



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.52 OF 2014

SAMUEL ELIMA SABUNI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Samuel Elima Sabuni moved this court by way of revision seeking orders of this court to revise the judgment of the Court Martial passed on 20th March 2014 wherein he was found guilty of two (2) counts of **being absent without leave** contrary to **Section 75(1) (a)** of the **Kenya Defence Forces Act**. In respect of the 1st Count, the particulars were that on 5th July 2013, the Applicant absented himself without leave from his post at Recruits Training School at Eldoret and returned back on 25th September 2013. The particulars of the 2nd Count were that on 30th September 2013, the Applicant absented himself without leave from his post at the Recruits Training School at Eldoret until his apprehension on 23rd November 2013. The Applicant was sentenced to serve one (1) year imprisonment in respect of the 1st count and sentenced to serve one and a half (1^{1/2}) imprisonment in respect of the 2nd count. The sentences were ordered to run concurrently. In addition, the Applicant's rank was reduced from the rank of corporal to that of private. He was further ordered dismissed from the armed forces.

In his letter seeking the revision of judgment and the sentence, the Applicant stated that the Court Martial that convicted him was incompetent in that the Director of Military Prosecution had not complied with **Section 213(6)** of the **Kenya Defence Forces Act**. He complained that there was no evidence upon which the Court Martial could have found him guilty. He took issue with the fact that he had been referred to the Court Martial without first being called upon to choose whether he should be subjected to a summary process by his Commanding Officer as provided under **Section 157** of the **Kenya Defence Forces Act**. The Applicant was aggrieved that he had been subjected to Court Martial yet at the time of the alleged offence he was no longer a member of the Armed Forces, his contract having expired. He challenged the assertion by the prosecution that his contract had automatically been renewed due to the then Operation Linda Nchi because he was not subjected to medical examination before his re-engagement. The Applicant asserted that he had resigned from the Armed Forces upon the expiry of his contract period and therefore to subject him to a Court Martial contravened his rights of fair trial. The Applicant was of the view that if all these circumstances were taken into account, he, firstly would not have been charged before the Court Martial, and secondly, if he had been charged as he was, he ought to have been acquitted or if not, given a non-custodial sentence.

The parties to this application urged the court to write its Ruling on the basis of the submission they had filed before the court. There are several issues that emerged for determination by the Court. The first issue is whether the Applicant was a member of the Kenya Defence Forces at the time that he was tried. According to the Applicant, his period of service to the Armed Forces expired on 17th July 2012 when his second nine (9) period of contract ended. The Applicant argued that upon the expiry of his contract period, and due to the fact that the country was at war in Somalia, his contract period was extended for a further one (1) year. In February 2013, he wrote to his superiors indicating that on expiry of his contract period that was extended, he did not wish to have the period renewed. It is his defence therefore that at the time it was alleged that he was absent without leave from his place of employment, he had actually left the Armed Forces and was awaiting for his retirement papers to be processed. This position was disputed by the Kenya Defence Forces. The prosecution called witnesses who produced the employment record of the Applicant which showed that his contract period was actually extended for a further period of three (3) years from 17th July 2012. That period was to have expired on 17th July 2015. The prosecution asserted that at the time the Applicant was arraigned before the Court Martial, he was in actual fact a member of the Kenya Defence Forces.

On re-evaluation of the evidence, this court agrees with the prosecution that indeed the Applicant was a member of the Kenya Defence Forces at the time that it was alleged that he absented himself without leave from his post. Although there was evidence that the renewal of the Applicant's contract for a further period of three (3) years may have been made without all the procedures being followed, including a mandatory medical examination of the Applicant, this court has no doubt in its mind that the Applicant was a member of the Kenya Defence Forces at the time that he was arraigned before the Court Martial. The Applicant's claim that he had resigned from the Kenya Defence Forces

six (6) months prior to his alleged absencing himself without permission is not supported by any evidence. In any event, the prosecution is able to establish that the Applicant did not deliver the letter of resignation to the military hierarchy. If that had been done, he would have produced evidence of such delivery. This court formed the view that the Applicant was merely making allegations that he could not substantiate.

