

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.2 OF 2015

(An Appeal arising out of the conviction and sentence from original decision in Court Martial Case No.4 of 2015 in respect of No.56921 S.SGT. Masai of Embakasi Garrison delivered on 11th August 2005 by the Court Martial sitting at Moi Air Base Eastleigh)

PETER MASAI MAILANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Peter Masai Mailanga was at the material time a member of the Kenya Defence Forces. He was charged with four (4) counts under the **Kenya Defence Forces Act, 2012** but was convicted of the two (2) counts. He was acquitted of two other counts that are not the subject of this appeal. The two counts were that the Appellant being a member of Kenya Defence Forces and being subject to **Kenya Defence Forces Act** under **Section 4(a)** of the **Act** 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 of the offence were that in September 2014, the Appellant deliberately obtained Kshs.100,000/- from a civilian Mrs. Mary Rose Kataki Mbindyo under the pretext that he would recruit her nephew Mr. Levis Nyongesa Ogolla to join Kenya Defence Forces, an act he knew or ought to have known constitutes an offence. He was further charged under the said **Section 4(a)** of the **Kenya Defence Forces Act, 2012** in that he disobeyed the standing orders contrary to **Section 77(1)** of the **Kenya Defence Forces Act, 2012**. The particulars of the offence were that on 11th February 2015 at about 18.00hrs, the Appellant left DOD CAU to Embakasi Garrison in military uniform using a civilian vehicle, an act he knew or ought to have known constitutes an offence. The Appellant pleaded not guilty to both counts. After full trial, he was convicted as charged. He was sentenced to serve eighteen (18) months imprisonment in respect of the first count and six (6) months imprisonment in respect of the second count. The sentences were ordered to run consecutively. In addition, the Appellant was demoted to the rank of Senior Private and was ordered dismissed from the Armed Forces. The Appellant was aggrieved by his conviction and sentence. He appealed against the same to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been sentenced to serve a custodial sentence that was harsh and excessive in the circumstances. He expressed the view that he was kept incarcerated at Moi Airbase guardroom for a period of six (6) months prior to his arraignment before the Court Martial without being granted bail thereby being in breach of his constitutional rights. The Appellant faulted the Court Martial for convicting him against the weight of the evidence. He accused the Court Martial of shifting the burden of proof in its verdict. He opined that the Court Martial acted unreasonably and was not independent, impartial or fair when it tried him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Were for the Appellant and Ms. Sigei for the State. Mr. Were submitted that no evidence was led by the prosecution to support the finding reached by the Court Martial to the effect that the Appellant had obtained money from the complainant to facilitate the recruitment of her nephew into the Kenya Defence Forces. The person who was to have been recruited did not meet with the Appellant. No documents were produced to show that the person could have been recruited. The documents were never delivered to the Appellant by the complainant. Mr. Were submitted that there were inconsistencies in the complainant's narration of what actually transpired. He urged the court to re-evaluate the inconsistencies in the complainant's testimony and find in favour of the Appellant. As regard the allegation that the Appellant had received the sum of Kshs.100,000/- from the complainant, learned counsel submitted that the Appellant's wife was deceived into allegedly refunding the money to the military police before the Appellant was arrested and charged. He submitted that the prosecution failed to establish, to the required standard of proof, that the Appellant had received the money from the complainant. As regard the other charge that he absented himself from his place of work without permission, Mr. Were submitted that the Appellant was at all the material times at DOD where he had been arrested and detained. He could not therefore be accused of being absent from duty when he was in lawful custody. In the premises therefore, he urged the court to allow the Appellant's appeal.

