



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
COURT MARTIAL CRIMINAL APPEAL NO. 1 OF 2017

CPT. BENSON MACHARIA MURIITHI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence by the Court Martial at Kahawa Garrison, Court Martial Case No. 8 of 2016 delivered on 20th January, 2017).

JUDGEMENT

The Appellant, Benson Macharia Muriithi was charged in the first count with the offence of stealing contrary to **Section 91 (1) (a)** of the **Kenya Defence Forces Act**. The particulars were that between March and April 2011 being deployed as a paymaster for Kenbatt 19 in South Sudan, stole sustenance imprest meant for Kenbatt 19 and Sector Headquarters amounting to Ksh 4,475,000 which he collected from Department of Defence CAU.

In count II, he was charged in the alternative with the offence of conduct prejudice of good order and service discipline contrary to **Section 121** of the **Kenya Defence Forces Act**. The particulars are that between March and April 2011 being deployed as a paymaster for Kenbatt 19 in South Sudan failed to surrender temporary imprest amounting to Ksh 4,475,000.

In count III he was charged with the offence of stealing contrary to **Section 91 (1) (a)** of the **Kenya Defence Forces Act**. The particulars were that between February and April 2011 being deployed as a paymaster for Kenbatt 19 in South Sudan stole self-allotment funds for the month of April and May 2011 amounting to Ksh 7,305,000.

In count IV, he was charged with disobedience of standing orders contrary to **Section 77 (1)** as read together with **Section 77 (2)** of the **Kenya Defence Forces Act**; Standing order Kenbatt 19 camp Para. 22 (f). The particulars were that on the 11th January, 2011 as paymaster for Kenbatt 19, without the authority of the Commanding Officer applied for Kenbatt 19 together with Sector Headquarters alongside HRDC self- allotment funds amounting to Ksh 7,305,000.

In count V he was charged with desertion contrary to **Section 74 (1)** as read with **Section 74 (2) (e)** and **S. 74 (3) (b)** of the **Kenya Defence Forces Act**. The particulars were that on the 11th of April, 2011 at Rumbek team site in South Sudan, as paymaster of Kenbatt 19 in South Sudan absented himself without leave until 8th December, 2015 when he was arrested at his home in Kathiga area by Military Police an act he knew or ought to have known constituted an offence. Total time absent was one thousand seven

hundred and two days (1702 days).

The Appellant was arraigned before the Court Martial court and a trial conducted at the end of which he was convicted in all five counts. He was sentenced to serve three years which would run concurrently. In addition, he was dismissed from the Kenya Defence Forces. Being dissatisfied by the decision he lodged the instant appeal setting out the following grounds of appeal.

- 1. That the members of the court martial erred in convicting the Appellant for desertion while he was defectively charged.**
- 2. That the members of the court martial erred in convicting against the fact that no soldier complained of having not been paid.**
- 3. That the members of the court martial erred in failing to notice the discrepancies in the evidence of prosecution witnesses.**
- 4. That the documents availed by the Principal Account Controller failed to show the exact funds lost.**
- 5. That the prosecution failed to call key witnesses to prove the Appellant indeed stole the funds.**
- 6. That the members of the court martial failed to note that the *mens rea* of the offence of desertion was not noted in the charge sheet.**
- 7. That the members of the court martial erred in convicting the Appellant of the offence of disobeying the standing orders when he in fact had authority to travel to Nairobi.**
- 8. That the members of the court martial erred in convicting the Appellant notwithstanding the fact that his constitutional rights provided for under Section 140 of the Kenya Defence Forces Act had been breached.**

The Appellant also referred to the cases of **Jeffrey Okuli Pepela vs. Republic (2015) eKLR** and **David Mwangi Njoroge vs. Republic (2015) eKLR** in buttressing the submission that the charges of desertion and disobedience of standing orders were not proved accordingly.

The Respondent, represented by learned State Counsel Ms. Aluda, opposed the appeal. She submitted that the Appellant was entrusted with money to pay the troops of Kenbatt 19 and had signed for the alleged missing money; Ksh 6,735,000/- and interest of Ksh 4,475,000/-. Counsel submitted that PW1 confirmed that the Appellant was the paymaster and he was given money at the Department of Defence in Nairobi in March, 2011 but disappeared until the date of his arrest in December, 2015. Learned counsel added that the charge sheet was properly filed and drafted. She submitted that the Appellant signed for interest without the authority of the Commanding Officer and contrary to the **Kenbatt 19 Standing Orders Paragraph 22 (f)**. She referred to the evidence of PW4 who confirmed that the Appellant did not pay the soldiers and in fact switched off his phone when they tried to reach him. PW5 testified that the Appellant disappeared after being paid and that is why an Absent Without Leave signal (AWOL) was raised. Further, an audit also proved that the money had been lost. Counsel added that the alleged breach of the Constitutional rights of the Appellant by being kept in custody for more than twenty four hours did not render the trial a nullity. She submitted that the Appellant claimed to have been arrested by South Sudanese soldiers and having lost money he ought to have reported the same. His failure to report the loss meant that he knew where it was. On the issue of jurisdiction, counsel submitted that it was clear that the Appellant signed for the money from DOD as was his duty as paymaster, thereby ruling out any claims that the Court Martial did not have jurisdiction.

This is the first appellate court whose duty is to reanalyze and reevaluate the evidence on record and come up with its independent decision but take due consideration that it has not had the opportunity to

hear the evidence and see the demeanour of the witnesses. See **Okeno v. Republic [1972] EA32.**

The prosecution called a total of 14 witnesses. **PW1**, Col. P. M. Njiru 18629 was the Commanding Officer of Kenbatt 19 between January 2010 and August 2012. He confirmed that the Appellant was paymaster of Kenbatt 19 between January 2012 and April 2011 and that his duties included clearing imperests he was accounting for, demanding similar imperests based on letters issued by the Commanding Officer, paying other ranks of officers as well as keeping safe custody of both public and non- public funds. PW1 went on leave on the 3rd of April, 2011. On the 13th of April, 2011 while on leave he got a call from his deputy Major Emathe(PW2) that the Appellant had requested for permission to go on pay duties in Rumbek as well as sort out some logistics. He never paid the soldiers at Rumbek but went missing. PW1 instructed PW2 to report to the contingent headquarters and constitute a board of inquiry to investigate the disappearance of the Appellant and if there was indeed any missing money. It was found out that a large sum of money was missing. They sent their report to Headquarters who formed another Board of Inquiry that discovered that in January, 2011, the Appellant requested for funds without the authority of PW1. PW1 produced Exhibit 14 dated 14th of February, 2011 being document for application for temporary imperest by Captain Macharia for Ksh 4,475,000 for the purposes of sustenance imperest for sector headquarters for January, February and March. It was approved on 25th of February, 2011 but was not surrendered to the unit by Captain Macharia; Exhibit 11 dated 29th of March 2011 written to Colonel in charge of officers seeking Ksh 760,000 for self-allotment funds and Exhibit 18 showing acquisition of funds by PW1 before leaving camp to record a statement in December, 2015 with the Military Police.

PW2, Lieutenant Colonel Francis Elkoni Emathe was the Mine Awareness Officer at Kenbatt 19 as well as the 2nd in Command. While PW1 was on leave, PW2 assumed the role of the Commanding Officer. He testified that on the 8th of April, 2011, the appellant went to the office to collect funds to pay officers at Rumbek. He was to return on the 14th of April, 2011. He left on Sunday, the 11th of April, for Rumbek. Major Moyo was informed that the Appellant had not paid his soldiers but he (appellant) had promised to do so on 15th of April. PW2 raised an (AWOL), Exhibit 12, when the Appellant failed to appear on the 14th as he was supposed to. On the 19th of April, 2011, PW2 raised a document to stop the salary of the Appellant after he had been absent for 8 days. On the 14th of April, 2011 while under instructions of the Contingent Commander, PW2 together with Major Mutunga the Education Officer and the deputy of Captain Muriithi WO2 Mbigi broke into the Appellant's office. They found Ksh 395,739 in the pay office.

PW3, Lieutenant Colonel Richard Angaka was the Colonel in charge of Pay Defence Headquarters. He confirmed that in February 2011, the Appellant went to collect self-allotment funds for service members of Kenbatt 19 amounting to Ksh 6,550,000 and Ksh 755,000. He also exhibited the imprest warrants by which the Appellant collected the money. He stated that the Appellant ought to have surrendered the imprests as an indication that it was used for the right purpose.

PW4, Major Said assumed the duties of officer commanding towards the end of March 2011. His testimony was that the Appellant and one Captain Langat were charged to pay the soldiers at Rumbek. On Wednesday 13th of April, 2011, they went to pick the Appellant from his hotel but he had since left for Kenya as his traced tickets and flight manifesto showed.

PW5, Major John Kilonzo was the Quarter Master at Kenbatt 19 in charge of logistics and general stores as well as the Officer Commanding Headquarters Squadron. He signed the imperest from the Appellant after he claimed to have talked to the Commanding Officer. The Appellant did not return with the imperest after 3 days as expected.

