



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
COURT MARTIAL APPEAL NUMBER 9 OF 2006

ROBERT OWINO GWAYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of Court

Martial Case No. 3 of 2006 at the Langata Barracks,

Nairobi delivered on 25th September, 2006).

JUDGMENT

BACKGROUND.

Robert Owino Gwayi, the Appellant herein was charged with the offence of desertion contrary to Section 31(1) of the Armed Forces Act. The particulars of the charge were that at the Department of Defence (DoD) Camp Administrative Unit(CAU), Nairobi on 29th May, 2005, at 0800hrs was absent without leave until 16th June, 2006 at about 1700hrs when he rejabbed at the DoD CAU headquarters.

At the conclusion of the trial, the Appellant was found guilty, convicted and sentenced to eighteen months imprisonment. He was further dismissed from the armed forces. Being dissatisfied with that court's decision he has filed this appeal. *His grounds of appeal are that the court martial erred in finding that the prosecution had proved their case beyond reasonable doubt and that the same court erred in failing to give reasons for the judgment, conviction and sentence.*

SUBMISSIONS.

The Appellant was represented by learned counsel, Mr. Aluk while the Respondent was represented by learned State Counsel, Ms. Nyauncho. Both parties filed written submissions which they entirely relied on. On behalf of the Appellant, four issues were raised for determination; Firstly, whether the Appellant was AWOL (Absent without leave). Secondly, whether the Appellant was discharged from duty. Thirdly, whether the Appellant was served with an extension of service notice and finally, what the Appellant is entitled to in this appeal. Counsel submitted that the prosecution needed to establish that although the Appellant was on termination, he intentionally absented himself from duty after service of notice of extension of service.

He submitted that the prosecution witnesses had actually testified that the Appellant was entitled to leave and was in fact proceeding on leave. He submitted that according to military procedures, 90 days after the Appellant was AWOL a publication was supposed to be made in the unit's Part II Orders declaring him a deserter which never occurred. Further, the abseight (a letter explaining absence without official leave) with regard to the Appellant was produced after 7 days rather than the mandated 8 days. This showed that the elements of desertion were not proved. He submitted that the prosecution demonstrated that the Appellant was to go on terminal leave and discharge and the same was never cancelled. Further, no extension of service notice was served upon him.

Counsel submitted further that as per the Armed Forces Standing Orders, Para. 36, a board of inquiry was supposed to be formed to look into the absence of the Appellant after 21 days elapsed which did not occur. In any case, the leave was properly recorded which was a testament that the Appellant did not desert his duties. Moreover, there was no proof that the Appellant was notified of the extension of service. The cases of **DPP v. Woolmington[1935] UKHL 1** and **Miller v. Ministry of Pensions[1947] 2 All ER 372** were cited in demonstrating that the prosecution did not prove their case beyond a reasonable doubt.

Miss Nyauncho submitted that the prosecution proved its case beyond a reasonable doubt. She submitted that the evidence on record showed that the Appellant was not cleared to proceed on leave by his commander as a matter of a requirement which meant that he was absent without official leave. She submitted that even though the Appellant's discharge instructions were published this did not constitute authority for the Appellant to proceed on leave; after all leave was a privilege and not a right. Further, his clearance certificate was also not signed which meant that he could not commence leave.

She further submitted that the camp commandant extended the Appellant's term of service for 180 days because he was under investigations. She submitted that when this was done the Appellant was still in the camp and he disappeared a week later. She further submitted that a board of inquiry was convened after the Appellant's absence and that it was published in Part II Orders after which the Appellant declared a deserter. She submitted that the fact that the abseight was raised after seven instead of eight days had no effect on the Appellant as this was a purely administrative issue intended to stop the Appellant's pay. She submitted that this neither prejudiced the Appellant nor exonerated him from the offence. Miss Nyauncho was candid that the Appellant absented himself from service for a period of more than 90 days and she therefore urged the court to dismiss the appeal.

EVIDENCE.