The second issue on whether the decision to arraign him before the Court Martial was procedural, the Applicant argues that he was not given the right to be tried summarily by his commanding officer as provided under **Section 157** of the **Kenya Defence Forces Act**. **Section 157** of the **Kenya Defence Forces Act** provides as follows:

“(1). Before dealing with a charge summarily, the commanding officer or appropriate superior authority, as the case may be, shall give the accused the opportunity to opt to be tried by a court martial.

(2) If an accused opts to be tried by a court martial, the commanding officer or appropriate superior authority, as the case may be, shall refer the charge to the Director of Military Prosecutions who shall be the final authority in deciding whether the charges should be dealt with by the court martial or be referred back to summary trial.

(3) If two or more charges against an accused are to be heard summarily together, an option stands for trial by a court martial in respect of any of the charges.

(4) If, after the start of a summary hearing –

(a) a charge is amended;

(b) a charge is substituted for another charge; or

(c) an additional charge is brought,

this sub-section shall apply to the amended, substituted or additional charge as if the reference in sub-section (1) to dealing with a charge summarily were a reference to proceeding with the hearing.

(5) If the accused refuses to make an option, that refusal shall be treated as an option to be tried by a court martial and the accused shall be so informed.

(6) The accused may withdraw an option to be tried by a court martial at any time before the court martial is convened.”

In the present case, from the evidence adduced before the Court Martial by the prosecution witnesses, it was clear that the Commanding Officer of the Applicant abdicated his responsibility by failing to explain to the Applicant the option that he had to be tried summarily before him. The offence that the Applicant was charged with, falls among the category of offences that can be tried summarily before the Commanding Officer. The Commanding Officer's explanation that he referred the case to the Court Martial because of the prevalence of the offence, is pedestrian and clearly shows an officer who was not keen on performing his statutory duties. By referring the Applicant to the Court Martial, the Applicant was denied other options which he could have benefited from including a less severe punishment than he was ultimately sentenced by the Court Martial. The Applicant therefore has a case when he argues that he was denied an opportunity to be summarily tried by his Commanding Officer who, in the scheme of things, would have been aware of the Applicant's circumstances better than a Court Martial. The issue for determination by this court therefore is what should be done to remedy the Kenya Defence Force's breach of the Applicant's right to be tried summarily before his Commanding Officer. This court is of the view that the Applicant's remedy will lie in the sentence that shall be meted out by this court.

As regards the merit of the case, this court cannot fault the verdict reached by the court martial in finding that the Applicant had absented himself without leave in the periods that appeared in the charge sheet. This court takes judicial notice that the country is at war in Somalia and therefore active members of the Armed Forces may not be discharged until the exigency created by the war in Somalia is resolved. The prosecution established, to the required standard of proof beyond any reasonable doubt, that the Applicant, upon being granted leave to be lawfully absent when he went on his annual leave, failed to return to his post when he was required so to do. Upon his return, he stayed for a few weeks before he again absented himself without leave of his superiors. He was arrested a few weeks later and arraigned before the Court Martial.

The prosecution witnesses who testified before the Court Martial established that indeed the Applicant had no justification to absent himself without leave from his post. This court finds no merit with the Applicant's assertion that he was entitled to be away because he was not then a member of the Armed Forces. The custodial sentence meted out on the Applicant was lawful. This court sees no reason to interfere with it.

The other grounds put forward by the Appellant have no merit as they do not touch on the substance of the issues that had been placed before the Court Martial for determination.

As regards the order reducing the rank of the Applicant from that of corporal to private, and the order further dismissing the Applicant from the Armed Forces under **Section 181** of the **Kenya Defence Forces Act**, this court is of the view that since the Applicant's right to be tried summarily was breached by his Commanding Officer, the order that commends itself to this court is the setting aside of the order reducing the rank of the Applicant and the further order dismissing the Applicant from the Kenya Defence Forces. Instead, this court orders that the Applicant shall be discharged from the Kenya Defence Forces and be paid his terminal dues for the period that he served as a member of the Kenya Defence Forces. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF JUNE 2018

L. KIMARU

JUDGE