PW6, Major Frederick Njoli was the Staff Officer 2 at Army Headquarters responsible for records of the staff. He confirmed that the Appellant enlisted on the 1st of April, 2003 up until he was attached to Kenbatt 19 from 28th of November, 2011. PW6 confirmed that the Appellant was absent without leave on the 14th of April, 2011 and an abseight report raised 8 days later. The Appellant was also declared a

deserter on the 5th of May, 2011 after 90 days of absenteeism.

PW7, Major George Koitamet Ngoshosh was the unit adjutant for Kenbatt 19 whose duties were to act as records officer and administrator of personnel. He confirmed that during the month of April, the Appellant left Wau to Rumbek on a regular UN flight to go and pay soldiers their dues. On 14th of April, he was informed by Major Emathe that he had gone missing.

PW8, Corporal Rufus Njiru alongside Superintendent Koech were tasked with the arrest of the Appellant. They arrested him in his village.

PW9, Major Erick Nzioki Kitusya was the Staff Officer 1 at the Finance Headquarters Kenya Army responsible for Finance, interpretation of budget policies for the headquarters of the Kenya Army, formation and development of all budgets, ensuring prompt payment to contractors and general administration of Kenya Army central funds. He confirmed that the Appellant signed for Ksh 3,000,000 in May 2010 to establish a canteen in South Sudan. In September the same year, the Appellant paid back Ksh 1,000,000 to the Kenya Army Central fund which was a refund of the profit at the end of the first quarter. The board of inquiry found that the Appellant disappeared with Ksh 2,985,980 as well as amounts deposited by the Protestant Church and the Roman Catholic Church amounting to Ksh 565,296.22 and Ksh 34,569.70 respectively. Collectively, the Appellant owed the Kenya Army Central Fund a total of Ksh 3,585,845.92. The Kenya Army commander directed that the amount be recovered from his salary hence a Ksh 200,000/ deduction in June, 2011.

PW10, Police Constable Martin Kitayi a forensic document examiner examined some documents on 3rd June, 2010 so as to ascertain the true signature of the Appellant. He then produced a report in this respect as P.Ext22.

PW11, Major George Olekatumbe was the Staff Officer 2 in charge of financial headquarters Army. He confirmed that Ksh 2,000,000 was collected from the canteen on the 2nd of June 2010.

PW12, Major Thomas Nyagando was the officer in charge unit Headquarters Company. In April 2011, PW2 instructed him to go sign for soldier's self-allotment funds and daily subsistence funds to replace the stolen funds; this amounted to Ksh 15,200,000/ which covered the months of April and May 2011.

PW13, Edward Njoroge was the Principal Accounts Controller. He testified that he received a payment voucher for payment of Kenbatt 19 officer's allowances for Ksh 755,000 transferred to Paymaster DOD CAU for onward transmission to Paymaster Kenbatt 19, Exhibit 15. The money was not accounted for by the Appellant. He also paid another voucher(Ext 16) for Ksh 6,550,000 which was also unaccounted for by the Appellant. He testified that on 28th of February, 2011 he received another voucher (Ext17) for sustenance imperest for Ksh 4,475,000 which was also not accounted for. He however could not confirm that Ksh 15,200,000 was paid out to compensate for the money lost.

PW14, Captain Anthony Kungu, a military police officer commenced investigations on the 1st of January, 2016 as the investigating officer. He summed up the evidence of all prosecution witnesses.

Having considered the evidence and submissions by both the Appellant and the learned State Counsel, I find the main issues for determination to be as follows:

- 1. Whether the charges of stealing as framed were defective.**
- 2. Whether all the charges against the Appellant were proved beyond a reasonable doubt.**

On whether the charge sheet was defective, counsel for the appellant submitted that the charge sheet was defective since the appellant was charged with stealing under **Section 91 (1) of the Kenya Defence Forces Act** which defines stealing as;

1. A person subject to this act who steals commits an offence and on conviction-

(a) if by reason of the person's rank, appointment or employment or as a result of any lawful command the person, at the time of the commission of the offence, was entrusted with the custody, control or distribution of the thing stolen, is liable to imprisonment for a term not exceeding fourteen years or to lesser punishment: or

(b) is liable to imprisonment for a term not exceeding seven years or to lesser punishment

Counsel submitted that the appellant ought to have been charged under **Section 93 (3) (e)** of the **Kenya Defence Forces Act** which is duplicate of **Section 268** of the **Penal Code**. However, on perusal of the Kenya Defence Forces Act, it is clear that **Section 93** deals with destruction of property and not stealing. It is this court's deduction that the defence counsel meant to rely on **Section 91 (3) (e)** of the **Kenya Defence Forces Act** which provides thus;

(3) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he or she does so with-

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he or she may intend afterwards to repay the amount to the owner.

