Poghisyo v Republic (Court Martial Appeal E001 of 2022)
[2023] KEHC 22550 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22550 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COURT MARTIAL APPEAL E001 OF 2022

DR KAVEDZA, J

SEPTEMBER 22, 2023

BETWEEN

LIEUTENANT COLONEL THOMAS KIPTUM POGHISYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The background of the application subject of this ruling is that the appellant, Liutenant Colonel Thomas Kiptum, was charged in Court Martial Case No. 4 of 2021 at the Kahawa Garrison with five counts. In counts 1, 2 and 3 he was charged with neglect to the prejudice of good order and service discipline contrary to section 121 of the *Kenya Defence Forces Act* (the 'Act'). In count 4, he was charged with disobedience to standing orders contrary to section 77(1) of the *Kenya Defence Forces Act*. Lastly, in count 5, he was charged with committing a civil offence contrary to section 133 (1)(b) of the *Kenya Defence Forces Act*, that is to say, obtaining by false pretence contrary to section 313 of the *Penal Code*.

2. The appellant pleaded not guilty to the charges and the prosecution closed its case after calling eight (8) witnesses. Subsequently, on February 11, 2022, the court held that the prosecution had established a prima facie case to warrant the appellant being placed on his defence in all the counts he had been charged with including the alternative charges.

3. Aggrieved by the said decision, the appellant filed an appeal to this court on grounds that the evidence before the court martial does not warrant him to be put on his defence as no evidence supports the case; that the members of the court martial committee erred in reaching a decision against the appellant without involving the Judge Advocate contrary to regulations 85 to 88 of the *KDF Rules*; and that the trial court failed to adhere to the requirements of writing a ruling and thus arrived at a wrong decision.

4. Simultaneously, the appellant filed a chamber summons application dated 8/11/2022 seeking for orders to stay the proceedings in the court martial case No. 4 of 2021 at Kahawa Garrison pending

hearing and determination of the appeal. The court however dismissed the application and held that the applicant had not met the threshold for grant of the orders of stay as prayed.

5. Aggrieved by the said ruling, the appellant filed a further notice of motion application dated 16/2/2023 seeking similar orders of stay of the proceedings in the court martial pending determination of the appeal. The grounds of the applications are similar save that the appellant is extremely apprehensive that should the defence hearing proceed, the appeal will be rendered nugatory. The supporting affidavit of the applicant of even date emphasized these grounds.

6. In addition, the appellant in his petition of appeal dated 8/11/2022 seeks orders that the ruling delivered by members of the court martial committee on 11/2/2022 be set aside and/or suspended. Further, that the trial court do review the evidence and deliver a ruling in accordance with the requirements on writing of rulings and judgments, providing the reasoning on every issue.

7. The application is opposed by the respondent through grounds of opposition dated 31/5/2023. The respondent challenged the application on grounds that the applicant has not met the threshold for the grant of stay orders of the court martial proceedings. Further, that the appellant has not shown that the appeal is arguable, or, that it will be rendered nugatory if the orders sought are not granted. The respondent further alleged that the applicant has not demonstrated that his fundamental rights have been violated and thus the application is premature. Mr. Otieno in his submissions reiterated the contents of the replying affidavit.

8. On the other hand, Ms. Ntabo for the state, relied on the grounds of opposition and maintained that the appellant has not met the threshold for the grant of stay of proceedings in the court martial. She relied on the case of *Raymond Kipchirchir Cheruiyot & another v Republic* (2021) eKLR to support her position. As regards to the appeal, it was submitted that the appellant has no right of appeal on a ruling of a case to answer as per section 347(1) of the *Criminal Procedure Code* and therefore this court has no jurisdiction to determine the matter. Lastly, as to the legality of the decision of the court martial, it was submitted that the court was properly constituted and the ruling properly rendered in view of section 176(1) of the *Kenya Defence Forces Act*.

Issues for determination

9. I have considered the application of the applicant, the affidavit in support of it, the annexures and the petition of appeal. I have also considered the submissions of the parties and find that the main issue for determination is whether the appellant is entitled to the orders sought.

Analysis and determination

10. Firstly, as stated above, the appellant previously filed an application dated 8/11/2022 seeking orders of stay of the proceedings in Court Martial Case No. 4 of 2021 pending determination of the appeal filed herein. The application was however dismissed on grounds that the appellant had not met the threshold for the grant of orders of stay. Subsequently, the appellant filed a further application dated 16/2/2023 seeking similar orders of stay pending determination of the appeal.

11. The record however reveals that the court (Hon. D Ogembo, J) granted ex-parte orders on 21/2/2023 dismissing the said application dated 16/2/2023 on grounds that the applicant had sought similar prayers in the application dated 8/11/2022. The court in dismissing the application noted that the applicant did not show any new evidence or change of circumstances that would warrant the grant of the orders of stay of the proceedings in Court Martial Case No. 4 of 2021. Clearly, this court is functus officio.

12. I now turn to the question whether there is a right of appeal at the close of the prosecution's case. In *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR Criminal Appeal No. 116 of 2007 (*Cholmondeley case*) this court gave a detailed explanation why it allowed an interlocutory appeal as follows:

> "In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the *Criminal Procedure Code* allows only appeals by persons who have been convicted of some offence. The appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; Muga Apondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal. But the basis of this appeal, as far as we are concerned is that the learned Judge made an order in the course of the trial which violated the appellant's fundamental rights guaranteed by section 77 of the Constitution." (emphasis mine)

13. As was stated in the case above, a determination that there is a case to answer does not and cannot mean that the Judge/ Magistrate will inevitably convict the accused person. It is simply an opportunity for the accused to give his side of the story and poke holes in the prosecution's case. Under section 347(1) (a) of the *Criminal Procedure Code*, a right of appeal from a subordinate court to the High Court only arises where an accused person has been convicted. It therefore follows that the appellant has no right of appeal against the interlocutory ruling made by the trial court. Having so stated, I need not delve into the merits of the appeal.

14. For the foregoing reasons, I find that the applicant's application dated February 16, 2023 has no merit and it is hereby dismissed.

It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER 2023.

.....

D. KAVEDZA

JUDGE

In the presence of: