



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
COURT MARTIAL APPEAL NO. 1 OF 2019

BETWEEN

ROBERT NYAMBARIGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of the Court Martial at Embakasi Garrison in Court Martial Case No. 2 of 2018 delivered by Hon. Angelo Kithinji Kwito on 9th February 2019).

JUDGMENT

1. The Appellant, **Robert Nyambariga**, then a member of the Kenya Defence Forces, was charged with various offences before the court martial. In Count 1, he was charged with committing a civil offence contrary to **Section 133(1)** of the **Kenya Defence Forces Act 2012**, that is to say causing grievous bodily harm contrary to **Section 234** of the **Penal Code**. The particulars thereof were that on 3rd February 2018 at about 1800 hours while deployed to AMISOM VII duties at Burgaavo Defensive Position in Somalia, with intent to cause grievous bodily harm, caused grievous bodily harm to Service Member **No. 73344 Bombardier Andrew Musungu** by shooting him on his right hand palm using his G3 rifle Butt No. 349 Reg No. 6593017, an act he knew or ought to have known constitutes an offence.
2. In the alternative to count 1, he was charged with conduct to the prejudice of good order and discipline contrary to **Section 121** of the **Kenya Defence Forces Act, 2012**. The particulars thereof were that on 3rd February 2018 at about 1800 hours while deployed to AMISOM VII duties at Buurgaavo Defensive Position in Somalia, assaulted Service Member **No. 73344 Bombardier Andrew Musungu** using his G3 rifle Butt No. 349 Reg No. 6593017 inflicting injuries on his right hand palm, an act he knew or ought to have known constitutes an offence.
3. In Count II, he was charged with disobedience to particular orders contrary to **Section 78(1)** of the **Kenya Defence Forces Act, 2012**. The particulars thereof were that: On 3rd February 2018 at about 1800 hours while deployed at Buurgaavo Defensive Position in Somalia for AMISOM VII duties, willfully defied orders issued to him by troop sergeant Service Member **No. 56756 Senior Sergeant David Kibe Wambugu** by refusing to relocate to the trench allocated to Section II, an act he knew or ought to have known constitutes an offence.
4. He denied all the three charges. Upon trial, he was found guilty of count 1. He was sentenced to serve four (4) years imprisonment less the one year which he had already spent in custody. In addition, the Court Martial ordered that he be dismissed from service without any benefits. Aggrieved by both his conviction and sentence, he preferred an Appeal to this Court.

Grounds of Appeal

5. The Appellant raised eleven grounds of appeal in his Petition of Appeal filed on 19th March, 2019. He was aggrieved with the following: that the Court Martial (hereafter the Court) failed to appreciate the legal objections raised by him; that the Court failed to appreciate that he did not corroborate the prosecution witnesses; that the Court did not appreciate the fact that he was undergoing psychological torture due to being in a war zone without receiving any counselling or debrief; that the prosecution did not adduce any evidence to prove that the necessary *mens rea* was formed on his part; that the trial judge advocate only considered the summation of the members of the Court and ignored his defence as well as the evidence tendered by some of the prosecution witness thus violating his right to a fair trial; that the Court handed him a harsh and manifestly excessive sentence given the circumstances and the mitigating factors; that the Court relied on extraneous circumstances when imposing the sentence on him; that the Court failed to appreciate that he was a first time offender; that the Court failed to give reasons for its decision; that the Court failed to take into account his conduct during trial and at the time when he was arrested; that the Court failed to consider his deteriorating health.

Summary of Evidence

6. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the Court Martial so as to arrive at its own independent verdict whether or not to uphold the decision of the Court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses as they testified and cannot therefore comment on the demeanour of the witnesses. (See **Okeno v Republic (1972) EA 32**).

7. The prosecution's case can be summarized as follows: On Saturday 3rd February, 2018 after the 11th Battery had pulled out from AMISOM duties in Buurgavo Somalia, the Troop Sergeant Major **PW4, 56756 SSgt David Kibe Wambugu** informed the Section Commanders that there was an order requiring the remaining soldiers to relocate to their respective allocated trenches. **PW6, 58734 Sgt Ahmed Abdi** who was the Section Commander in charge of Section 1 instructed **PW1, 73344 BDR Andrew Nanguwani Musungu** who was the Second in Command in his section to inform the Appellant and **PW2 85552 Gunner Gerald Okoth** to relocate to Section 2 where they had been reallocated. PW1 informed the said soldiers about the order as instructed but the Appellant, being a member of the Seventh Day Adventists church, told him that he would first go to church then relocate thereafter.