The appellant is said to have stolen funds which he acquired whilst working as a Paymaster of Kenbatt 19, funds which he only acquired by virtue of his rank as Paymaster of the camp. **Section 91 (1)** describes stealing in such a manner that is necessitated by someone who is of sufficient rank to carry out the stealing. The provision is clear that the person charged must have been entrusted with, or was in custody of, or distribution of the thing stolen. The case for the prosecution was that the money alleged to be stolen was taken by the appellant when he collected the sustenance imperest from the Department of Defence Headquarters in Nairobi but failed to remit the same to the soldiers at Rumbek. Their further case was that he knew that the money did not belong to him and the failure to utilize it for purposes it was intended and not accounting for it amounted to stealing. It is the obligation of this court to determine whether these elements of the offence of stealing were proved by the evidence adduced. The same will be demonstrated hereafter in this judgment. All the same, it is clear that the charges of stealing conformed to Section 91(1) of the Act and I accordingly hold that the charge sheet was not defective.

With regard to the duties of the Appellant as paymaster at Kenbatt 19, his duties included going to Kenya to clear some imperests he was accounting for in the mission area and demand similar imperests based on letters issued by the Commanding Officer. He was also responsible for paying other ranks and keeping safe custody of funds both public and non-public.

Of importance is to note is the circumstances under which the money was lost. The Kenya Defence Act expressly provides that the loss **must** be as a result of a lawful command to the person who steals. The Paymaster was bound by the orders of the Commanding Officer to execute whatever letters issued to him in respect of Kenbatt 19. This authority is based on **Kenbatt camp standing orders paragraph 22 (f)** which provides that;

“Expenditure of Public funds(imperest). No expenditure of imperest without authority from the Commanding Officer. The Commanding Officer is the only signatory for authority to draw public funds”.

This therefore means that the Appellant had authority to take the imperest but failed to give the troops of Kenbatt 19.

With regard to count 4, **Section 77 (1)** as read with **sub-section (2)** of the **Kenya Defence Forces Act** defines **disobedience of standing orders** as;

(1) A person subject to this act who contravenes, or refuses or fails to comply with, any provision

of any standing or routine orders, being a provision that the person is aware of, or might reasonably be expected to be aware of, commits an offence and shall be liable, on conviction by a court-martial, to imprisonment for a term not exceeding two years or any lesser punishment provided for under this act.

(2) For the purposes of subsection (1), “the standing or routine orders” means any order of a continuing nature, made for any formation or unit or body of service members, or for any command or other area, garrison or place, or for any ship train or aircraft.

The specific standing order in question that was disobeyed is **Kenbatt 19 camp standing orders Paragraph 22 (f)**, earlier mentioned.

On the 14th of January 2011, the Appellant applied for Ksh 6,550,000 as well as self-allotment funds of Ksh 755,000 from DOD CAU paid to him on the 2nd of February 2011. Both of these transactions totaled to Ksh 7,305,000 and the Commanding Officer had not signed for them. PW3 confirms receiving the signed letters that the Appellant claimed had been authorized by the Commanding Officer but had not. PW10, a document examiner confirmed that the signature on this specific letter was undoubtedly that of the Appellant. PW10 corroborated the testimony of PW3 that the Appellant fraudulently acquired the sum of Ksh 7,305,000 while disobeying the Kenbatt 19 standing orders since PW1 had not authorized the transaction. The Appellant having been the Paymaster had to pay the various officers at Rumbek. The money was lastly in the custody of the Appellant and he was nowhere to explain where he took it or how he utilized it.

However, it is trite that the evidence adduced must support the particulars of the offence. In this case, the amount stated in charge sheet as lost did not match the figures adduced in evidence. PW3 testified that the Appellant signed for Ksh 6,550,000 for service members and Ksh 7,550,000 for officers of Kenbatt 19 on the 18th of January 2011. This brings the amount to a total of Ksh 14,100,000. This amount does not reflect anywhere in the charge sheet. PW9 testified that the Appellant owed the Kenya Army Central Fund the proceeds of the canteen adding up to Ksh 2,985,980 as well as funds deposited by the Protestant Church Ksh 565,296.22 and the Roman Catholic Church Ksh 34,569.70 which sums up to Ksh 3,585,845.92. The Appellant was tasked with handling both public and non-public funds. More discrepancy is shown in the findings of the board of inquiry which discovered that the total missing amount from the pay office amounted to Ksh 8,192,060. This amount or the difference of the Ksh 395,739 do not reflect anywhere in the charge sheet and neither are they mentioned by the Prosecution in this respect. The prosecution also failed to give evidence showing that PW2 gave money or authority to the Appellant from the cash office to pay the officers at Rumbek. They also do not note the amount of money in question.

