

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

Court Martial 2 of 2000

ELIUD WANYONYI NAISERE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Eliud Wanyonyi Naisere was charged with six counts under the provisions of the Armed Forces Act. He was charged with neglecting to perform a duty Contrary to Section 19 of the Armed Forces Act. The particulars of the offence were that on the 30th of August 1997 at 2100 Hours the Appellant failed to investigate a fight between Julius Ongoro a Mess Waiter and Senior Sergeant Ngoge after the said incident was reported to him. The 2nd Count that the Appellant was charged with was refusing to assist a person exercising authority under or on behalf of a Provost Officer Contrary to Section 29 (b) of the Armed Forces Act. The particulars of the offence was that on the material day and at the said time the Appellant refused to assist Warrant Officer II Alfayo Arisa to arrest the said Julius Ongoro. In the 3rd Count the Appellant was charged with disobeying a lawful command with wilful defiance of authority Contrary to Section 28 (1) of the Armed Forces Act. The particulars of this Count was that the Appellant disobeyed an order by Major Sagwa to call Julius Ongoro to record a statement with the Military Police. The Appellant was charged with a further count of using insubordinate language to his Superior Officer Contrary to Section 27 (b) of the Armed Forces Act. The particulars of the offence were that on the material day and at the said time the Appellant rudely answered back Major Sagwa when he was given a lawful order which he failed to obey. The 5 Count that the Appellant was charged with was using words likely to cause a disturbance Contrary to Section 37 (b) of the Armed Forces Act. The particulars of the offence were that on the material day and at the said time, the Appellant incited members of the mess to prevent the Military Police from arresting the Mess Waiter. The 6 and the last Count that the Appellant was charged with was being of a conduct that was prejudicial to the good order and service discipline Contrary to Section 68 of the Armed Forces Act. The particulars of the charge were that on the material day and at the said time, the Appellant failed to accord Major Sagwa his due respect by walking away before he was dismissed. The Appellant pleaded not guilty to all these charges where he appeared before a duly convened Court Martial sitting at Langata Barracks. After due trial the Appellant was found guilty on the 1st, 2nd, 3rd, 4th and the 5th Counts. The Appellant was acquitted on the 6 Count. The Appellant was sentenced to serve six months imprisonment on each Count. The sentences were ordered to run concurrently. The Appellant was also ordered demoted to the rank of a private and as a result of the conviction and imprisonment lost his benefits. The Appellant was aggrieved by the said conviction and sentence and has appealed to this Court.

In his Petition of Appeal, the Appellant has faulted the decision of the Court Martial on basically four grounds. The first ground that the Appellant has raised on his Appeal is that the Court Martial did not have jurisdiction to hear and determine the charge before it, as the Appellant ought to have been tried summarily by his Commanding Officer. The second ground is that the Appellant was convicted by the Court Martial for the offences which he was charged on the Prosecution's evidence that was riddled with glaring discrepancies, contradictions, inconsistencies and in total disregard of the evidence adduced by the Defence. The other ground that the Appellant relied on is that he was found guilty of insubordination and failing to obey a lawful command when such order had not been issued in the first place. The Appellant further faulted the Court Martial for failing to consider the fact that the Officers involved and

who raised the Complaint were drunk and thus had their Judgment impaired to the extent that they could not have given credible account of what took place on the material day. The Appellant finally faulted the Court Martial for convicting him to too harsh a sentence considering the circumstances of the case.

The facts of this case briefly stated are that on the 30th of August 1997 Senior Sergeant Evans Ngoge in company of Sergeant Nyamiobo was having a drink at the Sergeants Mess at Kahawa Garrison. Senior Sergeant Ngoge had taken several beers from about 2.00 p.m. to 9.00 p.m. At the said Mess there was also a Sergeant Muriuki. At about 9.00 p.m. the said Senior Sergeant Ngoge had an argument with the Civilian Waiter at the bar. His name was Julius Ongoro Midega. The argument arose from a misunderstanding that was as a result of the said Mess Waiter refusing to serve the said Senior Sergeant Ngoge with a beer. The Mess Waiter refusal to serve the said Senior Sergeant Ngoge with a beer was because he had not been paid money for the said beer. In the course of the argument, the said Senior Sergeant Ngoge said he was slapped by the Mess Waiter. Senior Sergeant Ngoge appears to have wanted to fight back but was prevented by his fellow officers who were at the Mess at the time. It was decided that the matter be reported to the Chairman of the Mess Committee (hereinafter referred to as CMC). The CMC at the time was the Appellant. From the evidence adduced, it appears that the said Senior Sergeant Ngoge wanted action to be taken immediately, whilst the Appellant who was the CMC appeared to have taken the report made to him on his stride. From the point of view of Senior Sergeant Ngoge, the CMC was doing nothing to address his Complaint. He took a decision to report to a higher authority.