8. At about noon after the church service, **PW7, 77673 Sgt Bob Ochieng** who was in charge of the SDA church was going to the Mess for lunch when the Appellant approached him and told him that there was an issue that he wanted to share with him. The Appellant told him that he had acquired a bed from a member of the 11th Battery which bed was in trench 1 whereas he was expected to relocate to section II. PW7 told him that an order had been issued to all members and all the soldiers affected were expected to relocate with immediate effect. They parted ways thereafter.

9. The Appellant disappeared and returned to the camp in the evening at about 5.00 pm. PW6 called him and enquired to know why he had not relocated as ordered. While they were still talking, PW1 joined them then started arguing with the Appellant about the bed that had allegedly been given to the Appellant by a member of the 11th Battery. PW1 wanted the Appellant to relocate to Section II and leave the bed behind but the Appellant insisted on moving with the bed. The Appellant got angry and wanted to start a fist fight with PW1. Since it was already time for Stand 2/ Timam, PW6 advised that the Appellant sleeps in trench 1 that night then the issue would be resolved the following morning.

10. As such, PW1 and the Appellant went back to trench 1. While in the trench, the two continued to argue about the bed. PW1 also told the Appellant to report for night duty in Section II where he had been allocated since they could not work in the same trench being that they shared the same rank. While PW1 was leaving the resting bay to move to the fighting bay about two meters away for night duty, he heard the Appellant cocking his G3 rifle. Upon looking back, PW1 saw the Appellant moving towards him while pointing the gun in his direction. PW1 moved to his left away from the firing line and tried to reach for the muzzle of the rifle to prevent the Appellant from shooting him. The Appellant shot the ring finger on his right hand. The impact of the bullet made him fall but he rose up very fast and ran out of the trench to avoid being shot again

11. During the hearing of the case, PW1 informed the Court that the affected finger had not healed and that he could no longer use it.

12. **PW2, 85552 Gnr. Gerald Okoth** was in the resting bay when he heard a gun cock followed by a gun shot. He went to see who had fired the shot and found the Appellant holding a gun in a firing position while aiming at the direction of PW1 who was struggling to leave the fighting bay towards the exit while shouting "I have been shot". PW2 held the Appellant, whose hands were still on the trigger, from behind and called his colleague **PW3, 84666 Senior Gunner Onyango** who was preparing his bed at the fighting bay a few metres away, to go and help him disarm the Appellant. PW3 rushed there and took the gun away from the Appellant as PW2 took him to the resting bay. PW3 switched the gun to safe mode since it was still in fire mode. He removed the magazine and the extra rounds of ammunition which were in the chamber.

13. The Troop Sergeant Major, PW4, was in his trench when he heard the gunshot. While walking towards the trench occupied by the Appellant and PW1 about 150-200 metres away, he saw two soldiers coming towards him while holding PW1 whose hand was bleeding. PW4 instructed them to rush PW1 to the Medical Reception Centre at the Camp while he proceeded to trench one where he found the Appellant sitting on his bed. PW4 instructed that the Appellant be segregated from the other soldiers and be taken to the church for a close arrest while awaiting further orders. PW4 also took the G3 rifle Butt No. 349 Registration No. 6593017 from PW3 as well as 5 magazines and 99 rounds of ammunition.

14. PW1 was received at the Medical Reception Centre at about 1800 hours by **PW5, 94232 Sgt Joseph Kihara Nganga**. He reported that he had been shot by the Appellant. He had a through wound at the proximal joint of the ring finger on his right hand. The wound was bleeding and he could not move the ring finger. The diameter of the wound was approximately 2cm with soot around the edges. PW5, stitched the wound to arrest bleeding, dressed it then referred PW1 to Manda BMC for further management and assessment. PW5 opined that the presence of the soot was consistent with the complaint since soot comes out as combusted gun powder and can be found around the wound in such cases. PW4 produced the medical report he prepared in that respect.