On the charge of desertion it counsel for the appellant submitted that the appellant did not have the relevant *mens rea* to commit the offence. *Mens rea* is defined in Black’s Law Dictionary as:

“The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime: criminal intent or recklessness.”

The offence of desertion is provided for under **Section 74 (1)(a), (2)(e) and (3)b of the Kenya Defence Forces Act** as under;

(1) A person who is subject to this act commits an offence if that person-

(a) deserts

(2) A person deserts if that person-

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

(3) A person who commits an offence under subsection (1), shall be liable upon conviction by a

court martial-

(b) to imprisonment for not more than two years, in any other case”

The Appellant absented himself from Rumbek team site in South Sudan from 11th April, 2011 without leave until 8th December, 2015 when he was arrested by Military Police in Kathiga Area. This came to a total of 1702 days. According to the Appellant, he left for Kenya to raise the money he allegedly lost at Juba Airport but did not bother to return to Wau or Rumbek which was his service area. This evidence was not contradicted by the prosecution who obtained his ticket to Kenya as well as the flight manifesto. It is clear that the Appellant was continuously away and intentionally for a total of 4 years 7 months and 27 days. The Appellant informed PW4 that he would be returning to Rumbek on Wednesday the 13th April, 2011 but he failed to show up.

I find that the Appellant willfully deserted the mission area on the premise he wanted to get Ksh 700,000/= he lost at Juba Airport, a claim that is frivolous since he never reported the money was missing and because he stayed away from the mission area for about 4 years. Such a period of time is unreasonable. As such, I conclude that he had the necessary *mens rea* to commit the offence as he had no intention of returning to his duty station.

The Appellant also submitted that the prosecution failed to call a key witness; the Deputy Paymaster as he would have provided some transparency with regard to the records retrieved from the Pay Office. He would also give a clear picture of when they broke into the Pay Office. Though I contend that the Deputy Paymaster would indeed have provided useful evidence, the information he would have given was adduced by PW13, the Principal Accounts Controller as well as PW1 and PW2.

Finally, the Appellant added that he was held in custody from the 8th of December 2015 up to the beginning of the trial on the 22nd of March, 2016. He submitted that this was a breach of **Section 140** of the **Kenya Defence Forces Act** which provides that;

1. The allegations against a person arrested under Sections 137 or 141 shall be investigated without unnecessary delay, and as soon as practicable thereafter either proceedings shall be instituted to deal with the allegations or the person shall be released from arrest.

2. Where a person who is subject to this act remains in custody for 8 days without being tried by a court-martial or dealt with summarily-

a. A special report of the necessity for further delay shall be made by the person's commanding officer to the Service Commander in the prescribed manner; and

b. A similar report shall be made to the Service Commander in the prescribed manner every 8 days until the court-martial sits or the offence dealt with summarily or the person is released from arrest.

It is clear that the Appellant was kept in custody for a period longer than the law provides. However, this would not render the trial a nullity. I say so because if an appellate court upholds a conviction, the period of incarceration after a charge can be deducted from a custodial sentence. Further, an accused would also seek redress in compensation from the person he thinks is liable for his detention for a period longer than acceptable under the Law.

In sum, I find that the prosecution did not prove its case beyond reasonable doubt in count 1,2,3 and 4. I however uphold the conviction against the charge of desertion (count V).Section 74 (1)(a) and 3(a)(i) of the Kenya Defence Forces Act No. 25 of 2012 provides that any person who commits the offence of desertion is liable upon conviction to life imprisonment or any lesser punishment if the offence was committed by the person while he was on active service or under order for active service at the time when he committed the offence.

Considering that the Appellant has been in closed custody for a period of 1 year 4 months and 25 days and the court martial having omitted to pass a sentence on the said charge of desertion, this court orders that he has served sufficient punishment and shall forthwith be set free. His conduct was however contrary to that expected of a person serving in the armed forces. I therefore order that he be and is hereby retired in public interest. It is ordered.

Dated and Delivered at Nairobi this 4th day of May, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

- 1. Mr. Mwalimu for the Appellant*
- 2. M/s Sigei for the Respondent.*