

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.2 OF 2016

J M M APPELLANT

REPUBLIC RESPONDENT

The Appellant, J M M was charged with **desertion** contrary to **Section 74(1)(a)** as read with **Section 74(2)(e)** and **Section 74(3)(b)** of the **Kenya Defence Forces Act, 2012**. The particulars of the offence were that the Appellant, being a service member of the Kenya Defence Forces, and being subject to the **Kenya Defence Forces Act**, deserted from duty without permission and was absent for a continuous period of 214 days from 2nd May 2014 to 2nd December 2014, an act he knew or ought to have known constitutes 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. He was sentenced to serve nine (9) months imprisonment. He was further dismissed from the Kenya Defence Forces. Being aggrieved by this decision, the Appellant lodged an appeal to this court.

During the hearing of the appeal, it became apparent to the court that the only issue for determination by this court was in regard to whether the Appellant was in control of his mental faculties at the time of his desertion and at the time of his trial. According to Mr. Were, the Appellant's advocate, the Appellant was suffering from a mental disease at the time it is alleged that he deserted from duty. This fact was confirmed by the medical report which was prepared by the military doctor. He submitted that the Court Martial ought to have interrogated whether the Appellant had the mental capacity to commit the crime that he was charged with. He explained that the Appellant was insane at the time and therefore could not bear any criminal liability. As regard sentence, he submitted that the same was harsh and was not proportionate to the crime. He urged the court to allow the appeal. Ms. Aluda for the State opposed the appeal. She submitted that the issue of the Appellant's mental state at the time of commission of the crime was raised as an afterthought and should be dismissed. She submitted that the appeal had no merit and should be disallowed.

As stated earlier in this judgment, this appeal turns on one issue only: whether the Appellant was in a mental state to appreciate the fact that he had committed an offence. The Appellant was charged with an offence of desertion from duty. According to the evidence adduced before the Court Martial, the Appellant was given permission by his superiors to be away from work from the 14th to 20th April, 2014. The Appellant was required to return to work on 21st April 2014. He did not return to work. He returned to work briefly on 1st May 2014 then left on 2nd May 2014. According to his superiors, he did not return to work until 2nd December 2014. There was evidence from the relatives of the Appellant that suggested that they made effort to contact the Appellant's superiors in the intervening period to explain to them the fact that the Appellant's absence was occasioned by ill health.

“The service member has been well until August 2013 when he lost his father to ‘sudden death’. Thereafter, he reportedly began ‘not being himself’, apparently ‘got disinterested with work’, ‘withdrew from people’, became often forgetful, and would sleep ‘very poorly’. The symptoms apparently worsened in May 2014. He was seen in a local facility and offered psychotherapy. He was later referred to a medical facility and later to a psychiatrist (apparently authentic medical reports were availed). The service member is the 8th in a family of 9. He has a heavy genetic loading of mental disorders (maternal grandmother and 3 paternal cousins). He is married with 1 child. He denied any addiction to substances.”

This court has carefully considered the facts of this case. Having found that the Appellant lacked mental capacity to have committed the offence, the appeal has merit and shall be allowed. This court anxiously considered whether the right course of action would be to remit the case to the Court Martial to determine the question of the mental capacity of the Appellant. However, taking into account that the Appellant has

already been dismissed from the Kenya Defence Forces, the order that commends itself to this court, is to allow the appeal, quash the conviction, set aside the custodial sentence that was imposed upon the Appellant but uphold the decision of the Court Martial to dismiss the Appellant from the Kenya Defence Forces. It is apparent that taking into account the Appellant's mental medical history, he may not be suitably employed by the Kenya Defence Forces. He shall however be entitled to be paid his terminal benefits. It is so ordered.

L. KIMARU

JUDGE