



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.4A OF 2015

(An Appeal arising out of the conviction and sentence on No.81909 PTE Joakim Gakure Muchiri

on 22^h September 2015 in Court Martial No.6 of 2015 sitting at Kahawa Barracks)

JOAKIM GAKURE MUCHIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Joakim Gakure Muchiri was at the material time a member of the Kenya Defence Forces. He was charged under **Section 4(a)** of the **Kenya Defence Forces Act** and **Section 74(1)(a)** as read with **Section 74(2)(e)** and **Section 74(3)(a)(i)** of the **Act** with the offence of **desertion**. The particulars of the offence were that the Appellant, while deployed in Operation Linda Nchi in Afmadhow Somalia absented himself without leave from 16th August 2012 to 21st June 2014 when he was apprehended by military police thereby absenting himself for a continuous period of 674 days, an act he knew or ought to have known constitute an offence. When the Appellant was arraigned before the Court Martial, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentence to life imprisonment. In addition, he was dismissed from the Kenya Defence Forces. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court challenging the same.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof. The Appellant asserted that at the time of his trial he was not in active service with the Kenya Defence Forces and therefore could not be accused of deserting from duty. The Appellant was aggrieved that he had been convicted by the Court Martial yet the evidence presented by the prosecution was at variance with the charge. He faulted the trial court for relying on hearsay and inconsistent evidence to convict him. He took issue with the fact that the testimony that he had adduced in his defence was not taken into consideration before the Court Martial reached the impugned verdict finding him guilty as charged. The Appellant was of the view that the evidence adduced by the prosecution witnesses did not meet the threshold of establishing the case to the required standard of proof beyond any reasonable doubt. He was of the view that his constitutional right to fair trial was infringed when he was detained for a very long period of time before he was taken for trial before the Court Martial. He was finally aggrieved that the sentence that was imposed upon him was harsh and excessive in the circumstances. In the premises therefore, he urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, the Appellant and the Respondent presented to court written submission in support of their respective opposing positions. During the hearing of the appeal, this court heard oral rival submission made by Mr. Amutalla for the Appellant and by Ms. Nyauncho for the State. Mr. Amutalla submitted that it was not proved to the required standard that the Appellant was in active service at the time of his arrest. He referred the court to **Section 2** of the **Kenya Defence Forces Act** which defines what active service is. An enemy has also been defined. He submitted that the Appellant was referred to a board of inquiry which was constituted after it was alleged that the Appellant had deserted while he was on AMISOM duties. AMISOM is a force under the command of the United Nations. Learned counsel pointed out that duties under AMISOM were not duties defined under the **Kenya Defence Forces Act**. The charge was defective because it did not mention who the enemy was. He submitted that Kenya at the time was not at war with Somalia. Therefore, it cannot be said that Somalia is an enemy of the Kenyan State. He referred the court to the case of **Jeffery Okuri Pepela & 25 Others v Republic [2015] eKLR** where the court dealt with issues similar to the ones in issue in the present appeal. He submitted that because the mandate of the Appellant changed once he crossed the border into Somalia, he could not be accused of deserting from the Kenya Defence Forces. He submitted that the sentence that was meted on the Appellant was harsh and excessive in the circumstances taking into consideration that he was not in active service. The *mens rea* for the offence of desertion was not proved. The Court Martial failed to take into consideration that the Appellant was in pre-trial detention for nearly two years before he was tried and convicted. The Court Martial failed to take into consideration that the Appellant was granted leave of absence at the time and therefore it was not established that he had an intention to desert from service. He

urged the court to allow the appeal.

Ms. Nyauncho for the State opposed the appeal. She submitted that the Appellant was employed to serve in the Operation Linda Nchi at Afmadow in Somalia. The Appellant was given leave of absence but failed to return to duty. He deserted from duty for a period of more than 90 days. He became a deserter. The prosecution proved that the Appellant was in active service at the time he committed the offence. The Appellant was a member of the 1st Kenya Rifles which was attached to AMISOM. The Appellant was at all the material time working for the Kenya Defence Forces. The enemy that the Kenya Defence Forces was fighting is Al Shabaab. The Appellant cannot therefore claim that there was no enemy to be fought at the time. The prosecution witnesses who testified before court confirmed that the Appellant was in active service at the time he deserted from duty. She urged the court to dismiss the Appellant's submission that the prosecution failed to prove the charge brought against him to the required standard of proof. The prosecution was able to establish to the required standard of proof that the Appellant deserted from duty. He was in active service at the time of his desertion. The sentence that was imposed fitted the crime. The appeal should therefore be dismissed.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the Court Martial so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must always bear in mind that it neither saw nor heard the witnesses as they testified and therefore cannot make any finding regarding the demeanour of the witnesses. (See **Njoroge v Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution established the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt.

From the submission made, it was common ground that the Appellant was a member of the Kenya Defence Forces at the time. He was therefore subject to the **Kenya Defence Forces Act**. What is in dispute is whether the Appellant was in active service at the time and whether he deserted from duty. **Section 74(1)** of the **Kenya Defence Forces Act** provides thus:

“A person who is subject to this Act commits an offence if that person –

(a) Deserts;

(b) ...”

Section 74(2) provides that:

“A person deserts if that person –

(a)...

(b)...

(c)...

(d)...

(e) is absent without leave for a continuous period of more than 90 days.”

Section 74(3)(a)(i) provides that:

“A person who commits an offence under sub-section (1) shall be liable upon conviction by a Court Martial – to life imprisonment or any lesser punishment provided for by this Act if – the offence was committed under sub-section (1)(a) the person was on active service or under orders for active service at the time when it was committed.”

To establish its case, the prosecution was therefore required to establish to the required standard of proof beyond any reasonable doubt that the Appellant deserted from duty while in active service. According to the prosecution witnesses who included PW1 WOI Musa Ababuye, PW6 Major Emmanuel Shikuku Kaliakamur and PW7 Lt Joseph Mutua, the Appellant was a member of the 1st Kenya Rifles which was deployed to fight Al Shabaab militants in Afmadow in Somalia. PW6, PW7 and PW1 were officers in-charge of members of the Kenya Defence Forces who crossed into Somalia on 14th October 2011. They testified that they fought the Al Shabaab militants until 5th August 2012 when the Appellant and 11 other service members were granted permission to be absent from duty for a period of ten (10) days. The Appellant and his colleagues were transported to Liboi where they were to use their own means to travel home before returning back to Somalia.

PW6 testified that on 15th August 2012, the Appellant failed to return to work. He was given a grace period of three days to see if he would return. He didn't. An absent without leave (AWOL) letter was raised. Eight days later, a letter was written stopping the Appellant's salary. A board of inquiry later on 14th September 2012 was convened. It determined that the Appellant was absent from work without leave. On 20th November 2012, it was declared that the Appellant was a deserter after he was absent from service for a continuous period of 90 days. The Appellant did not return to work until 20th June 2014 when he was arrested by PW5 IP Paul Njuguna, an Administration Police Officer based at Kipipiri Sub-County Commissioner's Office. He was taken to Kipipiri Police Station where he was detained by PW4 CIP James Opiyo. He was on 21st June 2014 picked by PW2 SPTE Ferdinand Oketch based at the Military Police Corps, Gilgil. At the time of his arrest, the Appellant had continuously been absent from duty for 674 days. When he was placed on his defence, the Appellant told the court that he delayed in returning to work because he had domestic issues to resolve. He had tried to communicate to his commanding officer but was

unable to. He denied the assertion that he had deliberately deserted from duty.

On re-evaluation of this evidence, it was clear to this court that the prosecution indeed established to the required standard of proof that the Appellant, being a member of the Kenya Defence Forces, which at the time was in active service, deserted from duty when he was granted leave of absence of ten (10) days. The Appellant did not return to work. He never made any effort to return to work until he was arrested by the police after he was suspected of being a deserter from the Kenya Defence Forces. The Appellant submitted that he was not in active service at the time of his desertion. **Section 2 of the Kenya Defence Forces Act** defines “*on active service*” as:

“(a) when used in relation to a person, means the person is serving in or with a unit of the Defence Forces engaged in operations against the enemy.”

The Appellant argued that at the time he was a member of AMISOM and therefore he was not in active service with the Kenya Defence Service. Upon re-evaluating the evidence, this court holds that the Appellant was serving as a member of the Kenya Defence Forces attached to AMISOM and therefore he was subject to the **Kenya Defence Forces Act**. His claim that he was not in active service at time is not supported by evidence. The evidence on record clearly shows that he was in active service fighting Al Shabaab militants. It appears that the Appellant was confused in regard to whether Somalia as a State was the enemy or Al Shabaab as a terror group. There was no doubt in the evidence adduced by the prosecution witnesses that the Kenya Defence Forces was fighting a known enemy being the Al Shabaab militants. This court does not find merit with the Appellant’s assertion that he was not in active service at the time.

Taking into consideration the totality of the evidence adduced, it was clear to this court that the prosecution established to the required standard of proof that the Appellant deserted from duty while in active service. His appeal against conviction lacks merit and is hereby dismissed.

On sentence, the Appellant is on firmer ground. This court has taken into consideration the fact that the Appellant was in pre-trial detention from the time of his arrest on 20th June 2014 to the time of his conviction by the Court Martial on 22nd September 2015. He has been in prison since then. Apart from being sentenced to serve a custodial term, the Appellant was dismissed from the Kenya Defence Forces. He is no longer a member of the Kenya Defence Forces. This court forms the view that the Appellant has been sufficiently punished in the period that he has been in lawful custody. His custodial sentence is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so order.

DATED AT NAIROBI THIS 21ST DAY OF MAY 2019

L. KIMARU

JUDGE