



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Director of Military Prosecution & another (Criminal Appeal
97 of 2014) [2025] KEHC 5655 (KLR) (Crim) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL 97 OF 2014**

AB MWAMUYE, J

APRIL 30, 2025

BETWEEN

79650 SPTE JOHN KIMANI KAMAU APPLICANT

AND

DIRECTOR OF MILITARY PROSECUTION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The Applicant instituted these Criminal Revision proceedings by way of a Chamber Summons Application dated 27/11/2014 and amended on 04/10/2024 seeking the following orders:
 - i. That this Honourable Court be pleased to call for the file of Kahawa Barracks Court Martial No. 5 of 2014, Director of Military Prosecutions, Prosecutor against 79650 SPTE John Kimani Kamau, Accused, for purposes of satisfying itself as to the correctness and legality of the findings and order of the Kahawa Barracks Court Martial made on convicting the Accused/Applicant on a charge of Desertion contrary to Section 74(1)(a) as read together with Section 74 (3) (b) of The [Kenya Defence Forces Act, 2012](#) and sentencing him to 12 months' imprisonment.
 - ii. Spent
 - iii. Spent
2. The Application is anchored on the grounds stated therein and it is supported by the annexed affidavit sworn by Mr. Gitobu Imanyara, the Applicant's counsel, dated 27/11/2014. It was averred that the Applicant was enlisted in the Kenya Defence Forces on 1st September, 2008 and after his training he passed out/graduated on 27th March, 2009; whereupon he was posted to 20 Parachute Battalion. On



- 3rd April, 2009 he joined the Kenya Defence Forces “Special Forces” Unit; wherein he served for four years in several deployments including ‘Operation Linda Nchi’ in Liboi, Kiunga and the capturing of Kismayo.
3. Upon re-deployment from Kismayo and return to Kenya, it was averred that the Applicant found a very traumatized family which required his personal attendance. Therefore, he tendered his resignation on 27th May, 2013 and thereafter left the service on or about 29th May, 2013.
 4. On or about 18th March, 2014 the Applicant was arrested by the Military Police and arraigned on 11th June, 2014 at Kahawa Barracks where he was charged with Desertion contrary to Section 74 (1) (a) as read together with Section 74 (3) (b) of the [Kenya Defence Forces Act](#), 2012. The particulars of the offence was that on 29th May, 2013 the Applicant absented himself without leave for a continuous period of more than 90 days until he reported back to his unit at Kabete Barracks Nairobi on 18th March, 2014; an act he knew or ought to have known it constituted the offence of desertion.
 5. It is further averred that by the time the Court Martial had its first session on 11th June, 2014, the Military Authorities knew that the Applicant was being represented by Counsel but they neither communicated the date of the Trial to counsel nor informed the Applicant of his right to counsel as required by law. The Court Martial trial therefore proceeded without the Applicant being represented by Counsel.
 6. The Applicant’s counsel later managed to get the date of the second trial date from the Applicant’s relatives and was able to appear in Court on 2nd July, 2013. On that day, the Applicant’s counsel informed the Court that it was his first contact with the Court and further that the Applicant had, prior to his arrest, been under treatment for post-traumatic stress disorder since 2013. Counsel handed over to the Prosecution a copy of the medical report from Narok District Hospital showing that the Applicant had been attending the hospital for treatments since March, 2013; and had been denied treatment since his arrest and confinement in the military barracks.
 7. On 16th July, 2014 the Applicant’s counsel raised an objection to the powers of the Director of Military Prosecutions to prosecute on the grounds that the Director of Military Prosecutions was serving both as Chief of Legal Services and also as the Director of Military Prosecutions pursuant to his appointment on 24th September, 2013; contrary to Section 213 (6) of the [Kenya Defence Forces Act](#) No, 25 of 2012 which provides that the Office of the Director of Military Prosecutions shall be a separate office from that of the legal department in the Defence Forces or the line Ministry. The Applicant’s counsel submitted that Brigadier Dindi was holding the two offices in violation of Section 213 of the [KDF Act](#) hence not fit to appoint any prosecution counsel.
 8. The Applicant’s counsel stated that he also raised an objection to the application of the rules of procedure for courts martial in the impugned trial on the basis that the [Kenya Defence Forces Act](#), 2012 required the rules of procedure to be reviewed, amended, and revised to conform to the [Constitution](#) but the Court appeared to be relying on the [Armed Forces Rules of Procedure, 1969](#) that had been issued under the repealed [Armed Forces Act, 1968](#) and before the promulgation of the [2010 Constitution](#).
 9. On 17th July, 2014 the Trial Court overruled the Applicant’s objections while relying on Article 159 (2) (d) of the [Constitution](#) which provides that justice shall be administered without undue regard to procedural technicalities and also Section 24 of the [Interpretation and General Provisions Act](#) which provides that where an Act of Parliament is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made



under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.