He did not get the duty officer. He then decided to report to the field officer who happened to be Major Sagwa. Major Sagwa who was in his house told Senior Sergeant Ngoge to go to the Military Police and have the Mess Waiter fetched and record a statement with the Military Police. When the Military Police went to arrest the Mess Waiter, it appears that the members of the said mess were not happy. Insults were hurled at the Military Police. The Military Police were however not prevented from arresting the Mess Waiter. On his part, the Mess Waiter Julius Ongoro testified that he was on duty at the said mess on the material day. He reported to work at 11.00 a.m. and worked upto 2.00 p.m. then closed the mess as required by regulations. He testified that the Complainant, Sergeant Ngoge was at the mess from around 1 p.m. to 9.30 p.m. when the incident took place. According to Julius Ongoro, he was given Kshs. 40 by Sergeant Muriuki who instructed him to get him a Tusker Beer. Julius Ongoro thought that the beer he was ordered by Sergeant Muriuki was to be delivered to Sergeant Muriuki. It was then that Sergeant Ngoge came and demanded to be given a beer. Julius Ongoro refused to give him a beer because, according to him, Sergeant Ngoge had not paid for the same. Later when he sought clarification from Sergeant Muriuki, he was informed that the beer which Sergeant Muriuki had paid for was for Sergeant Ngoge. When Julius Ongoro sought to deliver the said beer to Sergeant Ngoge, he realised that Sergeant Ngoge had gone to the toilet. When Sergeant Ngoge came from the toilet, he confronted the Mess Waiter. It was the evidence of the Mess Waiter that Sergeant Ngoge pushed him to a corner and told him that he was going to beat him up and then sleep with him or fuck him. The Mess Waiter did not want to engage in any argument with the said Sergeant Ngoge. He told him not to play with him and attempted to disengage himself from the grip of the said Sergeant Ngoge. It was further the evidence of Julius Ongoro, that Sergeant Ngoge did not hear his plea and instead punched him on the left side of the chest. The Mess Waiter reacted. He threw a punch at the said Sergeant Ngoge. They fought and were separated by the members of the mess. It is at this point that Sergeant Ngoge reported the matter to the Appellant who was the CMC. The Appellant told Sergeant Ngoge that he would deal with the matter. Sergeant Ngoge was not satisfied.

He reported the matter to the Field Officer after failing to get the duty officer. The Military Police were involved. The Mess Waiter was arrested and his statement taken. When the arrest of the Mess Waiter was being effected by the Military Police, it was adduced in evidence that the members of the mess were not happy. One Sergeant Wakiaga particularly seem to have been incensed. After the said incident the matter was reported to the Commander of the Garrison who constituted a board of inquiry which investigated the matter leading to the Court Martial of the Appellant.

This being a first Appeal, this Court has a duty to reconsider the evidence which was adduced before the trial Court Martial, evaluate the evidence and draw its own conclusions giving due allowance for the fact that it has neither seen nor heard the witnesses - See Okeno -versus- Republic 119721 E.A. 32. Ngui -

versus- Republic 119841 KLR 729 and Njoroge -versus- Republic [19871 KLR 19. This Court on Appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on misapprehension of the evidence, or the trial Court is shown to have acted on wrong principles in reaching the decision See Chemagong -versus- Republic [19841 KLR 611 and Kiarie -versus- Republic [19841 KLR 739. In the instant Appeal, the Appellant has raised several grounds faulting the decision of the Court Martial. We shall proceed to address each ground of Appeal raised by the Appellant. In his Submissions before Court the Appellant argued that the Court Martial did not have jurisdiction to try the Appellant. It was his Submission that the Appellant ought to have been tried under Part 5 of the Armed Forces Summary Jurisdiction regulations (chapter 199 of the Laws of Kenya). It was his Submissions that the offences that he is alleged to have committed should have been dealt with summarily by the Commanding Officer. The Appellant submitted therefore that the Court Martial was improperly and irregularly convened. We have re-evaluated the evidence, and find that while it is true that the Appellant could have been charged under the Armed Forces Summary Jurisdiction regulations, the dimensions that the incident took meant that when the order to convene the Court Martial was made, it was properly made in the circumstances of this case. The fact that a member of the Armed Forces can be disciplined under the Armed Forces Summary Jurisdictions regulations does not by implication mean that he cannot be tried by a Court Martial which was lawfully convened. It is therefore our finding that the Court Martial had jurisdiction to deal with the charges brought against the Appellant in this. We have re-evaluated the facts of this case. An incident involving Sergeant Ngoge and the Civilian Mess Waiter, Julius Ongoro escalated to the extent that the Appellant got sucked in. The Appellant was the Chairman of the Mess Committee; CMC in short. This position is elective. There are rules governing conduct at the Mess. In the instant case, the Appellant was the Chairman of the Mess Committee of the Warrant Offices/Sergeants Mess. In case of breach of the rules, a Mess disciplinary Committee is convened. The convenor is the CMC. According to the evidence of Sergeant Ngoge, when he reported the fact that he was assaulted by the Mess Waiter the Appellant appeared to have done nothing. The incident between the said Sergeant Ngoge and the Mess Waiter took place at about 9.30 p.m. In the military jargon the incident took place at the silent hours.

