



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL APPEAL NO. 6 OF 2017

NICHOLUS MUNENE NDIRE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence in the Court Martial Case sitting at Embakasi Garrison Case No. 11 of 2016 delivered on 12th July 2017)

JUDGMENT

1. The Appellant, **Nicholus Munene Ndire**, was charged with the offence of desertion contrary to **Section 74 (1) (a)** as read with **Sections 74 (2) (e) and 74 (3) (b)** of the **Kenya Defence Forces Act No. 25 of 2012**. The particulars of the offence were that on 4th July, 2015 at about 0800 hours at Kenya Navy Base Mtongwe, he absented himself without leave and remained so absent until he reported back on 9th December, 2015 at 1400 hours thereby absenting himself for a continuous period of one hundred and fifty nine (159) days. He was convicted of the said charge and was sentenced to serve four (4) months imprisonment besides being dismissed from service. Being aggrieved by both his conviction and sentence, he preferred an appeal to this Court challenging the same.

Grounds of Appeal

2. The Appellant relied on the grounds of appeal in his Petition of Appeal filed on 25th July, 2017. The Appellant was aggrieved that the Court Martial failed to consider the five hundred and eighty eight (588) days already spent in custody before and during trial, when sentencing him to serve four more months in prison. In his view, the sentence was harsh and did not take into account the mitigating factors presented before the court. He also faulted the Court Martial for failing to appreciate his defence that he had urgent family issues to attend to but was denied permission thereby forcing him to absent himself without leave. He was of the view that the Court Martial erred in convicting him despite the weight of the evidence adduced.

3. Further, the Appellant was aggrieved that the prosecution failed to adduce evidence to prove that the necessary *mens rea* was formed on his part. He was also aggrieved that the Court Martial erred when it failed to note that the military owed him a duty of care and was in breach of Section 126 of the KDF Act 2012 for unreasonably refusing to grant him the permission requested. Finally, he faulted the Court Martial for ignoring the evidence adduced that he was harshly treated while in custody to a point of being denied medical care while in solitary confinement thereby infringing his right to fair trial. He therefore urged this court to set aside the Court Martial's judgment of 19th July, 2017, allow his appeal and set him free.

Evidence

4. 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 Martial. 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**).

5. The prosecution's evidence is that on Saturday 4th July, 2015 as PW1, **Warrant Officer 1 Victor Marriot Chemjor** was conducting his duties as the officer of the day at Kenya Navy Mtongwe Base. He discovered that the Appellant had not turned up for guard duties at the barrier gate as assigned in the Daily Order. PW1 immediately informed the Base Duty Officer, Captain Ndwiga about the Appellant's absence. He also inquired about the Appellant's absence from his colleagues who tried calling him on his phone but could not reach him. By the time PW1 was handing over duty on 5th July, 2015, the Appellant had still not turned up for duty and as such, PW1 counted him absent.

6. Upon being informed by PW1 about the Appellant's absence at his place of work, PW2 **Warrant Officer II David Cheptock** who was

his immediate supervisor immediately reported the absence to the office of the Base Sergeant Major. He also tried calling the Appellant on his phone since the Appellant never informed him that he would be absent from work, but could not reach him. Later on 9th December, 2015 at around 10.00 pm, PW2 was informed by the Appellant's colleague Private Chacha that he was with the Appellant at the single line accommodation area at Kenya Navy Base Mtongwe. PW2 immediately reported the issue to Master Camp Police who proceeded to arrest the Appellant.

7. PW3, **Captain Paul Ndemange Muteti** informed the Court Martial that according to the Appellant's service member records, he absented himself on 3rd July, 2015 and was declared absent on 11th July 2015. His absence report was sent to the IPPD, Kenya Navy Headquarters on 17th July, 2015 for purposes of stopping his salary since he was not working. On 1st October 2015, he was declared a deserter as per the Kenya Defence Forces Act and the same was published in the Part II Orders. The Appellant then rejoined (rejabed) on 9th December, 2015 and a rejab report was prepared to that effect.

8. Upon being tasked to investigate the Appellant's absence, PW4, **Spte Boniface Kyalo** visited his unit where he got the Appellant's AWOL (absent without official leave) message. He referred the Court Martial to the various documents used in the investigations which documents revealed that the Appellant intentionally absented himself from his place of work without permission from 4th July, 2015 to 9th December, 2015. As such, he concluded that the Appellant had deserted service and preferred the charge against him.