10. It is further stated that on the 10th September, 2014 the Applicant's Counsel made an application that the Accused /Applicant had voluntarily resigned from the service and had not absconded duty hence could not be prosecuted for desertion; and thus, the charges were defective. Counsel argued that there was evidence that the Accused Person had resigned.
11. The Counsel's application was overruled and the matter was slated for hearing on 15th October, 2014. However, the same could not proceed on 15th October, 2014 as the Judge Advocate presiding was attending a seminar from 13th to 18th October, 2014; hence the hearing was adjourned to 21st October, 20214. On the said date, Counsel for the Applicant could not proceed as he was attending to a matter at the Supreme Court from 21st to 23rd October, 2014. The matter was thus adjourned to 28th October, 2014.
12. On 28th October, 2014 the hearing did not take off owing to the fact that the Judge Advocate was restrained at the barrack's gate and only managed to appear in court at 12:46 pm, by which time the Applicant's Counsel had already left the premises. Consequently, the matter was adjourned to 30th October, 2014.
13. On the said day on 30th October, 2014 the Applicant's counsel was denied entry at the Kahawa Barracks gate and the defending counsel sought for an adjournment based on that.
14. Thereafter, it is stated that the Applicant's counsel never received any further communication until when the Applicant's cousin came to his office to inform him that the Applicant had been convicted and sentenced to 12 months' imprisonment.
15. The Respondent opposed the application vide a Replying Affidavit deponed by Jemima Aluda on the 21/01/2015.
16. The Revision Application was canvassed by way of written submissions. The Applicant's filed Submissions dated the 4th February, 2025 while the Respondents' filed their submissions also dated the 4th February, 2025.
17. I have carefully considered the application, the affidavit sworn on behalf of the applicant and the Respondent. I have also considered the rival written submissions made on behalf of the applicant and the respondent. Having done so, I find that the only issue arising for my determination is whether the trial and the subsequent conviction of the Applicant was irregular, illegal or incorrect.
18. Article 165 of the Constitution grants this Court supervisory jurisdiction over subordinate courts and any body or authority exercising a judicial or quasi-judicial function. It provides as follows;
 - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”



19. Further, Section 362 of the [Criminal Procedure Code](#) provides thus: -

“The High Court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

19. In [Joseph Nduvi Mbuvi vs Republic](#) [2019] eKLR; Odunga J (as he then was) stated thus;

“...I do not see why the High Court cannot call the proceedings in question to satisfy itself as to the correctness, regularity or legality of such order. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well...”

35. Similarly, Nyakundi J in [Prosecutor vs Stephen Lesinko](#) [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to Section 362 of the [Criminal Procedure Code](#) as follows: -

“It is plain from the above passage that the High Court is vested into wide revisionary powers to look into the orders, decisions, proceedings, sentences where any of the following circumstances manifest themselves.

- a. Where the decision is grossly erroneous;
- b. Where there is no compliance with the provisions of the law;
- c) Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
- d) Where the material evidence on the parties is not considered; and
- e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

20. In the present case, the Applicant argues that the Trial at the Martial Court was a nullity as it was prosecuted by an entity that was not constituted in conformity with the law, and that there could have been no evidence of desertion since the Applicant had resigned.

21. With regard to argument on the prosecution, Section 213 of the the [Kenya Defence Forces Act](#), No. 25 of 2012 provides as follows on military prosecutions:

- (1) There shall be a Director of Military Prosecutions in the Ministry responsible for Defence who shall be appointed by the Defence Council.



- (2) A person shall not be appointed as the Director of Military Prosecutions unless the person is
 - a) an officer of at least the rank of Brigadier; and
 - b) an advocate of the High Court of Kenya of not less than ten years
 - (3) A person appointed as the Director of Military Prosecutions under this section shall—
 - a) have power to direct military police to investigate any information or allegation of criminal conduct, and military police shall comply with any such direction;
 - b) exercise powers of prosecution under this Act and shall undertake prosecutions at a court-martial against any person subject to this Act in respect of any alleged offence under Part VI;
 - c) have power with the permission of the Judge Advocate to discontinue any proceedings before a court-martial at any stage before summing up by Judge Advocate.
 - (4) The Director of Military Prosecutions shall not discontinue proceedings before a court's martial unless with the permission of the Judge Advocate.
 - (5) Except as provided for in this Act, the Director of Military Prosecutions shall not require the consent of any person or authority for prosecutions and, in the exercise of the powers or functions under subsection (3) of this section shall not be under the direction or control of any person or authority.
 - (6) The office of the Director of Military Prosecutions shall be a separate office from that of the legal department in the Defence Forces or Ministry.
22. Section 214 of the the [Kenya Defence Forces Act](#) provides as follows on delegation of the powers exercised by the Director of Military Prosecutions:
- (1) The powers of the Director of Military Prosecutions, except the power to discontinue proceedings before a court-martial, may be exercised in person, or by any legal officers, appointed by the Defence Council and acting under the Director of Military Prosecutions.
 - (2) A delegation or assignment under subsection (1) shall not prevent the Director of Military Prosecutions from exercising the power in question in person.
 - (3) A delegation under this section—
 - a) shall not divest the Director of Military Prosecutions of the responsibility concerning the exercise of the powers or the performance of the duty delegated; and
 - b) may be withdrawn, and any decision made by the person so delegated to may be withdrawn or amended by the Director of Military Prosecutions.
23. It is evident that at the time the Applicant was being tried at the Court Martial, the then Director of Military Prosecution was serving as both the Director of Military Prosecutions as well as the Chief of Legal Services. This was in violation of Section 213 (6) of the [KDF Act, 2012](#) which required the two offices to be independent.
24. It therefore follows that since the then Director of Military Prosecution was holding the two offices in violation of Section 213 of the [KDF Act](#) he could not appoint any prosecution. Thus, it is the finding of this Court that the prosecution of the Applicant was initiated and conducted in violation of the law and was thus an illegality and a nullity.



