



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 246 OF 2010

ROBERT MORARA NYAKUNDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of the Principal Magistrate's Court at Maralal (Hon. A.K. Ithuku) dated the 26th April, 2012 in Criminal Case No.170 of 2011)

JUDGMENT

FACTS

1. The Appellant No.66737 SPTE ROBERT MORARA NYAKUNDI, a serviceman of the Armed Forces, was charged before the Court Martial in Case No.2 with the following offences alleged to have been committed under the **Armed forces Act, Cap 199, Laws of Kenya**:

(a) Charge: An act to the prejudice of the good order and service discipline contrary to **Section 68** of the Armed Forces Act.

Particulars: That at the Kenya Military Academy (KMA) Lanet on or about the night of 4/5 February, 2010 between 2000 hrs and 0545 hrs, while on guard duties at Kenya Military Armoury, he (the accused) lied about the movements and whereabouts of his sentry mate Spte Lule Onyango of Kenya Military Academy.

(b) Charge: Sleeping at his post when on guard duty contrary to **Section 22(1) (a)** of the **Armed Forces Act**.

Particulars: In that at the Kenya Military Academy (KMA) Lanet on or about the night of 4/5 February, 2010, between 2000 hrs and 0545 hrs, he (the accused) slept while on guard duties at his sentry post at the Kenya Military Academy Armoury.

- c. Charge: Neglect to the good order and service discipline contrary to **Section 68** of the **Armed Forces Act**.

Particulars: In that at the Kenya Military Academy (KMA) Lanet on or about the night of 4/5 February, 2010, between 2000 hrs and 0545 hrs, while on guard duties at the Kenya Military Academy Armoury, he (the accused) failed to report the absence of his sentry mate, 72044 Spte Isaiah Lule Onyango.

2. On the evidence, the Appellant was acquitted on the 8th count but was convicted of the 9th and 10th Counts. He was subsequently sentenced to one year imprisonment on each count which were to run concurrently. In addition, he was dismissed from the Armed forces in accordance with **Section 103(4)** of the **Armed Forces Act**.
3. Aggrieved, the Appellant preferred this appeal against conviction and sentence. The grounds of appeal in the Petition of Appeal filed on 21st February, 2014 are *inter alia* that:
 - a. **the Court Martial erred in law and fact in failing to find that the charges against the appellant were not proved to the required standard of proof in criminal cases as provided for in the Evidence Act Cap 80 Laws of Kenya;**
 - b. **the Court Martial erred in law and fact in failing to find that the Appellant could not have failed to report the absence of his sentry mate between 2000hrs and 0545hrs, as per count 10, because his sentry mate was accused of leaving his post between 2200hrs and 0200hrs;**
 - c. **the Court Martial erred in failing to consider that the evidence in respect of count 9 was by a single witness and the same was weak and uncorroborated;**
 - d. **the Court Martial erred in fact and in law in convicting the Appellant on the basis of the finding that P.W.19 had been charged with the offence of robbery with violence and that the Appellant's co-accused were guilty as accomplices;**
 - e. **the Court Martial erred in failing to find that the facts upon which the Appellant was convicted of the 8th count are the same facts on which he was convicted;**
 - f. **the Court Martial erred in failing to find that the charges against P.W.19 had not been proved;**
 - g. **the Court Martial erred in failing to note that reliance on the evidence of P.W.19 and P.W.23 was in breach of Article 50(4) of the Constitution;**
 - h. **the Court Martial erred in relying on statements obtained from the Appellant unlawfully;**
 - i. **the Court Martial erred in failing to abide by the provisions of Section 169(1) of the Criminal Procedure Code, Cap 75; and**
 - j. **the charges and charge sheet were fatally defective.**
4. The Appellant therefore asked the court to quash the conviction and set aside the judgment.

APPELLANT'S SUBMISSIONS

5. The appeal was argued in this court on 27th May, 2014. Mr. Maragia submitted that charges 8 and 10 are defective as the section under which they were brought had not been provided for. Unlike count 9, the 8th and 10th counts are not specifically provided for under the Act. He argued that **Section 68** which was cited in the Charge Sheet provides for "any conduct" which is not ascertainable and therefore exposed an accused person to prejudice. In addition, this Section does not create an offence but only provides for the sentence.
6. Counsel also argued it was not proved that the Appellant was sleeping while on duty as alleged in the 9th count. P.W.1 testified that it was Spte Onyango and not the Appellant who was sleeping and that the Appellant was at all times in the guard. His testimony was only in regard to Spte Onyango. P.W.13 too did not testify that the Appellant was sleeping (see page 79 of the record). It was also argued that having been acquitted of the offence of lying about the whereabouts of his sentry mate, the Appellant ought to have automatically been acquitted of the 10th count as the facts giving rise to both are similar. When asked about his sentry mate, he spoke the truth and he therefore cannot be accused of failing to report his absence.
7. Mr. Chebii, Prosecuting Counsel conceded the appeal and submitted that the conviction should be quashed. He concurred with the Appellant's Counsel that it was Spte Onyango who was sleeping while the Appellant was in the guard room. The court therefore arrived at an erroneous finding in respect of the 9th count. He also argued that if the Appellant was acquitted of the 8th count then he ought also to be acquitted of the 10th count. Further there were no reasons given for the decision of the court. Ultimately Prosecution Counsel left it to court to reach determination.

