was marked as exhibit II in the case.

The Appellant in his defence told the court that on 26th August, 2004 he appeared before **Brigadier Sasia** for 8 charges which had been prepared by Col. Ajumbo the Corps. Commander Transport who, according to the Appellant could not raise the charges as it contravened the Rules of Procedure; Rule 91 of the Armed Forces Act. The Appellant further stated that upon conviction and sentence he immediately appealed through Redress dated 13/9/04 and submitted it to Kenya Army Headquarters through the chain of command. The Appellant stated that since he had raised the Redress whose purpose was to correct a wrong done, he believed that it was incorrect to have issued Part II orders No. 10 of 2004 according to his interpretations of The President and Commander in Chief Regulations for the Armed Forces 1997. That, therefore, as Commandant, School of Signals, whose duty it was to ensure compilation, cancellations and corrections of Part II Orders, he directed that Part II Order No. 10 of 2004 that related to him be cancelled through Part II Order No. 11 of 2004. The appellant said that he also wrote to the Commander Kenya arm Corps of Signals informing him of the occurrences at the Unit and the remedial action taken as required of him. The Appellant stated that he believed that the action he took, which was the subject of the charge, was above board as he was correcting a wrong which was his responsibility.

The issues for determination are as follows:

- (1) **Did the High Court orders in the judicial review application staying the proceedings of the court martial take effect.**
- (2) **Were the proceedings of the Court Martial properly convened.**

- (3) **Were the charges against the Appellant defective, null and void.**
- (4) **Who can issue Part II order and who can amend, correct or cancel those orders.**
- (5) **Should the Publication of Part II Order No.11 of 11.11.2004 have awaited the outcome of the Redress.**
- (6) **Was Captain Akaki P.W.1 A credible witness?**
- (7) **Were the summing up directions by the Judge Advocate adequate?**
- (8) **Was the sentence passed against the Appellant harsh and excessive?**

Mrs Baraza learned Counsel who appeared for the Appellant submitted that the **Court Martial was not properly convened** when it commenced its proceedings. Counsel submitted that the Court Martial was served with a Stay of Proceedings Order from the high Court on 16th march 2005. That according to the convening order for the Court martial, it was meant to convene on 16th March 2005. That the Court Martial reconvened on 7th April 2005 despite the stay order and without afresh convening order being issued. In response **Mrs Oduor**, learned State Counsel for the Respondent submitted that on the 7th April 2005 when the Court Martial sat for the proceedings, the Presiding Officer stated that the Court Martial had commenced 21 days before 7th April 2005. Counsel submitted that therefore the proceedings of 7th April 2005 were a continuation of those of 16th March, 2005. Counsel also submitted that the order of the High Court granting stay to the Appellant was dated 15th March 2005 and was to remain in force for 21 days. Learned Counsel for the State submitted that in fact no stay of proceedings order was served on the Court Martial. In any event, learned State Counsel observed the stay could not be effective retrospectively and that the Court Martial had already convened by the time the Order was issued.

The issue of the **Convening Order viz a viz the Stay Order from the High Court** were matters that were raised before the Court Martial and it made. In ruling at page 12, 13 and 32 of the record of proceedings. The Appellant produced before the Court Martial what he purported to be stay orders from the High Court, stopping the Court Martial from proceeding. The alleged order was actually the proceedings of the High Court in which the order of stay of the Court Martial proceedings and leave to lodge judicial review proceedings under Order LIII VI of Criminal Procedure Rule were granted. The High Court order was not extracted nor served on the Respondents.

The Presiding Officer of the Court Martial was **Brigadier M.O. Oyugi** who was also the 2nd Respondent in the Judicial Review application made before the High Court. It was his view on behalf of the members of the Court Martial that the Appellant failed to comply with the High Court Order which granted both Stay of proceedings and leave to file Judicial Review proceedings for two reasons. One, the Appellant did not cause the High Court Order granting stay, to be extracted for service on the Respondents. Two, the Appellant did not file and serve the Notice of Motion application for Judicial Review within the time stipulated by the Court which was 21 days or at all.