PW1, Maj. Alex Muiti Nteere was a record keeper who produced a FF15A Form to show that the Appellant was enlisted on 14th August, 1981 in the Armed Forces and was due for discharge on 9th February, 2005. He also produced an authority for discharge that showed that the Appellant was entitled to annual privilege and terminal leave. The privilege leave was to start on 24th April, 2005 and end on 15th May, 2005 while his terminal leave was to begin on 16th May, 2005 and end on 13th August, 2005. These instructions had been sent to the commandant for execution and the leave published in Part II Orders. He testified that the orders were amended and the date changed to 24th April, 2005 instead of 24th May 2005. He produced the Appellant's clearance certificate to show that the same was not filled by the chief of the branch, the document clerk, the adjutant, the camp administrative officer and the commanding officer as a requirement before he proceeded on leave.

He testified that the entries in the form FF 15 A were canceled when the Appellant was given a 180 days extension of service in accordance with Part II Orders dated 27th May, 2005. In cross examination, he stated that the extension of service was not executed as the Appellant was absent but that his discharge instructions were canceled.

PW2, Cpt. Hillary Kipkurui Kibet was an administrative Officer/ Adjutant at DOD CAU. As adjutant his duties included record keeping, monitoring correspondence and any other duties delegated by his commanding officer. He testified that he received the Appellant's discharge instructions which he forwarded to the commandant, DOD. He also identified the Part II orders allowing the Appellant to

proceed on privilege leave after the completion of his colour service. He testified that he signed the orders after they were prepared by the clerk. The orders indicated that the Appellant's discharge was made on 13th August 2005. He also identified a letter dated 24th May, 2005 originating from the commandant, DOD CAU seeking authority to extend service of the Appellant dated 24th June, 2005. He insisted that the Appellant had absented himself from duty without leave.

In cross examination, he admitted that all the necessary documents and preparations for the Appellant's retirement had been completed and that the Appellant had been paid road transport expense. The same was paid for a one way trip as the Appellant was not expected to report back. He stated that he prepared the leave payment before the discharge was issued.

PW3, Lt. Col. S. N. Nyaga was a staffing officer 1 at SAD. He identified the Appellant's clearance certificate but added that he did not sign it as he was aware of the ongoing investigations.

PW4, Maj. Luka K. Kuto took over administration duties after PW2. He recalled that on 16th June, 2006 he was informed by one WOII, Kamakili that the Appellant had reported for duty. He informed the relevant offices and was instructed to put the Appellant under closed arrest. He then reported that the Appellant had rejabed. Thereafter, the commanding officer acting as commandant convened a board of inquiry and appointed an officer to compile an abstract of evidence to be forwarded to the DOD. He corroborated the evidence of PW2 to the effect that the Appellant deserted duties without leave.

PW5, Col. R. K. Mbithi was the acting Commandant, DOD CAU Camp as at May, 2005. He testified that he ordered the extension of service of the Appellant after he was informed that there were investigations against him that were going on. At the time, the Appellant was at the camp but a week later he absented himself.

PW6, Maj. John Kamau Kinuthia, compiled abstract evidence against the Appellant. He found out that the Appellant absented himself from 29th May, 2005 and rejabed on 16th June, 2006. The Appellant was previously attached to HQ KA SAD but was placed under DOD CAU due to the ongoing investigations against him. He testified that leave period stopped running once the AWOI was raised.

When he was put on his defence, the Appellant gave a sworn statement. He did not call any witness to support his defence. He testified that he took his terminal and privilege leave from 24th April, 2005 to 13th August, 2005. The same was to run for 122 days and was published in Part II orders. The orders were signed by Cpt. Kipkurui. He was accordingly paid his leave transport allowance after it was authorized by the adjutant. He showed a QR card on which leave was entered. He stated that leave clearance certificate was only a requirement when one was proceeding on discharge. One Lt. Col. Nyaga declined to sign it until he was certain that he had been cleared of all debts and liabilities. He therefore left COL. Nyaga to process it through other stages. He stated that no pass was required for an officer proceeding on discharge. Further that when he returned on 16th June, 2006, he wanted to receive his terminal dues. On extension of service, he testified that he was not served with any letter to that effect. He had duly considered himself as a retired officer. He urged the court to allow the appeal.

DETERMINATION.

The main area of contention revolves around the Appellant's contention that he was on terminal and privilege leave awaiting his discharge from the military against the Respondent's contention that he was not granted the leave in question. Further to that, the Respondent asserted that his term of service was actually increased by 180 days. It then behooves this court to clearly set out key issues and events prevailing before the dismissal from service of the Appellant.