15. PW1 was admitted at Defence Forces Memorial Hospital in Nairobi on 5th February, 2018. Upon examination by **PW8, 19519 Lt Col (Dr) Agunda Moses**, he had an entry wound dorsal aspect of the right hand around the base of the 4th finger, approximately 1cm in diameter. At the exit on the volar aspect of the hand, base of the 4th finger, the wound was about 2cm in diameter. The 4th finger vascularity status was preserved; there was good venous return but the sensation had been reduced. There was tenderness on range of motion of the 4th and 5th metatarsophalangeal joints.

16. An x-ray of the hand showed a fracture at the proximal phalanx of the ring finger. There was also a metallic foreign body around the forearm. The management instituted was surgical debridement of the wound, K-wiring fixation of the fracture, wound cleaning and dressing. Antibiotics and analgesics were administered. He also had to undergo physiotherapy. PW1 was discharged on 3rd March, 2018 to continue with the dressing as an outpatient. PW8 concluded that PW1's history was consistent with the observation made and produced the medical report he prepared in that regard.

17. **PW10, 84786 Spte Elphod Lihada** from the Military Police Headquarters was tasked with investigating the case on 9th February, 2018. He visited the scene of crime on 4th February, 2018 at around 1000hrs. He assessed PW2 and PW3's weapons and confirmed that their magazines and ammunition were still intact. He went to PW4 who handed over to him the Appellant's G3 rifle, five magazines, four of which were loaded with twenty rounds of ammunition each while one had nineteen rounds. He also searched the scene and recovered 1 spent cartridge of 7.62 calibre on the ground at the exit of the trench. He took photos of the scene and the layout of the trenches and thereafter interviewed witnesses within the camp. Upon confirming from the Daily Arms Book that the weapons had been received by the Appellant, he travelled with them to the Kenya Department of Defence (DOD) Headquarters in Nairobi where he handed them to Sergeant Hassan Nguire of Military Police.

18. On 11th April, 2018, **PW9, 235220 Chief Inspector James Onyango** received from Sergeant Hassan Nguire a G3 rifle bearing serial number 6593017 marked exhibit A; 5 G3 magazines marked exhibits B1, B2, B3, B4 and B5; 99 rounds of ammunition marked exhibits C1-C99, one fired cartridge marked exhibit D. Examination revealed that exhibit A was a G3 rifle of model G3 A2 designed to hold rounds of ammunition in caliber of 7.62 * 51mm. It was in a good general and mechanical condition as tested by eight rounds of ammunition picked at random from exhibits C1-C99. A drop test on the G3 rifle also revealed that its safety belt was very effective and therefore not capable of accidental discharge. Exhibits B1-B5 were found to be G3 rifle magazines of capacity twenty rounds of ammunition in caliber 7.62*51mm. All of them were in good working order. Each of them successfully test fired in exhibit A. PW9 also found that exhibit A and exhibits C1-C99 were a firearm and ammunition respectively under the Firearms Act Cap 114 Laws of Kenya. PW9 stated that exhibit D was fired in exhibit A on the 12th April, 2018.

19. PW9 further opined that when handling such a weapon, the safety lock must be applied at all times unless one is ready to shoot. He stated that one cannot pull the trigger unless they are ready to shoot and should not point a firearm at anything they do not intend to destroy. He also stated that a soldier must always ensure the firearm is facing a safe direction unless they are in action. A safe direction in this case is either up or down depending on who is up and who is down.

20. The Appellant gave a sworn testimony in his defence. He stated that he joined the military in 2002. He later joined AMISOM to enable him sort out his financial needs. He was first posted to Liboi where he worked with PW1 in the same Platoon and there had never been any bad blood between them. After about five months, they proceeded to Buurgaavo on 19th January, 2018. When they first arrived in Buurgavao, the 11th Battery were still there and as such, PW4 told them to occupy any vacant spaces that they could find and operate from there. He entered trench number one where he stayed for ten days with Corporal Nyangi and Corporal Sambusi of the 11th Battery. The two Corporals informed him that there was shortage of beddings and water in Buurgaavo. When the 11th Battery were leaving, the two corporals sold him some items including a bed. However, they agreed that he would pay them later since he did not have money at that time.

21. On Saturday, 3rd February 2018 while on his way to church, he met PW1 who informed him that he was required to relocate from trench 1. When he returned from church at about 5.00 pm, PW1 told him not to move out with any item from the trench since he was going to occupy the trench and would use them. Since it was already Timam time, he decided to go and talk to PW6 regarding that issue because Sergeant Wachira who was the senior most had travelled. While he was talking to PW6, PW1 joined them. They discussed the issue and PW6 told him to go back to the trench and proceed for night duties with his colleagues then relocate the following day with his luggage.