ISSUES FOR DETERMINATION

8. The issues for determination flowing from the submissions of the parties are:
 - a. whether the charge sheet and the charges against the Appellant were defective
 - b. whether the Court erred in allowing the statement made by the Appellant to P.W.23
 - c. whether the charges were proved beyond reasonable doubt.

ANALYSIS

9. It is the duty of this court, being the first appellate court to re-asses and re-evaluate the evidence on record so as to reach an independent conclusion. Refer to the case of **Okeno V. Republic** (1972) EA 32.
10. The Prosecution's case was that on the night of 4/2/2010 and 5/2/2010 the Appellant was placed under guard duty of the armoury with one Inspector Lule Onyango (Spte Onyango). It was alleged that during this time, the Appellant's sentry mate, Spte Onyango left his post at the armoury where they were supposed to be guarding together and further he went outside the armed forces camp and committed various crimes including attempted robbery. The Appellant who was the in-charge by virtue of being senior to Spte Onyango, was accused of failing to report that Spte Onyango had deserted his post and of lying about Spte Onyango's whereabouts when asked by his superiors. He was also charged with being asleep while on duty.
11. There were a total of 24 witnesses called by the Prosecution but for purposes of these proceedings, I will only consider the testimonies that touch on the Appellant.
12. P.W.1, 5420 Stg. Michael Nthenge, was the stores man in-charge of the arms' stores. He remembered that on the morning of 4/2/2010 between 8.30 and 9.30, he was issuing arms to the servicemen who had been tasked with guarding the Armed Forces as indicated in the part one orders dated 4th February, 2010. The Appellant and Spte Onyango were designated to guard the armoury and were issued with weapons for this purpose.
13. The witness told the court that on 5/2/2010, he went to clean the armoury at 0530hrs. He found Spte Onyango sleeping on the floor on the left side of the entrance to the store. He proceeded to the room in which the cleaning material are stored wherein he found the Appellant lying on the table. P.W.1 explained that normally, one of the guards would be sleeping in this room, while the other kept watch outside.
14. P.W.1 then took out the cleaning materials and tried to wake up Spte Onyango in order to clean the veranda but he did not respond. He sought the assistance of the Appellant but their attempts to resuscitate Spte Onyango for about 20-30minutes were not successful. It was at that point that they called the duty officer No.13004 Lt. Olusi to the scene who took over the matter.
15. During cross-examination, the witness clarified that the Appellant was seated on the chair with his head on the table and that the Appellant and Spte Onyango were supposed to alternate in guarding the armoury.
16. P.W.2 testified that as the designated duty officer on 4/2/2010, her duties included mess collection, issuing arms to guard personnel, visiting the guard post at least once, ensuring that the armoury and offices are locked and that the guns are kept safe. She stated that on the evening of 4/2/2010 at around 2000hrs, she visited the armoury and found the Appellant alone. She inquired of the whereabouts of Spte Onyango and was informed that he had gone off for supper. The witness then proceeded to the main gate, the armoury and later to the communications centre and reported that nothing unusual happened that day.
17. On 5/2/2010, she was called to the armoury by P.W.1 where she found Spte Onyango unconscious. The Appellant told her that he had last seen Spte Onyango the previous night at 2200hrs after he returned from supper. The Appellant did not respond when asked if he had reported that there was something wrong with Spte Onyango.
18. When cross-examined by Counsel for the Appellant the witness testified that she did not see the Appellant with any communication equipment. She blamed the Appellant and his sentry mate for failing to collect the equipment from the communication centre. She also stated that although it was raining on that night, the Appellant should not have taken shelter at the lobby but instead remained under the veranda or used an umbrella. During re-examination, the witness clarified that she went to the armoury at 2200hrs.
19. P.W. 7, Cpl. Anna Chepkurui also a material witness to the case against the Appellant, worked as an Exchange Operator at the Armed Forces. She stated that on the date alleged she was on duty

- from 0530hrs on 4/2/2010 to 0730hrs on 5/2/2010. She testified that there was no incident that occurred on this night at the communications centre or at the armoury. She further testified that if any incident had occurred at the armoury, she would have heard as it is situated about 5 metres from her station. During cross-examination by Counsel for the Appellant, she stated that neither the Appellant nor Spte Onyango went for the communication Motorola that day. She explained that it was the duty of the senior person in that post to sign for the same and that she had no obligation to report if a person failed to collect it.
- 20.P.W.8 PTE Godfrey Kusina Jumba testified that he saw the Spte Onyango on 4/2/2010 at around 2000hrs in his room at the single line. The Spte changed into his track suit and left. The witness learnt of the incident the following day, after the morning run when they were summoned to a parade.
 - 21.P.W.9 Sgt. Mary Njambi was assigned clerical duties on this day and was Battalion Orderly (BO). On this day, she saw Spte Onyango at 2000hrs standing at the armoury alone. She saw that one of the doors was opened and Spte Onyango informed her that it was a room in which one of the guards was supposed to rest as the other watches guard. He informed her that his sentry mate, the Appellant had gone for supper. She maintained that on that night she did not receive any communication from the Appellant or Spte Onyango.
 - 22.P.W.10 and P.W.11 are the clinical officers who treated Spte Onyango who was non-responsive at the time of admission. They also took various samples from him for purposes of testing.
 - 23.P.W. 13, Lt. Col. Joseph Asunah Ouda was the investigating officer in this matter. He was on duty on 4/2/2010 and had seen both Spte Onyango and the Appellant guarding the armoury at around 1830hrs. He testified that on 5/2/2010, he received the report that one of the sentries stationed at the armoury had been found unconscious. He went to the scene and found the Appellant. On being questioned, the Appellant denied having any knowledge of the circumstances under which Spte Onyango had become unconscious and that he was okay at the time when he took guarding allowing the Appellant to rest in the lobby. He told P.W.14 that Spte Onyango had not left his post throughout the night.
 - 24.He informed the Commandant and the Officer-in-Charge of the Military Police and further mounted a guard during which he directed all the servicemen to look for Spte Onyango's weapons that had gone missing. He explained that these arms were later recovered from a scene where a robbery had taken place. It was on his direction that the Appellant was arrested by the Military Police.
 - 25.P.W.14 and P.W 15 told the court on the circumstance under which they were attacked by robbers wielding guns on 4/2/2010. On this day, they were working as attendants at Bismark Petrol Station when a man carrying two passengers on his motorbike approached their place of work at around 2330hrs under the guise that he wanted to purchase gas while their true intention was to rob P.W.14 and P.W.15. The assailants however did not realise that there were Police Officer in the vicinity notably P.W.16 and P.W.17, who were taking shelter from the rain in the main office. These officers were able to obtain a G3 rifle butt 178 serial number 6502955 that one of the robbers was wielding. In it was a magazine loaded with 20 rounds of ammunition of 7.62 calibre. This is the gun that was identified by P.W.1 as the one issued to Spte Onyango on the material day.
 - 26.P.W.12 told the court that it was his motor bike registration No.KMCC 548A that was used during the robbery. He testified that he was called by P.W.19 who he had engaged to carry out transport business using this motor bike and informed him that the same had been stolen by Spte Onyango and 2 men. This bike was later recovered at Teachers Police Post Lanet.
 - 27.P.W.19 confirmed that he had been employed by P.W.12. He said that on 4/2/2010 he received a call at about 2100hrs from Spte Onyango who he knew previously as a customer with instructions to pick him at Posta in Lanet. He obliged but on reaching the junction of Mawanga, they encountered 2 men who together with Spte Onyango attacked and robbed him of his Kshs1,600/= money together with P.W.12's motor bike.
 - 28.P.W.20 who is attached with the office of the CID Nakuru, also investigated the matter and concluded that in fact Spte Onyango together with two other persons, attacked P.W.19 and took his motor bike before proceeding to Bismark Petrol Station where they attempted to rob the attendants.
 - 29.P.W.21, a Chief Analyst with the Government Chemist Department found no evidence of toxic