25. On the question whether the evidence tendered was capable of founding a conviction for the offence of desertion, I note that Applicant was charged with the offence of Desertion contrary to section 74 (1) as read together with section 74 (3) (b) of the *Kenya Defence Forces Act*, 2012.
26. Section 74 of the *Kenya Defence Forces Act* provides as follows:
74. Desertion
- (1) A person who is subject to this Act commits an offence if that person—
 - (a) deserts; or
 - (b) persuades or procures any person subject to this Act to desert.
 - (2) A person deserts if that person—
 - (a) with the intention, either at the time or formed later, of remaining permanently absent from duty—
 - (i) leaves the Defence Forces; or
 - (ii) fails to join or rejoin the Defence Forces when it is the person's duty to join or rejoin them;
 - (b) being an officer, enlists in or enters the Defence Forces without having resigned the person's commission;
 - (c) being a service member, enlists in or enters the Defence Forces without having been discharged from any previous enlistment;
 - (d) is absent without leave, with intent to avoid serving in any place outside Kenya, or to avoid service or any particular service when before an enemy; or
 - (e) is absent without leave for a continuous period of more than ninety days.
27. The Applicant testified at the Martial Court that he resigned from the service through his letter dated 27th May, 2013 after he came back from his leave which ended on 25th May, 2013. PW1, the Officer who was commanding 30 Special Forces Battalion and the supervisor of the Applicant at that time, testified that when the Applicant returned from leave he expressed his intention to resign from the service to take care of his ailing parents. PW1 testified that he summoned the Applicant for an interview in a bid to make him change his mind but the Applicant's mind was already made up. PW1 also testified that he told the Applicant that he could not resign as he had to be interviewed by the commanding officer and await discharge approval.
28. PW4, the Regimental Sergeant Major at 30 Special Forces Battalion also testified that the Applicant went to him and told him that he wanted to resign from the service as his parents were sick and they needed him. He testified that he referred the Applicant to the Officer Commanding as he was in a hurry.
29. PW7, the Investigating Officer also testified that the Applicant had expressed his intention to resign but was to seek the approval of the Officer Commanding and wait for his letter to be approved.
30. Under the *Kenya Defence Forces Act*, only the resignation, or more properly speaking the request for withdrawal of commission, by Officers requires approval before it becomes effective. The resignation of regular service members does not require prior approval. Section 249 of the Act reads as follows at subsections 7 and 8:



- (7) An officer may by notice in writing to the Defence Council, request to be relieved of his or her commission and, unless otherwise determined by the Defence Council, the request shall take effect on the date indicated in the notice.
- (8) Where the Defence Council declines to approve resignation request under subsection (7), the Defence Council, shall within reasonable time and in writing, communicate such decision and reasons for declining.
31. There is no similar provision for service members, such as the Applicant. Service Member is defined at Section 2(1) of the Act as
- “service member” means any member of a service of the Defence Forces who is not an officer”
32. Section 247 of the Act deals with termination of the service of members of a regular force. Section 247(b) gives resignation as one of the ways in which a service member may leave the service, but nowhere else in the Act is the same elaborated unlike in the case of Officers.
33. I am also satisfied that a limitation of the right to resign from employment for a service member would require an express provision of the Act similar to Section 249(7) and (8) for Officers, and it cannot be inferred under Part V of the Act and specifically the omnibus provisions of Section 43 of the Act. In the absence of such an express provision in the body of the Act, it must then follow that a resignation by a service member such as the Applicant need not be approved before it takes effect. Consequently, it is the finding of this Court that the Applicant resigned and thus could not have been charged, convicted, and sentenced for the offence of Desertion.
34. Either of the two limbs in of itself would be determinative of this Revision Application in favour of the Applicant. Even if one limb was not to succeed but the other did succeed, the Revision Application would have to succeed.
35. From the foregoing, I find that the Applicant was unlawfully charged under the KDF Act when in fact he had already tendered his resignation from service. Further, the subsequent Trial was also irregular and unlawful for having been conducted by a prosecutor that had not been properly appointed.
36. Consequently, the Revision succeeds and the impugned conviction and sentence be and are hereby quashed. The Applicant is awarded the costs of the Revision Application, which shall be borne by the 2nd Respondent.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL, 2025.

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BAHATI MWAMUYE

JUDGE

