



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.122 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. John Onyiego – Ag. CM delivered on 15th September 2014 in Kahawa Garrison Court Martial No.5 of 2014)

ATHMANI ALI ZANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Athumani Ali Zani, an officer of the Kenya Defence Forces was charged before the Court Martial with two (2) offences. In the first count, the Appellant was charged with the offence of **stealing** contrary to **Section 91(1) (a)** of the **Kenya Defence Forces Act**. The particulars of the offence were that between 21st December 2013 and 22nd December 2013 within Nairobi County in the Republic of Kenya, the Appellant, stole service vehicle Registration Number 79 KA 75 (KBM 487B) Toyota Corolla valued at Kenya Shilling 1,470,633.00. The Appellant was charged with an alternative charge of **losing public property** contrary to **Section 96(1)** of the **Kenya Defence Forces Act**. The particulars of the offence were that between 21st December 2013 and 22nd December 2013 within Nairobi County in the Republic of Kenya, the Appellant, lost service vehicle Registration Number 79 KA 75 (KBM 487B) Toyota Corolla valued at Kenya Shillings 1, 470,633.00 which had been handed over to him by Senior Sergeant Samson Kazungu.

In the second count, the Appellant was charged with the offence of **disobedience to standing orders** contrary to **Section 77(1)** of the **Kenya Defence Forces Act**. The particulars of the offence were that on 21st December 2013 at Defence Headquarters Camp Administrative Unit, the Appellant failed to park service vehicle Registration Number 79 KA 75 (KBM 487B) Toyota Corolla under his custody in the camp official motor transport park, contravening **Defence Headquarters Camp Administrative Unit Standing Orders Chapter 9 Paragraph 2**. In the alternative, the Appellant was charged with the offence of **neglect of duty** contrary to **Section 65** of the **Kenya Defence Forces Act**. The particulars of the offence were that on the 21st December 2013 at Defence Headquarters Camp Administrative Unit, the Appellant, failed to park service vehicle Registration Number 79 KA 75 (KBM 487B) Toyota Corolla under his custody in the camp official motor transport park contravening **Defence Headquarters Camp Administrative Unit Standing Orders Chapter 9 Paragraph 2**.

When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. At the conclusion of the trial, he was discharged and acquitted on the two (2) main charges. He was however convicted of the alternative offence of **losing public property** contrary to **Section 96(1)** of the **Kenya**

Defence Forces Act, 2012. He was sentenced to serve one (1) year imprisonment. The trial court further ordered that the Appellant be dismissed from service and that his rank be reduced to that of a private. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. In summary, the Appellant took issue with the fact that his defence had not been considered before the trial court reached the decision to convict him. He was aggrieved that he had been convicted on the basis of evidence which did not directly link him to the offence. He was of the view that the prosecution did not establish his guilt to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that were imposed on him. He urged the court to issue an order directing that he be entitled to all his benefits and decorations after his 29 years of service and that he be reinstated to his decorations as a Warrant Officer 2.

During the hearing of the Appeal, this court heard submission made by Mr. Muchiri on behalf of the Appellant and the response to the submission made by Ms. Nyauncho on behalf of the State. Mr. Muchiri submitted that the charge sheet was defective for want of sufficient particularity. According to counsel for the Appellant, the charge sheet did not properly describe the particular conduct constituting the offence. He submitted that the CCTV footage was not made available by the prosecution and thus did not discharge its onus of proof. Mr. Muchiri further submitted that there was no direct evidence linking the Appellant to the commission of the offence. On her part, Ms. Nyauncho opposed the appeal. She submitted that the omission in the charge sheet was not fatally defective as it can be cured by the application of **Rule 81(1) (b) of the Armed Forces Rules of Procedure**. According to her, the Appellant was not prejudiced by the defect in the charge sheet. In this regard, she urged the court to invoke the provisions of **Article 159 of the Constitution**. She submitted that the prosecution adduced sufficient evidence which established the Appellant's guilt beyond any reasonable doubt. She submitted that the motor vehicle was under the custody of the Appellant. The Appellant failed to park the motor vehicle at the designated parking yard. The Appellant did not also hand over the keys of the motor vehicle as was required by the Vehicles Standing Orders. According to Ms. Nyauncho, the Appellant was therefore solely liable for the loss of the motor vehicle. She urged the court to dismiss the appeal.

What are the facts of this case?