22. He went back to the trench and started preparing for night duties. Since he had a problem with his eyesight, he agreed with his colleagues that he would be the first to keep watch until 8.00 pm before it became so dark. As he was leaving the resting bay towards the fighting bay, he cocked his rifle and put the safe lock on, in preparation to go to his place of work. PW1 who was in front of him panicked, jumped and reached out for the muzzle of his rifle thereby causing a commotion between them. He was shocked as he did not know what PW1's intentions were. He denied aiming the rifle and also denied opening the safety lock. In his view, the safety lash may have opened unknowingly during the struggle between them thereby causing the bullet to exit. He stated that he did not even hear the fired shot hence could not tell whether it was his weapon that fired the bullet that shot PW1. He did not intend to shoot him because if he did, the bullet would have hit PW1's chest.

23. PW1 ran outside and PW3 took away his gun then he went and lay on his bed. About one hour later, PW4, PW6 and three Corporals went to the trench and alleged that he had shot PW1. He did not say anything to them. They instructed PW2 and PW3 to tie him up with a rope and took him to the SDA Church where he was held until the following day at around 4.00 am. The OC went and took him into the vehicle that PW1 had boarded and they travelled all the way to Laskaboni where they joined the 11th Battery then took a flight from there to Manda. Upon arrival at Manda, he was put under custody while PW1 was taken for treatment. He was in Manda for two months. He stated that he did not have any ill motive to harm PW1.

24. On cross examination, he confirmed that he had used the weapon without it developing any mechanical problem.

25. The Appellant's service record was submitted to the Court by **130571 Captain H M Njoroge**, the Adjutant at 75 Artillery Battalion. According to the records, he was enlisted on 3rd August, 2002. He had served for nine years colour service and three years in reserve. He was entitled to reckon sixteen years and three months service for purposes of determining his pension and/or gratuity. He also was entitled to the following decorations or awards: long service and good conduct medal, UN Medal and the Constitution of Kenya 2010 Medal. Further, nil acts of gallantry or distinguished conduct were recorded in his conduct sheet. He had been awaiting trial for one hundred and two (102) days, that is, from 3rd February, 2018 to 15th May, 2018, none of which were spent in close arrest. He had also never been convicted of any offence prior to this case.

Analysis and determination

26. The Appeal was canvassed by both written and oral submissions. The Appellant filed his written submissions on 11th November, 2019 and was represented by learned Counsel Mr. Bosire. The Respondent on the other hand was represented by the learned State Counsel, Mr. Momanyi who only tendered oral submissions.

27. Upon carefully re-evaluating the evidence on record and considering the parties respective submissions, I find that there are only three issues for determination. The first is whether the prosecution proved the offence against the Appellant beyond a reasonable doubt. The second is whether the sentence imposed was manifestly excessive in the circumstances. Third, is whether the Court erred by failing to give reasons for its decision.

Whether the prosecution proved the offence against the Appellant beyond a reasonable doubt

28. On this issue, the Appellant submitted that he only cocked his gun in preparation for night duty since it was already Timam time and doing so was not a threat to PW1. Counsel for the Appellant argued that PW1 panicked when the Appellant cocked his gun because of the altercation they had earlier and without any threat, struggled to hold the muzzle of the Appellant's rifle thus injuring his finger. In the Appellant's view therefore, the injuries PW1 sustained were self-inflicted. Further, the Appellant contended that the injury sustained by PW1 was caused by the heat from the rifle's muzzle and not a bullet since the bleeding was easily arrested according to PW5 who first attended to him.

29. The learned state counsel Mr. Momanyi opposed the Appeal. He submitted that the prosecution proved its case against the Appellant to the required standard which is beyond a reasonable doubt.

30. From the evidence on record, it is not in doubt that PW1 sustained a gunshot wound on the ring finger of his right hand. It is also not in dispute that the injury was occasioned by a bullet discharged from a weapon entrusted to the Appellant's care namely, a G3 rifle Butt No. 349 Registration No. 6593017. PW1's narration that the Appellant shot his finger was corroborated by PW5 who stated that PW1 had a through wound on the said finger with soot around the edges which was consistent with a gunshot wound. This was further supported by the medical evidence presented by PW8 who stated that PW1 had an entry and exit wound on the affected finger. Further, an x-ray of PW1's right hand showed a metallic foreign body around the forearm which confirmed that the wound was occasioned by a gunshot. To that end, I reject the Appellant's contention that PW1's injury was caused by heat from the muzzle of his rifle.