It is uncontested that as per Part II Order S/No. 1/05, dated 19th January, 2005, the Appellant's discharge was approved and he was granted RA/RTES from 24th May, 2005 to 13th August 2005, both days inclusive. Further, Part II Orders S/No. 08/05 amended this initial order and changed the date from 24th

May, 2005 to 24th April, 2005. It is also clear that as per Entry 49 in his record he had been posted on the Y 1 list on 24th May, 2005 and that with effect from that date he would be proceeding home for 22 days of privilege leave and 90 days terminal leave pending his discharge on 13th August, 2005. The information as to his discharge effective of 13th August, 2005 was indicated in his certificate of service which also indicated that the reason for his discharge was completion of colour service. It is also uncontested, as shown in a claim for RTE/Ration allowance form, that the Appellant was paid travel expenses on 21st April, 2005 to travel one way.

Further, it is uncontested as per Part II Orders S/No. 14/05 dated 27th June, 2005 that his service was extended based on the authority of KA/52543/RECS dated 23rd June, 2005. There was also a letter dated 24th May, 2005 seeking the extension of the Appellant's service. In addition, there was also, as per Part II Order S/No. 11/05, a strength decrease canceling the entire occurrence, that was published in S/No. 01/05. There was further the abseight letter dated 21st July, 2005 that indicated he was abseight with effect from 4th June, 2005. Finally, there was a rejab notice that indicated that he rejabed on 16th June, 2006.

Having laid down the uncontested issues I narrow down the contentious issue which is whether the Appellant was granted leave in light of his forthcoming discharge from the military. The prosecution at the trial submitted that the clearance certificate which ought to have been filled was not completed by all the officers who ought to have done so. On that basis the Appellant could not proceed on leave. The Appellant contended that after he filled his forms he left them with the adjutant and expected them to have been completed when he returned to receive his terminal dues. This was the basis on which the prosecution submitted that leave was not a right but a privilege. I feel that this is a matter that can only be decided if this court were dealing with a labour dispute.

Back to the core issue, I find it undisputed that the Appellant had 122 days of leave from 24th April, 2005 which were approved as per Part II Orders S/No/ 01/05 dated 19th January, 2005, as amended by Part II Order S/No. 08/05, which approved his RA/RTES. That being the case, it is clear that his discharge and leave were clearly approved. The prosecution's case was that there were investigations pending against the Appellant and this led his commanding officer to extend his service on 24th May, 2005 so as to ensure completion of investigations. This was happening a month after the Appellant was supposed to begin his leave. The Respondent countered this point by submitting that the Appellant was still at the camp given that his clearance certificate which would enable him to begin his leave was yet to be filled by all the officers who were required to fill it.

A look at the certificate clearly shows that five out of twenty eight(28) designated signing officers did not sign it. The Appellant on the other hand left the certificate with the adjutant who refused to sign it. But since he was running out of cash to run his expenses, he proceeded on leave and hoped to collect the certificate when he returned to collect his terminal dues. Although he did not begin the leave on the designated date, 24th April, 2005, what was material was for the prosecution to demonstrate that they served the Appellant with extension of service notice; and that the Appellant being aware of the extension, deliberately failed to resume duty. This onus, unfortunately, was not discharged. The prosecution failed to show that they served the extension notice. They also failed to establish that the Appellant was in the camp on 24th May, 2005 as alluded by the Respondent.

In the circumstances, it is abundantly clear that the Appellant did not absent himself from duty but proceeded on leave as set out in Part II Orders S/No. 01/05. Although not all designated officers signed the discharge certificate, the fact that he was paid the one-way travel allowance meant that he was not expected back in the camp. This mitigates against any assertion that that he deserted duties or was absent without leave.

In the result, this appeal succeeds. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free. I order that he be reinstated back to service in the rank of WOII with full benefits of service. All his decorations, if any, be restored.

DATED AND DELIVERED AT NAIROBI THIS 15TH MARCH, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence:

1. Mr. Omari h/b for Mr Ojieda for the Appellant.
2. M/s Nyauncho for the Respondent.