We have examined carefully the entire proceedings of the Court Martial and all the arguments raised within those proceedings and rulings; together with the submissions made by both counsel for the Appellant and Respondents before us. We find that the Court Martial was convened on the 16th march 2005 pursuant to a convening order signed by **Lt. Gen Kianga**, Commander, Kenya Army.

We are satisfied that at the time the Court Martial convened, the High Court had already issued the order of stay of the Court Martial dated 15th March 2005. We find that the High Court order was never extracted and served upon the Court Martial or the Respondents named in it. Instead, on 15th March 2005, the proceedings of the High Court were served indirectly on the 1st Respondent. The Appellant's Counsel, who also defended the Appellant at the Court Martial, presented an Application before the High Court on 8th April, 2005 in which she sought unsuccessfully, the extension of time to serve the Order of Stay of Proceedings. That means that the order of 15th march 2005 staying the proceedings of the Court Martial was the only order of Stay the Appellant had which was effective for 21 days from said date. By 7th April 2005, the Stay Order had expired before being served upon the Respondents and therefore it never took effect. We find and hold

that no order stopping the proceedings of the Court Martial was served on the Court Martial at any one time and that therefore the proceedings were not defective or a nullity for non-compliance with any High Court Order.

As for the question whether the **Court Martial was properly convened**. The convening order was worded as follows:-

“CONVENING ORDER FOR A COURT MARTIAL

ORDERS BY LT.GEN J M KIANGA ‘MGH’ ‘CBS’, ‘nde’ (K) egse (USA)

Commander KENYA ARMY

The detail of officers as mentioned below will assemble at AFSHE LANGATA BARRACKS at 0900 hours on 16th March 2005 for the purposes of trying by a court martial the accused persons(s) named in the margin.

LT COL R T M

KIBISU (18449)

Headquarters Kenya Army

PRESIDING OFFICER

BRG. OYUGI (17861) – 4 BDE

MEMBERS

.....
.....
.....

The Chief Justice has appointed the Judge Advocate

The record of the proceedings will be forwarded in an envelope marked confidential toCommander Kenya Army

Signed this 2nd day of Marcy 2005

Signed

LIEUTENANT GENERAL

ARMY COMMANDER”

It is also convened in compliance with Rule 21 and 22 of the Armed Forces Rules of Procedure. **Mrs Baraza** submitted that the Court Martial was convened on 16th March 2005 but that it was served with an order from the High Court ordering stay of the proceedings. That it reconvened again on 7th April 2005. The argument of the Appellant’s Counsel was that the Court Martial could not reconvene again without another convening order.

Mrs Oduor learned Counsel for the State did not agree with **Mrs Baraza’s** submissions. Learned Counsel submitted that the proceedings of 7th April, 2005 were a continuation and that therefore no new convening order needed to issue. It is not disputed that the Court Martial was properly convened on 16th march 2005. Contrary to what the Appellant’s Advocates submitted, the order of the High Court staying the proceedings dated 15.3.2005 was not served upon the Respondents, that is, the Army Commander who convened the Court Martial **Lt. General J.M. Kianga**; and the 2nd Respondent the Presiding officer of the Court Martial **Brigadier Oyugi**. The reasons why the Court Martial did not proceed to hearing on the 16th March 2005 is explained in the record of the proceedings of the court martial at page 17 of the

record where the presiding officer stated as follows in response to certain applications by the Appellant:-

“On the issue of the first application it is not merited since the abstract of evidence says that he was served on 12th November, 2004 and it is clearly shown that the court martial was to commence work on 16 March 2005. It is not true therefore as the accused alleges that the same did not do so because he was with. (sic) The fact is that the court did not seat as from 16 March 2006 due to lack of quorum, therefore, the accused has had ample time to prepare his defence...”

It is clear that the Court Martial did not assemble as ordered in the convening order on the date set of 16th March 2005 for lack of quorum. Only one convening order is required to be made to convene a Court Martial which is an *ad hoc* Court. Nowhere in the Act or the Rules thereunder is the commencement date said to be of essence, which in our understanding means that a court martial should meet on the date set in the convening order or anytime thereafter. It would be superfluous to require that a fresh conveying order should have been issued once the Court Martial failed to assemble on the given commencement date. We find and hold that the Court martial was properly convened as required under Section 85 of the Armed Forces Act and Rules 21 and 22 of the Armed Forces Rules of Procedure.

The second issue we shall deal with concerns the charge. **Was the charge null and void *ab inito*?** Mrs Baraza submitted that the charge against the Appellant was void for two reasons; one, for having been laid by a Colonel instead of an officer senior in rank to the Appellant. Counsel argued that since the appellant was a Lt. Col., then only a Brigadier or a General could lay the charge; two, that the charge was bad for duplicity in that the particulars of the charge cited two misconducts (i) **Mischievously** and (ii) **without lawful authority**. That each misconduct should have been the subject of a separate charge and by joining both in one count, that rendered the charge duplex. Counsel relied on the case of UGANDA –V- AMISI 1970 EA 291 holding (VI) where it states:-

“(Vi) Objection to a charge on the ground of duplicity may be raised on appeal although not taken at the trial.”

We have no quarrel with the Court’s holding in the cited case.

Mrs Oduor, learned State Counsel submitted that the charges were not bad for duplicity. Counsel also submitted that the charge was not wrongly laid since in law the officer who should be senior to the Appellant was not the one laying the charge but the Presiding Officer of the Court Martial hearing the case against him.

The Armed Forces Act **Cap 199** is silent as to who frames charges against a person charged under the said Act. Under **Section 80** of the Act it provides for investigation of charges against an accused person and states thus:

“Section 80. where a person subject to this Act is accused of all offence under Part V, the accusation shall be reported in the form of a charge to the accused’s commanding officer, and the commanding officer shall investigate the charge in the prescribed manner.”

Section **81 (1) (a) and (b)** gives provisions regarding the manner in which the Commanding Officer may deal with the charge, it provides thus:-

“Section 81 (1) After investigating a charge against an officer the commanding officer shall either:-

(a) if the charge is one which he has power to deal with summarily and he considers that the charge should be so dealt with, deal summarily with the charge; or

(b)” in any other case, refer the charge in the prescribed manner to the appropriate superior authority:

Provided that he may dismiss the charge if he is of the opinion that it ought not to be further proceeded with.”

These sections provide that only a Commanding Officer of an accused person may investigate and deal with the charge against an accused in the manner prescribed under the Act. The sections do not set down any provisions indicating the rank or otherwise of the person who can frame the charge against the person accused. The Act does however prescribe who a superior Authority should be in relation to

reference of a charge against an accused by the Commanding Officer under Section 81 of the Act. Section 79 of the Act prescribes the Appropriate superior authority thus:

***“S.79. For the purposes of this Act, the appropriate superior authority is the Commander or such officer, not below the rank of lieutenant or corresponding rank, as may be prescribed:
Provided that an officer of such rank as may be prescribed shall not be the appropriate superior authority for the purposes of a case in which the accused is above such rank as may be prescribed.”***

From the record of the proceedings after **Co. Mumo** signed the charge against the Appellant and after he decided that the charge should not be dealt with summarily he referred it to Brigadier Sasia for further action.

Finally the charge was framed and signed by **Col. Karani**, Camp Commandant. We find and hold that the charge against the appellant was properly laid before the Court Martial and that therefore it was not null and void ab initio on that account.

As for the claim that the charge was duplex, the charge was brought under **Section 68** of the Armed Forces Act which provides

“Section 68” Any person subject to this Act who is guilty of any act, conduct or neglect to the prejudice of good order on conviction by court martial, to imprisonment for a term not exceeding two years or any less punishment provided by the Act.”

The charge against the Appellant was framed thus:

“Conduct prejudicial to the good order and discipline of the Armed Forces contrary to S.68 of the Armed Forces Act. Particulars of the offence: The accused person at School of Signals (SOS) Kahawa Barracks on 11th November, 2004 mischievously and without authority caused to be published School of Signals Part II Orders Officers serial number 14/2004 dated November, 2004 in respect of Lt. Col R.T.M. Kibisu (18449) citing authority of the President and Commander-in –Chief’s Regulations in particular 5166 (2) (a) and his letter of reference CONFD/72/1 dated 11th November, 2004 an act he knew or was expected to know to be an offence.”