9. PW5, **Captain Edward Khasenya Oketch**, a Kenya Navy Fleet Appointment Administration Officer in charge of keeping records of all officers and service members posted to Kenya Navy produced the Daily Order of 4th July, 2015 indicating that the accused had been deployed to man the Barrier gate at GPMG when he absented himself, as Exhibit 1. He produced AWOL message dated 5th July, 2015 raised when the Appellant absented himself without official leave as exhibit 2. Further, he produced the Absence message dated 17th July, 2015, the Rejab message and Part II Orders dated 25th December, 2015 as exhibits 3, 4 and 5 respectively. PW5 further produced the Investigation General dated 22nd December, 2015 sent to the military police to investigate the Appellant's incident as exhibit 6. Finally, PW5 also produced an amendment document dated 21st April, 2016 as exhibit 7. The said document was written to amend the Appellant's absence date to read 4th July, 2015 instead of 3rd July, 2015.

10. Finally, PW6 **Captain Daniel Mutua** confirmed that according to the Appellant's service record, he had spent a total 588 in custody. However, 198 days of the said total were spent in close arrest at Mtongwe Base while awaiting trial before the Court Martial was convened.

11. The Appellant's defence was that his girlfriend whom he had not published as required under military procedure was four months pregnant at the time and had been ailing. She had been admitted at Nkubu Dispensary in Meru and lost her pregnancy which affected her health. As such, the Appellant needed a pass to travel to Nairobi to attend to her. He informed his immediate supervisor (PW2) about the same and requested him for a pass. However, after waiting for a response to that effect for about two weeks, he decided to absent himself from work without leave since none was forthcoming. Upon going back to work voluntarily on 9th December, 2015, he was detained under close arrest for a period of seven (7) months instead of the requisite forty two (42) days before being taken to the trial.

12. Prior to the hearing of the appeal, the Appellant filed an application before this court to be released on bail pending appeal. His application was allowed and he was accordingly released on bail pending appeal on 17th August, 2017. This appeal was canvassed by way of written submissions. In his written submissions, the Appellant condensed his grounds of appeal to three namely, that the trial was unfair, that the Court disregard rules of evidence and that the prosecution failed to prove beyond reasonable doubt that he wilfully deserted duty. Ms. Sigei, learned State Counsel opposed the Appeal and prayed that the same be dismissed and the conviction and sentence be upheld.

Determination

13. This court has carefully re-evaluated the evidence on record and considered the parties respective submissions. I have isolated four issues for determination. Firstly, whether the *prosecution proved beyond reasonable doubt that the Appellant was guilty of desertion*. Secondly, whether the Court Martial relied on hearsay evidence to convict the Appellant. Thirdly, whether the Appellant's right to a fair trial was violated? Fourthly, whether the sentence of four months imprisonment was harsh and excessive.

Whether the Appellant was guilty of desertion.

14. As regards this issue, the Appellant submitted that the prosecution did not adduce sufficient evidence to prove *mens rea* on his part. He further contended that the Court Martial failed to consider his defence that his pregnant girlfriend was unwell and he had been denied permission to go and attend to her. On the other hand, the Respondent submitted that the evidence adduced by the prosecution witnesses was sufficient to establish that the Appellant deserted duty as the same was consistent and well corroborated. She submitted that the Appellant's aforesaid defence was an afterthought as he did not cross examine the prosecution witnesses on any of the alleged issues and did not produce any document to show that his girlfriend was actually sick as alleged. In her view therefore, the Appellant intentionally absented himself for a period of 159 days which was more than the ninety (90) days provided under the Kenya Defence Forces Act and was therefore guilty of desertion.

15. On whether the prosecution proved that the Appellant possessed the relevant *mens rea* to commit, it behoves this court to define what *Mens rea* is. The **Black's Law Dictionary, 9th Edition** defines it as:

“The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness.”

16. The offence of desertion is provided for under **Section 74 (1) (a), (2) (e) and (3) (b) of the Kenya Defence Forces Act as follows;**

“(1) A person who is subject to this act commits an offence if that person-

(a) deserts

(2) A person deserts if that person-

(e) is absent without leave for a continuous period of more than ninety days.