Sergeant Ngoge testified that when he reported the incident to the Appellant as the CMC he told him that he was going to take action, but from the perception of Sergeant Ngoge he appeared not to take the report seriously. The Appellant admits that the report was made to him but explained that as it was late in the night, he could not convene a Mess Disciplinary Committee Meeting to deal with the situation. It is our considered view that the explanation given by the Appellant was plausible. Sergeant Ngoge in his evidence even conceded to this fact. Unfortunately in the circumstances prevailing at the time and the said Sergeant Ngoge having become inebriated (having taken at least six bottles of Tusker beer) came to the conclusion that he could only be assisted if he went higher with his Complaint. He sought to report to the duty officer. He could not find him. He went even higher. He reported the matter to the Field Officer. The Field Officer on duty was Major Sagwa. When the matter was reported to him he ordered the Military Police to arrest the Civilian Mess Waiter, Julius Ongoro. From the evidence it is clear that the non-commissioner officers who were at the Mess were not happy. They hurled insults on the Military Police and were generally rowdy. They were abusing the Military Police for arresting the Mess Waiter who was serving them at the time. No evidence was however adduced to show that it is the Appellant who incited the Non-commissioned Officers at the Mess. It is apparent that some of the officers who were shouting and hurling insults at the Military Police were drunk. They however did not obstruct the Military Police when they arrested the Mess Waiter. The Field Officer did not take kindly to the happenings at the Mess. He made a report to the Commander who immediately instituted a board of inquiry who made a report that led to the being charged with the six offences under the Armed Forces Act. As we have stated earlier in this Judgment the incident that took place at the Warrant Officers/Sergeants Mess involving Sergeant Ngoge and the Mess Waiter, sucked in the Appellant. The events took a turn for the worse when the Field Officer informed the Commander who instituted a Board of Inquiry which recommended that the Appellant be charged at the Court Martial. From the evidence which was adduced it is clearly evident that the offences committed by the Appellant were minor infractions which could have been dealt with by his Commanding Officer. What appears to have tilted the case and made the tide to turn against the Appellant is the insults that were hurled at the Military Police when they went to arrest the Mess Waiter. Coming to the charges that the Appellant was charged with we have re-evaluated the evidence that was adduced before the Court Martial and find that the first Count of neglecting to perform a duty Contrary to Section

19 of the Armed Forces Act was not proved. The Appellant as the CMC did not have an opportunity to investigate the incident involving Sergeant Ngoge and the Mess Waiter. The matter was taken from his hands before he could act. He could not have been expected to convene the Mess Disciplinary Committee at the odd hour that the said incident took place. We find that Sergeant Ngoge appears to have had a grudge with the Appellant and sought to put the Appellant in trouble by reporting to the Field Officer when the matter could have been dealt with by the Appellant. Sergeant Ngoge only took a few minutes to surmise that the Appellant had refused to assist him. We would allow the Appellants Appeal on that Count. We find that the 2nd Count of refusing to assist a person exercising authority under or on behalf of a Provost Officer Contrary to Section 29(b) of the Armed Forces Act was proved. The Appellant was informed by Warrant Officer II Arisa that he had been ordered by Major Sagwa to arrest the Mess Waiter. The Appellant did nothing in his capacity as the CMC. In fact the attitude of the Appellant was lackadaisical. He was not enthusiastic when the said Mess Waiter was arrested. We will not interfere with the finding of the Court Martial. The 3rd and the 4th Counts were proved. The Appellant disobeyed the order of Major Sagwa to call the Mess Waiter and indeed it is apparent that his support of the Mess Waiter made his conduct to be intransigent. The 5th Count was not proved. No witness testified that the Appellant incited his fellow non commissioned officers to prevent the arrest of the Mess Waiter. We would allow his Appeal on that Count.

In the upshot, we would allow the Appellants appeal on count one and five of the charges. We would dismiss the Appellants appeal on the 2nd, 3rd and 4th Counts. On the sentences imposed, we have considered the mitigation of the Appellant. Prior to the incident the Appellant had worked with the Armed Forces for a period of thirty four years. He was due to retire from the Armed Forces at the time he was Court Martialled. We have considered the charges that he was facing and are of the view that the most appropriate sentence that would have been imposed on the Appellant is dismissal from the Armed Forces as provided for under Section 103(1)(c) of the Armed Forces. We have therefore exercised our power as provided under Section 118(3) of the Armed Forces Act. In the circumstance therefore we substitute sentence of the Court Martial and we order that the Appellant is ordered dismissed from the Armed Forces. He shall however get his full benefits at the rank which he was dismissed from the Armed Forces. It is so ordered.

DATED at NAIROBI this 28th day of May 2004.

M.A.MAKHANDIA

AG. JUDGE

L.KIMARU

AG. JUDGE