Mrs Baraza submitted that the word ‘*mischievously*’ was disjunctive of the word “*without lawful authority*” we do not agree with that submission. They should be read conjunctively and together they form one complete charge. We do not find that each of the two words should have found a charge on its own. It is the publishing of the Part II Orders ‘*without authority*’ that was an offence under **Section 68** of the Act. The term ‘*mischievously*’ was used to describe it. We find no merit in this ground of appeal as wet.

The other issue for determination is who can issue Part II Orders and relevant to that who can amend either by correcting or canceling such orders. It was **Mrs Baraza’s** submissions that since the Appellant’s duties included maintenance of signals and Part II Orders as Officer in charge School of Signals, then the appellant should not have been convicted for canceling Part II Order No. 10 of 2004.

Learned Counsel for the Respondents submitted that since the effect of the Cancellation of Part II Order NO. 10 of 2004, was to cancel penalties imposed against the Appellant by a superior authority, the Appellant had no authority to cancel and by so doing he committed an offence.

This issue does not in our view need much effort to dispose off. We must first describe what a Part II Order is. Under the Armed Forces Standing Orders, Order 16 (b) states:-

“16 The service orders of a unit will comprise.

(a)

(b) Part II Orders – All matters which affect pay, service or documents.

18 Part II Orders (*Servicemen and Officers*), a specimen layout of which is at Annex A and B respectively, are the means by which personal occurrences of members of unit, whether on posted or attached strength, are published and notified to all concerned”

Order 16 and 18 falls under the title “*Instructions for the Preparation of Part II Orders*”

Captain Akaki, PW1, described Part II Orders in his evidence at Pg 34 of the proceedings thus:-

“PW1 ...

Your honour Part II Orders is a publication which the Unit gives orders to its personnel about what they are supposed to do or on occurrences that should be going out and should bePart II Orders is a publication of the Unit occurrences regarding its personnel such as courses qualifications, academic and charges and many other things that are communicated from the School to the Higher HQS.”

On the other hand **Col. MUMO**, PW3 in his evidence at Pg 67 of the proceedings stated that Part II Orders are service orders that are published affecting records of service personnel. **Col. MUMO** stated that the said orders could originate from the Unit where the person affected was attached or could be issued by higher HQ for publication. The Appellant in his defence added another angle to Part II Orders describing them as the mode by which personnel occurrences are entered into service books or service documents, FF120 and FF199.

It is quite clear to us that Part II Orders could either originate from a Unit, like School of Signals where the Appellant was the Commandant; or from Higher HQ for publication. The Part II Order No. 10 of 2004, exhibit 6 in this case, was authorized by **Col. MUMO** under whom the School of Signals Unit felt. **Col. MUMO** was the Appellant’s Commanding Officer at the time the Part II Order was published, and he ordered the publication by virtue of his position. The instruction was reduced into writing by Major Ikua’s letter Exhibit 6. The Act and the rules made there under are silent as to who can cancel Part II Orders. It is however clear that the Officer in charge of Records under Order 19 of the Armed forces Standing Orders can issue such Orders. The Part II Orders could also be issued by the immediate Higher HQ and in respect of the School of signals where the Appellant worked at the time, it was Kenya Army Corps of Signals under the Command of **Col. MUMO**. The Administrative Officer and Adjutant could also publish Part II Orders with appropriate authority as per the applicable Rules and Regulations of the Armed Forces.

The issue is who could cancel Part II Order already issued. We are clear in our minds that correction of a Part II Order does include an amendment but does not include cancellation and that the latter is a completely different action and the consequences both different and drastic. We also note from the evidence before the court that once Capt Akaki published Part II Orders No. 10 of 2004 dated 14th September 2004 he noted the error on it and amended it with Part II Order No. 11 of 2004 dated 15th September, 2004. The nature of the amendment was explained by Captain Akaki as correcting the Force No. of the Appellant from 19449 to the correct one of 18449. We note that **Col. MUMO** in his evidence said that he called Captain **Akaki** to ask him to amend Part II Order No. 10 of 2004 a fact which Capt Akaki never testified to. We think that the variation in the evidence of these two witnesses was not material and that it did not prejudice the Appellant’s case.

The Appellant argued that he had the authority to cancel Part II Orders in question by virtue of being Commandant of the School of signals and by virtue of his duties and responsibilities at the Unit. The Appellant admitted in his defence that there was no Statute, Order, Rule or regulation under the Armed forces which authorized him to cancel the said order. That is the correct position as the law is silent on who can make cancellation of a Part II Orders.

We appreciate the Appellant's duties and responsibilities of Maintaining Part II Orders within his Unit and of ensuring their correctness and smooth operation. We however consider that when the Appellant ordered the cancellation of Part II Order No. 11 of 2004, which affected him he was not correcting any error or making any necessary amendment to it or ensuring the smooth running of the Part II Orders under his Unit. What the Appellant did was three fold.

The Appellant sat on appeal in his own case. In his defence he stated that his understanding of The President and Commander in Chief Regulations for the Armed Forces and the Armed Forces standing Orders was that once he had put in an appeal or in other words a redress, until it was finalized the case was stayed. In other words the Appellant understood the Redress to be an automatic stay of any penalties invoked against him in the case whose appeal was pending. We note from the evidence adduced before the Court Martial that there was doubt whether there was any redress pending. We do not think that whether a redress was pending or not was material. The truth of the matter is that the authority which caused the publication of the Part II Order in question was the Appellant's Commanding Officer and the Appellant could not by honest belief or by any other stretch of imagination whether due to misinterpretations or misconception of the legal provisions have had authority to order their cancellation. In effect the Appellant was the judge in his own cause.

Secondly the Appellant was an Army Officer who knew that he could not contradict orders or instructions given by an officer senior in rank to him. In this case, he not only contradicted an officer senior to him but in addition one that was his Commanding Officer. That was gross in subordination.

Under Section 2 of the Armed Forces Act "Commanding Officer" is defined as:

"in relation to a member of the armed forces, means the prescribed officer having powers of command over that person."

We think the definition speaks for itself. Col. MUMO had command over the Appellant and the Appellant had the duty and responsibility to submit to that command. By canceling the Part II No. 11 of 2004, the Appellant directly challenged Col. MUMO's command over him an act which was prejudicial to the good order and service discipline of the Armed Forces. Thirdly the Appellant had no authority to cancel Part II Order No. 11 of 2004, in addition to what we have said above, for the added factor that the Order related to him and the cancellation had the effect of averting the implementation of penalties invoked against him for charges for which he had been found guilty. It was a blatant disregard of command and discipline of the Army to which he was bound to cancel them. Not only was the action criminal in nature, it was an abuse of office and a contravention of a due process.

We find and hold that the Appellant had no legal right or authority whether acquired personal or by virtue of his position at the School of Signals to cancel Part II Orders No. 11 of 2004 and in consequence thereto avert the implementation of punishments awarded against him.

The other issue is whether under Regulation 5166, the publication of Part II Orders should have awaited the outcome of the Redress. Mrs Baraza, learned counsel for the Appellant submitted that the Armed Forces Act was silent as to what should happen once redress is pending. Counsel argued that forms FF120 and FF199 were not issued because the redress was pending.

Mrs Oduor, learned State Counsel submitted that there was no evidence that any redress was pending. Further that there was no evidence that the case could be dealt with in any other way.

The President and Commander in Chief's Regulations for the Armed Forces Regulation 5166 (2) (a) states

"5166 (2)

(a) "A general conduct sheet, FF 120, is to be kept, as a confidential

document in his unit, for any other officer serving therein who, in respect of any offence:

(1) Has been found guilty by a court other than a court martial where such finding has been reported to the Defence Council

(2) Has, under the AFA been convicted by court-martial or found guilty by an appropriate superior authority.

(a) No entry is however, to be made in general conduct sheet under sub para-a above, until any appeal has been decided. Findings quashed on appeal are not to be entered.”

We have already dealt at length with the authority to publish Part II Orders and the effect of the Appellant to cancel Part II Order No. 10 of 2004. The simple answer to this issue is that once the Appellant’s Commanding Officer issued instructions for the publication of Part II Orders whether or not the instruction were erroneous or was subject to other processes before it could be published, that did not donate any authority to implied, express, acquired or otherwise, to cancel the publication on his own volition as he did. We also find that the fact the Appellant wrote exhibit 10, a letter to his Commanding Officer **Col. MUMO**, PW3 informing him of the cancellation and the “perceived” reasons for same would not accord the Appellant a defence to this act of cancellation. Neither were the so called misconceptions, misinterpretations and honest belief a justification for the *action* to cancel the said Part II Orders.

The other issue raised concerned the credibility of PW1 Capt Akaki. The Appellant contented that Capt Akaki’s credibility was questionable because of denying his own signature in the document dated 11/11/2004 in which reference was made of cancellation of Part II Order No. 14 of 2004 affecting the Appellant. In **NDUNGU KIMANYI V. REPUBLIC - citation incomplete!**

“.....The witness upon which whose evidence is proposed to rely upon should not create an impression in the mind of the Court that he is not a straight forward person or do something which indicates that he is a person of doubtful integrity which makes it unsafe to accept his evidence.....”

The document in question was put to **Capt Akaki** during cross-examination by the Appellant’s advocate. **Capt Akaki** was clear in his evidence that he could not confirm that the signature on it was his because the document was a photocopy. Eventually **Capt Akaki** admitted signing it when a copy of the original was shown to him by the defence. We do not find anything in the record of the proceedings that would justify a finding that this witness, **Capt Akaki** was unreliable or of questionable credibility.

The Appellant’s Advocate challenged **the summing up by the Judge Advocate** on grounds that he failed to address the Armed forces Standing Order, President and Commander in Chief Regulations, defectiveness of the charge the Appellant’s *mens rea* and his defence of honest belief, issue of Redress pending and manner in which the Appellant’s action compromised the good order and discipline of the Armed Forces.

Mrs Oduor on the other hand submitted that the summing up was exhaustive and adequate.

What is summing up? Rule 78 (4) gives the duties of the judge Advocate in summing up. It provides as follows:-

“78 (4) After the closing addresses the judge advocate shall sum up the evidence and advise the court upon the law relating to the case before the court close to deliberate on their finding; and if in the course of deliberating on their finding the court require further advice from the judge advocate, they shall suspend their deliberation and ask and be given such advice in open court”

Issue is whether the Judge Advocate discharged her duty in the summing up as required.

We have perused the Summing up in the record of the proceedings. We note that the Judge Advocate ably summarized the evidence that was adduced before the Court martial. We have also noted that in the summing up the Judge Advocate gave directions as to the law applicable relating to the case. We find that the summing up given was quite adequate and that it met the requirements of the law.

Mrs Baraza challenged the **sentence meted out to the Appellant by the Court Martial** stating that it was excessive and harsh and that **Section 68 and Section 102** of the Armed Forces Act provided for lenient sentences which ought to have been considered.

Mrs Oduor submitted that there was nothing wrong with the sentence meted out as the same was proper and within the law.

Section 68 of Act provides a penalty for the offence committed under that section as imprisonment for a term not exceeding two years or any less punishment provided by this Act.

Section 102 (6) of the Act provides that where an officer is sentenced by a Court Martial to imprisonment he shall also be sentenced to dismissal from the Armed Forces. We agree with **Mrs Oduor** that the sentence meted out by the Court Martial was within the law. However we have considered that the Appellant was a very senior officer in the Army being a Lt. Col. Loss of a job after 22 years of service and at an age of 44 years is quite a severe punishment as it has with it the effect of finality. It ended his long career. We have also considered the fact that the Appellant was guilty of gross misconduct and insubordination. The dismissal from the Armed Forces may have been tenable due to the circumstances of the case. We have also considered the fact that after the conviction and sentence on 16th April 2005, the Appellant remained in prison until his release on bond on 8th June 2005 a period of almost 2 months. We do find that the sentence of imprisonment for 12 months together with dismissal was harsh in all the circumstances of the case. We shall vary the sentence by setting aside the order of 12 months imprisonment and in substitution thereof order imprisonment for the period already served. The order of dismissal shall not be disturbed.

Dated signed and delivered this 7th day of December 2006.

J.ESIIT

M. MAKHANDIA

READ IN OPEN COURT

In the presence of

Appellant present

Mrs. Baraza absent

Mr. Midikira holding brief for Mrs Baraza

Mrs. Oduor present state

Ann – Court Clerk

J. LESIIT

M. MAKHANDIA