- substances in the specimens taken from Spte Onyango.
- 30.P.W.22 explained that the camp standing orders prohibited any person from leaving the camp after 2130hrs unless they were on leave, off or had a pass.
 - 31.P.W.23, Police Chief Inspector Pius Ouma of Provincial CID recorded the Appellant's and the other accused person's statements on the robbery that had taken place at the petrol station.
 - 32.These statements were produced as evidence after a trial within a trial was conducted and a ruling made, in which it was found that the statements had been made voluntarily. In his statement made on 26/3/2010, the Appellant told P.W.23 that he reported on duty at the armoury at 0930hrs and was later joined by Spte Onyango at 1100hrs. They worked together until 1830hrs when he took his tea break. He did not find Spte Onyango at his post on his return until the following morning when he was found sleeping outside by P.W.1. He stated that the duty officer did not go by the armoury that night.
 - 33.The charges against the Appellant and his co-accused were drafted by P.W.24 who was the compiling officer in this case.
 - 34.When put on his defence, the Appellant chose to give sworn testimony. He testified that he was enlisted in the Armed Forces on 3rd August, 1992 and had been at the Kenya Military Academy for about 14-15 years during which period he had received honours for good conduct and long service. He confirmed that on 4/02/2010 he had been charged with guarding the armoury until the following day at 0900hrs together with Spte Onyango.
 - 35.They worked well together until 2000-2030hrs when the Appellant left for supper. He returned sometimes between 2100-2130hrs to relieve Spte Onyango. He explained that at the time he was asked by P.W.2 of the whereabouts of Spte Onyango, he believed that he had gone for supper and would return thereafter. However, the Appellant did not see the Spte again until the following day at 0545hrs.
 - 36.The witness further stated that when guarding the armoury, they were supposed to stand in the veranda but he was forced to take shelter in the lobby when it started raining. He denied having been issued with protective gear that would allow to remain on guard at the veranda regardless of the rain.
 - 37.That despite being concerned that his colleague had not returned, he did not report having not been issued with a motorolla radio communication nor did he leave his post. He also asserted that contrary to the allegation of P.W.7 there was no requirement to sign for the motorolla radio communication.
 - 38.He denied the allegations that P.W.2 and P.W.9 had gone to the armoury as alleged and stated that he would have reported to them had they gone to the armoury.
 - 39.The Appellant also denied being asleep while on duty and stated that P.W.1 found him seated in the lobby, holding his rifle. He was aware of P.W.1 movements and assisted him in resuscitating Sgte Onyango. He was not aware of the circumstances under which the Spte Onyango had become unconscious.
 - 40.The charge as framed contains particulars of the Appellant's acts of omission which are clear and properly framed in accordance with the requirements of the Criminal Procedure Code.
 - 41.Upon re-assessing and re-evaluating the evidence on record it is clearly apparent the Appellant was an army officer and had been assigned guard duties. He was charged under Sections 68 and 22 of the Armed Forces Act and the particulars of the various offences were stated.
 - 42.This court has had occasion to peruse the Charge Sheet and is satisfied that the Statement of the Offence describes the offence and makes reference to the section that creates the offence and the particulars of the offence state clearly and in ordinary language how the acts of omission and negligence were committed. The charges as they stand are not flawed in form or content and this court is satisfied that the charges were properly drafted and conform to the provisions of Section 137 of the Criminal Procedure Code and are sufficient to support a conviction.
 - 43.This ground of appeal is found lacking in merit and is disallowed.
 - 44.The evidence from the statement made by the Appellant is of great probative value and the trial court relied upon it when convicting the Appellant. This court has therefore to satisfy itself that there are no indicators that raise any reasonable doubt that the Appellant did not make the statement voluntarily.
 - 45.The indicators are; was the Appellant cautioned; did the Appellant write the statement; did the Appellant sign the statement; was the Appellant proficient in the language the statement was made

- in; was the statement made before a competent police officer.
46. Having perused the court record I am satisfied that the trial court directed itself properly and in accordance with the principles cited hereinabove when conducting the trial within a trial before ruling on the admissibility of the statement made by the Appellant before PW23.
47. This court is satisfied that the trial court correctly ruled and concluded that the statement had been made voluntarily by the Appellant and further that it did not err in law and fact in admitting it.
48. This ground of appeal is found lacking in merit and is disallowed.
49. The evidence in the statement on the Appellants whereabouts was weighty and was corroborated by the evidence of PW1 and PW2. These two prosecution witnesses testified to having found the Appellant in the lobby on the material date. In his sworn testimony and in the statement the Appellant states that he was in the lobby and further adds that the lobby was a resting place when the other guard stood on duty.
50. From the evidence it can be clearly discerned that the Appellant was possessed of knowledge of the absence of the other guard and it therefore follows that it was incumbent upon him to be present at the guard post and by being in the lobby he acted in total disregard of his duties.
51. This court finds that the trial court did not err in fact or law in relying on the evidence in the statement which evidence was indeed corroborated.
52. The prosecution is found to have proved its case beyond reasonable doubt that the Appellant was found to have abdicated his duties and this court finds that there was no miscarriage of justice and therefore finds no reason to interfere with the conviction and sentence.

FINDINGS:

53. For the reasons stated above this court makes the following findings;
- a) The charges on the charge sheet are found not to be defective and are properly framed.
 - b) This court finds that the charges against the appellant were proved beyond reasonable doubt.

DETERMINATION

54. The appeal is found to be without merit and is hereby dismissed.
55. The conviction and sentence are upheld.

Dated, Signed and Delivered at Nakuru this 9th day of February, 2015.

A. MSHILA

JUDGE