(3) A person who commits an offence under subsection (1), shall be liable upon conviction by a Court Martial-

(b) to imprisonment for not more than two years, in any other case”

17. It is not in dispute that the Appellant was at the material time a member of the Kenya Defence Force having been enlisted to join the Kenya Navy Fleet Trade –Seamanship on 3rd November, 2013. The prosecution ably established that at the time of the offence, the Appellant had been deployed at the barrier gate at Mtongwe Base to man the GPMG as per the Daily Order of 4th July, 2015. The Appellant was therefore no doubt subject to the **Kenya Defence Forces Act**. In order to establish the offence of desertion therefore, it was incumbent upon the prosecution to prove that that the Appellant was absent from duty for a continuous period of more than ninety days and that he did not have permission from his superiors to be away from duty.

18. From the record, it was the prosecution’s case that the Appellant absented himself without leave on 4th July, 2015 and remained so absent until he reported back on 9th December, 2015 thereby absenting himself for a continuous period of one hundred and fifty nine (159) days which was obviously more than the statutory ninety (90) days. This was established by PW1 and 2, his immediate supervisors. They indeed tried reaching him on his phone and even inquiring about his whereabouts from his colleagues but could not reach him.

19. Notably however, the Appellant did not dispute the fact that he was absent from 4th July, 2015 to 9th December, 2015. His explanation was that he had sought permission to attend to his sick girlfriend who was also pregnant at the time but was denied the permission hence he decided to absent himself without leave so as to attend to her. In the premises, this court finds that the prosecution was able to prove beyond any reasonable doubt that he deserted duty as provided under Section 74 (2) (e) of the Act.

20. As regards the reasons tendered by the Appellant for absenting himself, this court has reviewed the evidence on record and established that indeed the Appellant did not produce any medical documentation to prove that his alleged girlfriend was unwell and required his help as alleged. Further, the Appellant did not even inform any of his colleagues about his alleged problems if at all to enable them communicate the same to his superiors. In addition, he continued to stay away from work even after his alleged girlfriend had left him for allegedly failing to attend her in her time of need. He did not make any effort to contact his unit so that the AWOL and absight messages could be lifted. In the circumstances, the court finds that the Appellant had the necessary *mens rea* to commit the offence.

Whether the Court relied on hearsay evidence to convict the Appellant?

21. As regards this issue, it was the Appellant’s submissions that the documentary evidence tendered in court by the Prosecution constituted hearsay evidence since the makers of the same were not called to vouch for their authenticity. He was of the view that the same had no probative value and could not be relied upon the court. Learned State Counsel on the other hand submitted the documents could not be regarded as hearsay evidence since the same were part of the Kenya Defence Forces records. Further, she submitted that all the five witnesses who relied on the said documents were persons of authority in the Kenya Defence Forces who were fully aware of the processes and documentation required to be absent from work. She also asserted that the Appellant did not cross examine any of the witnesses on the authenticity of the said documents and as such could not now claim that the same constituted hearsay evidence.

22. Hearsay is defined in the **Black’s Law Dictionary, 9th Edition at page 739** as:

“Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and is therefore dependent on credibility of someone other than the witness.”

23. This court disagrees with the Appellant’s contention that the documents tendered in evidence by the Prosecution were hearsay. This is in view of the fact that there is nothing on the record to show that the Appellant’s Counsel objected to admissibility of these documents during trial. Secondly, the documents were made in the course of ordinary business of the Kenya Defence Forces and produced by a witness who was tasked with keeping records of all service members and officers in the Kenya Navy, meaning therefore that he was very familiar with the Appellant’s records. Further and in any case, the evidence contained in the documents was consistent with oral testimonies of PW1, PW2, PW3 and PW4. In view of the foregoing reasons therefore, the documents tendered in evidence were not only relevant but did not also constitute hearsay evidence as alleged by the Appellant.

24. The Appellant further submitted that the Court Martial’s decision occasioned a miscarriage of justice on his part since there were several mistakes on the documents tendered in evidence by the prosecution. This Court has carefully perused the Court Martial’s proceedings and established that the only error on the documents as submitted by PW5 was a typographical error on the rejab message which erroneously indicated that the Appellant absented himself on 3rd July, 2015 instead of 4th July, 2015. The records further show that PW5 produced in evidence an Amendment note dated 21st April, 2016 which had been raised to amend the said date to read the correct date. In any event, the error on the dates does not change the fact that he was absent without leave for a continuous period of over ninety (90) days and was therefore a deserter according to the Kenya Defence Forces Act. The errors did not therefore occasion any miscarriage of justice as alleged.

Whether the Appellant’s right to a fair trial was violated.

25. The Appellant submitted that he was held under close arrest for more than seventy two (72) days without any justifiable reasons being given for his detention without a charge in contravention of Section 72 Rule 6 of the Armed Forces Act and Articles 47 (i) and 50 (2) (e) of the Constitution of Kenya which essentially require that a trial and/or administrative action should be concluded expeditiously and/or without unreasonable delay. It was also his submission that no delay reports were sent regarding his trial as by law required. Further, he asserted that he was mistreated while on trial but the Court Martial failed to address the issues raised in that regard thereby violating his right to a fair hearing and right to be presumed innocent until proven otherwise. On the same issue, it was the Respondent's submission that the Court Martial duly addressed all the issues raised by the Appellant throughout the trial period.

26. There is no doubt that the Appellant was kept in custody for a period longer than is provided by the law. The said action was unreasonable and indeed in breach of the Appellant's constitutional right. However, the redress falls in a civil suit to seek compensation for damages against the responsible person or entity. The violation does not render the trial a nullity.

27. Further, as regards the Appellant's claims that the Court Martial failed to address the issues he raised regarding his mistreatment in custody, this court finds the same to be false and unfounded. Indeed, this court has perused **page 49** of proceedings where the Appellant through his Advocate on record informed the Court that he had not been provided with beddings and his pay had been withheld thereby making it difficult for him to afford a haircut. At **page 51** of the proceedings, the Judge Advocate stated as follows upon hearing submissions by the Counsel for the Appellant, the Prosecutor, the Defending Officer:

“From the submissions, there is indication that the mattresses have been procured and as of yesterday they were being marked for delivery and then have them issued to the accused persons. On the issue of pay, it is being well managed within its mandate. So let the matter be dealt with administratively within the Ministry as counsel has indicated.”

28. Further, at Page 89 of the proceedings, the Appellant through his counsel reiterated that he had not received his salary arrears and had not been taken to get a haircut. From the proceedings at page 90 and 91, it is clear that the Judge Advocate sought an explanation for the same from the relevant personnel who were present in court and ordered them to follow up on the issues and brief the Court on the next mention date. Hence, the claim by the Appellant that his personal welfare issues were not attended to is unfounded.

29. In addition to the foregoing, the Appellant submitted that the Court Martial failed to establish whether the confessional evidence allegedly adduced by the Prosecutor during trial at Page 105 and 106 of the proceedings in the Court Martial, was voluntarily recorded. The record shows that counsel for the Appellant objected to the production of the said statement on the ground that the Appellant was not obliged to incriminate himself and his objection was upheld by the court. This ground of appeal also fails.

Whether the sentence of four months imprisonment was justified?

30. On the issue of the sentence, the Appellant submitted that the Court Martial failed to consider that he had already spent a total of five hundred and eighty eight (588) days in custody before and during trial, when sentencing him to serve four more months in prison. He stated that this sentence was harsh and did not take into account the mitigating factors presented before the court. The learned State Counsel on the other hand submitted that the aforesaid sentence was legal and proper as the Court Martial duly considered the Appellant's mitigation when sentencing.

31. Under **Section 74 (3) (b) of the Kenya Defence Forces Act** the maximum sentence prescribed for the offence of desertion upon conviction is imprisonment for not more than two years. The Appellant was kept under closed arrest at Mtongwe base for a period of one hundred and ninety eight (198) days before being presented for trial. He was kept in custody for a total period of five hundred and eighty eight (588) days before being sentenced to serve four months imprisonment.

32. The Court Martial seems to have considered the period the Appellant was in custody before sentencing him to four months imprisonment. In its calculation, *five hundred and eighty eight (588) days was just four months short of the maximum sentence of two years prescribed for the offence of desertion. I do note however that there were no aggravating circumstances to justify the imposition of the maximum sentence on the Appellant.*

33. Further, prior to the Appellant's release on bail pending appeal on 17th August 2017, he had been in prison from 19th July, 2017 when the Court Martial's judgment was delivered. This was a period of approximately one (1) month. Taking into consideration the period that the Appellant was under closed arrest and the period that he was in prison prior to being released on bail pending appeal, I hold that the Appellant has been sufficiently punished.

34. In the upshot, I find that his conviction was safe and I uphold it. He remains dismissed from service. Having found that the Appellant has sufficiently been punished, I order that he be forthwith set free unless otherwise lawfully held. The cash bail that he paid on account of bail pending appeal shall also be refunded to him. It is so ordered.

DATED and DELIVERED this 12th day of **March, 2019**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Kaimenyi for the Appellants

2. *M/s Atina for the Respondent.*