31. I now determine the nature and extent of PW1's injury, that is, whether it amounted to grievous harm. The Appellant submitted that the injury sustained by PW1 did not amount to grievous harm as defined under **Section 4** of the **Penal Code** in view of PW5's testimony that the bleeding was easily arrested.

32. **Section 4** of the **Penal Code** defines Harm and Grievous harm as follows;

“Grievous harm” means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.

“Harm” means any bodily hurt, disease or disorder whether permanent or temporary.”

33. PW1 stated that the Appellant shot his finger ripping it apart. Upon being taken to the medical centre at the camp, he was attended by PW5 who stitched the said finger to arrest further bleeding. The medical evidence presented by PW8 revealed the extent of the injury as follows: an entry wound dorsal aspect of the right hand around the base of the 4th finger, approximately 1cm in diameter. At the exit on the volar aspect of the hand, base of the 4th finger, the wound was about 2cm in diameter. The 4th finger vascularity status was preserved; there was good venous return but the sensation had been reduced. There was tenderness on range of motion of the 4th and 5th metatarsophalangeal joints. PW8 further stated that an x-ray of PW1's right hand showed a fracture at the proximal phalanx of the finger as well as a metallic foreign body around the forearm.

34. A surgical debridement of the wound had to be undertaken to remove dead or infected skin tissue to facilitate its healing. K-wiring fixation of the fracture was also conducted to stabilize the bone fragments on the affected finger. Further, the wound had to be cleaned and dressed in addition to administration of analgesics and antibiotics until 3rd March, 2018 when PW1 was discharged so as continue with the dressing as an outpatient. PW1 had also been attending physiotherapy sessions to enable him regain the normal function of the joint around the fracture but as at the time of his testimony, he was still unable to use the affected hand. In the premises, I am satisfied that PW1 sustained a serious injury which fell squarely within the definition of grievous harm.

35. I now grapple with question of whether it is the Appellant who fired the fatal shot. In advancing his defence, the Appellant contended that the safe lock of his already cocked rifle may have accidentally opened during the struggle with PW1 thereby unknowingly discharging the fatal bullet that hit PW1's finger. He claimed that he did not even hear the gunshot. However, I find this contention unbelievable. First, there is no evidence that there was a struggle between the Appellant and PW1 between the time when he cocked his rifle and a few seconds later when a shot was fired. Indeed, neither PW2 nor PW3 who were in the same trench, albeit in different positions being the resting bay and fighting bay respectively, saw or heard any scuffle between the two. Instead, PW2's evidence that he found the Appellant holding his gun in a firing position while aiming at the direction of PW1 was accordingly corroborated by PW3.

36. Secondly, PW2 stated that the Appellant's hand was still on the trigger when he rushed to hold him. This is further cemented by PW3's testimony that he found the Appellant's gun in open and fire mode upon disarming him. Additionally, PW2 and PW3's testimony that a firearm should be held facing a safe direction was corroborated by PW9 who opined that a safe direction is either up or down and that a firearm must never be pointed at something you do not intend to destroy. In the premises, I am convinced that it is the Appellant who fired the fatal shot and the contention that the bullet may have discharged accidentally has no merit.

37. Having found that it is the Appellant who shot PW1, the next issue for determination is whether he had the *mens rea* to cause PW1 grievous harm. In his submissions before this court, the Appellant faulted the trial court for failing to appreciate that none of the witnesses testified that he had any intentions of harming PW1. He argued that the prosecution did not prove that he had the required *mens rea* to harm

PW1 since there was no bad blood between them. On the other hand, the learned state counsel submitted that it was sufficiently established that the Appellant had the intention to cause PW1 grievous harm.

38. My evaluation of the evidence is that the Appellant had the intent to use his gun to harm PW1 as a means of settling a score following the altercation. By cocking his gun and failing to lock it on safe mode while going after PW1, was a testament that he was prepared to have the firearm discharge knowing fully well that doing so could cause grievous harm to PW1 or even death. Needless to add, since he was a trained and experienced soldier, he knew that a gun is a very dangerous weapon.

39. The mere fact that the Appellant may have had work related frustrations without any counselling and/or debrief as submitted or that he was annoyed by PW1 following the altercation, did not warrant him to use his rifle to shoot PW1. In the premises, I find that the Appellant had the *mens rea* to cause PW1 grievous harm. I therefore have no reason to fault the decision of the Court below and dismiss the appeal on conviction.

Whether the sentence was manifestly harsh and excessive.

40. The Appellant submitted that the court imposed on him a very harsh sentence which was not justified given the circumstances and the mitigating factors. He pointed out that he had been an astute service man of good character and was a first offender. He argued that this Court is empowered under **Section 354** of the **Criminal Procedure Code** to alter a sentence if it is of the view that the trial court did take into account key material considerations. Learned Counsel, Mr. Bosire further urged the court to consider that the Appellant had suffered a deformity while participating in the war in Somalia. He stated that the Appellant developed a hearing problem due to bomb detonation and also has an artificial eye. He therefore urged the court to reconsider the sentence handed to the Appellant and also reinstate his benefits.

41. On his part, Mr. Momanyi submitted that the sentence was lenient. He however conceded that it was harsh for the Appellant to lose all his benefits when he had served in the Armed Forces for nine years colour service. He therefore urged the court to order that the Appellant's benefits be reinstated.

42. It is a well settled principle that an appellate court should only interfere with the discretion of a trial court in sentencing where the court disregarded a material fact, or considered irrelevant factor or that the sentence was manifestly harsh or excessive as to constitute an error of principle. The prescribed sentence for assault causing grievous harm is up to a maximum life imprisonment whilst the Appellant was sentenced to four (4) years less the one year already spent in custody. Considering the gravity of the Appellant's actions and the effect it had on PW1, I find that the sentence meted out by the court martial was very lenient. Given his long service in the Army and for the Nation I find no basis for interfering with it.

43. As regards the prayer for reinstatement of the Appellant's benefits in view of his years of colour service, I agree entirely that just like other workers, more so public servants, upon dismissal, benefits for the period worked follow almost automatically. This court would be glad to issue the order prayed for. But from experience, the parties affected have expressed frustrations in following up their dues pursuant an order made in a criminal appeal. And since this Court may not be armed with the proper teeth to enforce such an order other than encourage a negotiations, I make an order that the Appellant pursues his benefits in other appropriate forum.

Whether the judge advocate erred by failing to give reasons for the Court Martial's decision?

44. Finally, the Appellant faulted the Court for failing to give reasons for its decision. He argued that the same was akin to condemning him unheard. The Appellant's trial was governed by the **Kenya Defence Forces Act**.

45. **Section 175** of the **Kenya Defence Forces Act** provides as follows:

“(1) In proceedings before a court-martial, rulings and directions on questions of law, procedure or practice shall be given by the Judge Advocate.

(2) Any rulings or directions given under subsection (1) shall be binding on the court.”

46. Further **Section 176** of the **Kenya Defence Forces Act** provides as follows regarding the decision of a court martial:

“(1) Subject to this section, every question to be determined on a trial by a court martial shall be determined by a majority of the votes of the members of the court.

(2) The Judge Advocate is not entitled to vote on the finding.

(3) In the case of an equality of votes on the finding, the court shall acquit the accused.

(4) In the case of an equality of votes on the sentence, the Judge Advocate has a casting vote.

(5) A conviction, where the only punishment that the court can award is death shall not have effect unless it is reached with the concurrence of all members of the court and, where all the members do not concur in a conviction in such a case, the presiding officer shall declare a mistrial and the accused may be tried by another court.”

47. From the foregoing provisions, it is clear that there is no requirement that the judge advocate has to give reasons for the decision of the

Court. In any event, the Court's proceedings as well as the judge advocate's summation attest that the judge advocate only gave directions on the issues to be considered when determining the Appellant's guilt for the offence he was charged with. Thereafter, the members of the Court deliberated on the summation and a decision made pursuant to **Section 176** hereinabove. Hence, ground of appeal also fails for lack of merit.

Conclusion

48. In view of the foregoing, this appeal is dismissed in its entirety. The Appellant's conviction and sentence are accordingly upheld. It is so ordered.

DATED and DELIVERED this 2nd day of **March, 2020**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.
2. Mr. Momanyi for the Respondent.