Ms. Sigei for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which established the Appellant's guilt on the two counts as he was convicted to the required standard of proof. The prosecution was able to establish that the complainant sought assistance from the Appellant to secure recruitment of her nephew into the Kenya Defence Forces. The complainant met with the Appellant. The Appellant agreed to assist the complainant to have her nephew recruited into the Kenya Defence Forces on consideration of the payment of certain sums. The prosecution was able to establish that the Appellant was paid the sum of Kshs.100,000/- by the complainant. The Appellant failed to fulfill his part of the bargain. He did not refund the money to the complainant despite the complainant requesting for the refund of the same. After some time, the complainant made a report to the military police. The Appellant was arrested and charged with the present offence. As regard the second charge, learned State Counsel submitted that upon the military police receiving the complaint from the complainant, the Appellant was summoned to DOD where he was arrested. However, while at DOD, the Appellant escaped and disappeared. He re-appeared twelve (12) days later and was re-arrested. The prosecution proved the charge that he had escaped from lawful custody. In the premises therefore, learned State Counsel urged the court to dismiss the appeal and confirm the conviction and sentence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate 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 is required to be always conscious of the fact that it neither saw nor heard the witnesses as they testified and cannot therefore make a determination regarding the demeanour of the witnesses. (See **Okeno –vs- Republic [1972] EA 32**). The issue for determination by this court is whether the prosecution adduced evidence to support the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt.

As regard the first count, the prosecution was required to prove that the Appellant engaged in a conduct that was prejudicial to good order and discipline of the **Kenya Defence Forces** in accordance with **Section 121** of the **Kenya Defence Forces Act**. It was the prosecution's case that the Appellant obtained money from the complainant under the false pretence that he would secure recruitment of his nephew to the Kenya Defence Forces. The Appellant denied this allegation. On re-evaluation of the evidence and the submission made during the hearing of the appeal, this court reached the determination that the prosecution proved this charge to the required standard of proof beyond any reasonable doubt. The prosecution established that the Appellant was a member of Kenya Defence Forces. It also established that the Appellant obtained the sum of Kshs.100,000/- from the complainant under the pretext that he would assist the complainant to have her nephew recruited into the Kenya Defence Forces.

The prosecution established that the Appellant was paid in two tranches of Kshs30,000/- and Kshs.70,000/-. When the Appellant failed to deliver his part of the bargain, the complainant sought the refund of the said sum of the money. The prosecution adduced evidence of short message service (SMS) that was extracted from the mobile telephone number of the Appellant and the complainant. In the messages, the Appellant acknowledges that he received the money and further that he would refund the complainant in due course. He failed to do so forcing the complainant to lodge a complaint with the military police. When he was confronted with the accusation, the Appellant called his wife to DOD where she refunded the said sum of Kshs.100,000/- to the military police. It was after receipt of this money that the Appellant was charged. It was clear to this court that the Appellant could not have sought to refund the money if in the first place he had not received the same from the complainant. In premises therefore, this court finds no merit with the Appellant's appeal on this count as a result of which the same is dismissed.

In respect of the second count, the prosecution adduced evidence which proved to the required standard of proof beyond any reasonable doubt that the Appellant, upon being escorted to DOD by the military police, and upon being left at the guardroom, escaped and disappeared for a period of twelve (12) days. He later re-appeared and was re-arrested. The prosecution was therefore able to establish that he disobeyed the standing orders issued to him by his superiors despite knowing that he ought to have complied with the said orders. The explanation given by the Appellant as to his disappearance i.e. that he was at the military barracks all along does not wash. If he was at his place of work, why didn't he report to his superiors who even recorded that he was absent without leave? It was clear to this court that the Appellant was at the time a fugitive from justice. The appeal against conviction on that count similarly lacks merit and is hereby dismissed.

As regard sentence, the Appellant is on firmer ground. It was evident to the court that the Court Martial did not take into account the period that the Appellant was in lawful detention at military facilities before his trial by the Court Martial. Taking into account the period that he was in pre-trial detention, this court is of the considered opinion that the custodial sentence that was imposed by the court martial was harsh and excessive in the circumstances. In the premises therefore, this court sets aside the custodial sentence that was imposed by the Court Martial and substitutes it with a sentence of this court. This court orders the military police to release the sum of Kshs.100,000/- that it is holding as an exhibit to the complainant. This is just compensation to the complainant. The Appellant had served two months in prison before he was released by this court on bail pending appeal. This court holds that the total period that the Appellant was in pre-trial custody and in prison after his conviction is sufficient punishment. The Appellant's custodial sentence is therefore commuted to the period served. The other orders issued by the Court Martial demoting the Appellant to the rank of Senior Private and dismissing him from the Kenya Defence Forces shall stand. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF MAY 2019

L. KIMARU

JUDGE