The Appellant was at the material time a Warrant Officer II with the Kenya Defence Forces. He was deployed as a driver at the defence headquarters. PW1 Staff Officer II Major Felix Mbithi, an Administration Officer at the Operations Doctrine and Training branch at the Defence headquarters testified that a service vehicle Toyota Corolla with military Registration Number 79 KA 75 and civilian Registration Number KBM 487 B was in the year 2008 transferred from the Directorate of Military Intelligence to the branch for the use of the Assistant Chief of Defence Forces Operations Doctrine and Training, Major General Nthenge, whom the Appellant was attached to. An issue voucher, a Forces Form 7110 and an Army Book 562 (log book) were produced into evidence as **Prosecution's Exhibit Nos. 4, 5 and 7**. The Appellant was therefore responsible for the vehicle.

PW2 Captain Gideon Tuisang, a Motor Transport Officer at the defence headquarters, Camp Administration Unit testified on the operations of the motor transport unit at the camp. According to PW2, at the beginning of each month, a driver is required to obtain a work ticket either from the branch or at the motor transport unit. The work ticket is to be signed by an officer or a Class I Warrant Officer before a vehicle leaves for duty. Before leaving the camp, the vehicle is booked out at the main gate by way of a booking register recording the vehicle's registration number, the driver's name and the time the vehicle leaves the camp. A booking register was produced as **Prosecution's Exhibit No. 8**. At the end of day duty, service vehicles are parked at camp administration unit motor transport parking yard and the vehicles keys were to be handed in to the motor transport duty officer. PW2 testified the motor transport yard is at all times manned by two guard personnel and is monitored through CCTV cameras. A copy of the Motor Transport Regulations was produced into evidence as **Prosecution's Exhibit No. 6**.

PW2 testified that on 23rd December 2013, he received a report from the Appellant that the vehicle

military Registration Number 79 KA 75 and civilian Registration Number KBM 487 B was missing. The Appellant reported that he brought the vehicle back to the camp in the evening of 21st December 2013 and parked it at the Defence Forces Canteen Organization (DEFECO) parking lot. He reported that he had placed the motor vehicle keys in a ventilation hole on top of the door of his changing room.

The evidence of PW3 Corporal Vilembwe Selede Geoffrey was that he reported for duty at the camp's main gate on the day in question at 9.00 a.m. His work was to identify vehicles coming into the camp including the occupants of the vehicles. He was on duty until 22nd December 2013 at 9.00 a.m. His evidence was that he did not see the Appellant on the material day. PW4 Corporal Andrew Muoki Mutua was also on guard duties at the motor transport yard on the material day. He testified that he reported to work on 21st December 2013 and left at 9.00 a.m. on 22nd December 2013. He told the court that he did not see motor vehicle Registration Number KBM 487B at the motor transport yard. PW5 Warrant Officer I Naftali Wangombe was assigned to investigate the case. He established that on 21st December at 4.45 a.m. the vehicle left the camp driven by Sergeant Kazungu. He went to pick Major General Nthenge at Mountain View Estate in Nairobi and took him to Jomo Kenyatta International Airport. The vehicle was then returned to the camp and was parked at the Defence Forces Canteen Organization (DEFECO). Later at around 3.00 p.m., Sergeant Kazungu drove the vehicle to South B Estate in Nairobi where he handed over the vehicle to the Appellant.

PW7 Captain Ombati, an officer at the Directorate of Military Intelligence testified that a request for CCTV footage for 21st December 2013 to 22nd December 2013 was made on 23rd December 2013. According to PW7, the same could not be retrieved as the CCTV footage storage unit overwrites itself every twelve (12) hours.

When the Appellant was put on his defence, he denied committing the offence. He testified that the vehicle in question was at the material time formally in the custody of Sergeant Kazungu. He testified that although he was on leave, Major General Nthenge had requested him to source for spare parts for his Mercedes Benz at Industrial Area and therefore he needed the vehicle to run the errands. The Appellant testified that he made arrangements to meet with Sergeant Kazungu on 21st December 2013 in South B Estate where he handed over the vehicle to him. He testified that he later returned the vehicle to the camp. He arrived at the camp at around 7.10 p.m. and was cleared by the security personnel at the main gate to enter the camp. He then parked the vehicle at the Defence Forces Canteen Organization (DEFECO) parking lot and placed the vehicle's keys in a ventilation hole on top of the door at his changing room where it was normally kept before leaving for his house at Kibera within Nairobi.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh evaluation with the ultimate objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither saw nor heard the witnesses as they testified and must therefore give due regard in that respect (**See Okeno -vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **losing public property** that he was convicted of.

There are several issues that came up for determination during the hearing of this appeal. The first issue for determination is whether the charge that the Appellant was convicted of was defective. According to Mr. Muchiri, the charge that the Appellant was convicted of was defective for want of sufficient particularity. He submitted that due to failure by the prosecution to sufficiently set out the particulars of the charge, the Appellant was hampered in the preparation and in the presentation of his defence. In response, the prosecution argued that the omission pointed out by the Appellant in the charge sheet did not render the charge fatally defective. In any event, it was submitted that the defect was curable under **Rule 81(1)(b)** of the **Armed Forces Rules of Procedure**.

Our re-evaluation of the evidence adduced before the Court Martial clearly shows that the charge that the Appellant was convicted of was defective. The Appellant was convicted of the alternative charge of **losing public property** contrary to **Section 96(1)** of the **Kenya Defence Forces Act**. This is how the

charge was framed:

“Losing public property contrary to Section 96(1) of the KDF Act 2012 In that he,

Between 21 December 2013 and 22 December 2013, within Nairobi County in the Republic of Kenya lost service vehicle Registration No.79 KA 75 (KBM 487B) Toyota Corolla valued at Kshs.1,470,633.00 which had been handed over to him by 55274 Senior Sergeant Samson Kazungu.”

Section 96(1) of the **Kenya Defence Forces Act** provides as follows:

“A person who is subject to this Act commits an offence if that person – “

It was clear that **Section 96(1)** of the **Kenya Defence Forces Act** by itself does not set out an offence which can lead to the conviction of any accused person. The prosecution explained that the section that the Appellant was convicted of was in actual fact **Section 96(1)(a)** of the **Kenya Defence Forces Act**. On perusal of proceedings before the Court Martial, we noted that during his closing submissions, the prosecutor attempted to have the charge sheet amended to reflect the particulars stated above by the prosecution. The defence objected to it on the grounds that the prosecution could not amend the charge sheet at that later stage of the proceedings because both the prosecution and the defence had already closed their respective cases. The Judge-Advocate in his summing up had this to say at page 212 of the proceedings:

“It is clear from the above section that Section 96(1) alone does not create an offence but paragraph (a) does which is missing. The particulars therefore, clearly show that there is a public property in this case a motor vehicle under the care or entrusted to the accused which is not denied and that the property got lost. The accused was at the time a service member. Section 96(1) could not have referred to any other offence as reflected in the particulars other than losing property under (a) which is the only paragraph dealing with losing property under that section.”

The prosecution on this appeal argued that the defect apparent in the charge sheet was not fatal to the prosecution’s case because it could be cured under **Rule 81(1)(b)** of the **Armed Forces Rules of Procedure**. It is important that we set out what that **Rule** provides. It states as follows:

“81.(1) At any time during a trial, if it appears to the court that there is in the charge sheet –

- a. *A mistake in the name or description of the accused;*
- b. *A mistake which is attributable to a clerical error or omission, the court may amend the charge sheet so as to correct the mistake.*

(2) At any time during a trial, if it appears to the court before they close to deliberate on their finding that it desirable in the interests of justice to make additional to or omission from or alteration in a charge which cannot be made under paragraph (1), they may, if such addition, omission or alteration can be made without unfairness to the accused, so amend the charge if the Judge-Advocate concurs.”

Having re-evaluated the facts of this case, we are inclined to agree with the Appellant that the charge that he was convicted of was fatally and incurably defective for lack of particularity. An accused person has the right to be informed of the charge and the particulars of the charge that he is facing before commencement of the trial. Whereas the prosecution can amend the charge in the course of the trial, such amendment cannot be sought after both the prosecution and the defence have closed their respective cases. In the present appeal, the Appellant was not informed of the charge facing him with sufficient particularity. This court does not consider the failure by the prosecution to particularly set out the section and the particular paragraph that the Appellant was convicted of to be a matter which was amenable to amendment or cure by this court attributing such failure to **“clerical error or omission”**.

The failure by the prosecution to set out the section under which the Appellant was charged with renders the entire charge incurably defective and therefore the Court Martial could not have convicted the Appellant on the basis of such defective charge sheet. This court is supported in its finding by the provisions of **Article 50(2)(b)** of the **Constitution** that requires the prosecution to inform an accused person of the charge that he faces with sufficient details to enable him answer to it. It cannot do for the prosecution to say that the Appellant understood the charge facing him if the section under which he was charged was not set out in the charge sheet. The Appellant cannot assume that he is being charged under a particular section of the law. It is the duty of the prosecution to set out the charge which shall be in the form that an accused person can answer to.

In that regard, **Section 81** of the **Armed Forces Rules of Procedure** cannot be invoked to validate an otherwise invalid and defective charge sheet. In any event, the prosecution made the application to amend the charge sheet after both prosecution and the defence had closed their respective cases. At the time the request was made to the Court Martial to amend the charge sheet, it was not “**during a trial**” as defined under **Rule 81** of the **Armed Forces Rules of Procedure**. In any event, even if the prosecution had such right to amend the charge sheet, under **Rule 81(2)** of the **Armed Forces Rules of Procedure**, such action would have been unfair to the Appellant and therefore could not be legally permitted. This court holds that the Appellant has established the ground of appeal that he was convicted on a defective charge sheet. That ground of appeal is upheld.

This court would have stopped there. However, for completeness of record it will address the substance of the appeal *i.e.* whether the prosecution proved to the required standard of proof beyond any reasonable doubt that the Appellant caused the loss of public property. It was the prosecution’s case that the Appellant lost the motor vehicle that was entrusted to him in the course of his duty. According to the prosecution witnesses, the Appellant breached Armed Forces Procedures by failing to park the motor vehicle within the designated area and further failed to keep the keys of the motor vehicle within the specified area. In his defence, the Appellant stated that the motor vehicle, having civilian number plates, and having been assigned to a senior military officer, could not be parked in the designated area due to security reasons. For that reason, the particular motor vehicle was either parked at the residence of the senior military officer or within the Defence Headquarters Camp near the residence of one of the drivers that was assigned to drive the motor vehicle.

According to the Appellant, on 21st December 2013, upon completing the work that he was assigned, he returned the motor vehicle to Defence Headquarters Camp and parked it near a place referred to as DEFCO. Other vehicles were usually parked at the said parking area. Sergeant Kazungu who was usually assigned to drive the motor vehicle, parked it there. There were CCTV cameras mounted at the gate and at the place where the motor vehicle was parked. He left the keys of the car in the ventilation hole above the door of Sergeant Kazungu, the officer designated to drive the motor vehicle. This was the arrangement he had with Sergeant Kazungu. The Appellant was informed on 22nd December 2013 that the motor vehicle was missing. He immediately returned to the camp and reported the loss to the Military Police. He was placed under close arrest. He recorded statements of the loss of the motor vehicle. After investigations were concluded, he was court-martialed.

The issues that emerged for determination were the following:

- I. Did the Appellant return the motor vehicle to the camp after finishing the work that he had been assigned by his designated superior?
- II. If he did, how did the motor vehicle disappear in a military installation which is secured 24 hours?

As regard the first issue, it was clear from the evidence adduced by the prosecution witnesses and by the Appellant in his defence that the Appellant offered exemplary service to the Kenya Armed Forces for a period of close to thirty (30) years. During this period, he had been promoted and assigned positions of responsibility. This court’s perusal of the Appellant’s record of service clearly showed that he was a diligent and trustworthy officer. It is our finding that, taking into consideration the service record of the Appellant, it was inconceivable that he would have failed to return the motor vehicle to the camp as alleged by the prosecution. We hold that the Appellant returned the motor vehicle to the camp as was

required of him. There are questions which emerged as to the security arrangement at the camp especially relating to military motor vehicles that are assigned civilian number plates. That is an issue that the military should address. We further hold that the Appellant parked the motor vehicle near DEFECO where the motor vehicle was usually parked. The Appellant did not breach any military procedures by failing to park the motor vehicle at the motor transport parking unit.

On the second issue for determination, PW7 testified that the CCTV mounted at the Military Camp was self-deleting after every 12 hours. From the evidence adduced, it was clear that the Appellant was not aware of this fact. Immediately he learnt of the disappearance of the motor vehicle, he requested for the CCTV footage. The Appellant's request was not unreasonable in the circumstances. This court took judicial notice of the fact that there was 24 hour security in the camp where the motor vehicle was parked. Apart from that, there were CCTV cameras mounted in strategic positions in the camp. We hold that the loss of the motor vehicle at the camp was as a result of failure of the entire security machinery at the camp. The Appellant happened to be a convenient scape-goat hence the Court Martial. Whereas the Appellant may have been careless in some respect, especially where he kept the key of the motor vehicle, we hold that his carelessness cannot in the circumstances of this case result in criminal liability. This court wondered of what use the CCTV cameras were at the camp if the recordings are not preserved for a longer time. If that were the case, the cause of the loss of the motor vehicle would have been established.

The upshot of the above reason is that the appeal lodged by the Appellant is allowed. The conviction of the Appellant is quashed. The custodial sentence imposed on the Appellant is set aside. In particular, the Appellant is ordered to be reinstated back to service in his rank of Warrant Officer II with effect from 15th September 2014 when he was sentenced by the Court Martial. For the avoidance of doubt, the Appellant shall not lose any benefit that he is entitled to on account of his service with the Armed Forces. His decorations are similarly restored. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE