IN THE COURT MARTIAL APPEAL COURT OF TANZANIA
AT DAR ES SALAAM
(CORAM: MURUKE, TWAIB & BONGOLE, J.J.J.)

COURT MARTIAL APPEAL NO. 1 OF 2014

[Appeal from the decision of the General Court Martial held at TPDF Officers' Mess, 43-KJ Lugalo, given on 30th July 2012]

P10445 LT BONIFACE YESAYA NJAU ..... APPELLANT

VERSUS

THE JUDGE ADVOCATE GENERAL ..... RESPONDENT

JUDGMENT

F. Twaib, J:

The appellant, P10445 Lieutenant BONIFACE YESAYA NJAU, at the material time serving at 521 Battalion of the Regular Army in the Tanzania People's Defence Forces (TPDF), is also a qualified dentist. Before his arraignment, conviction and punishment by the General Court Martial held at Officers' Mess at 34KJ-Lugalo, Dar es Salaam, Lt. Njau held the higher rank of Captain. It was due to his conviction that he was demoted to Lieutenant.

This sentence is the basis of the appellant's second ground of appeal, where he challenges ***"the legality of the whole sentence of reduction in rank from Captain to Lieutenant"***.

The appellant's first ground contests *"**the legality of all of the findings in all charges"***. In his Statement of Appeal, the appellant gives two distinct particulars to explain this ground of appeal:

i. That the learned trial Judge-Advocate erred in law and in fact by dismissing the plea in bar of trial raised by the appellant by wrongly translating "Formal Warning" as being synonymous with "Reproof" and thus inaccurately

conferring jurisdiction upon the Court when in fact it had none since conduct for which Formal Warning has been administered leads to release from the Defence Forces if it is persistent and not trial.

ii. *Further that and without prejudice to the above, the appellant was not subject to trial since the conduct subject of the Formal Warning was not persistent as to call for further disciplinary measures under the Code of Service Discipline i.e., no offence had been committed by the appellant.*

The appeal has been lodged in terms of section C. 144 (1), (2), (3) and (4) of the **Code of Service Discipline** [the First Schedule to the **National Defence Act**, Cap 192 (R.E. 2002), made under sections 53 and 85 of the said Act]. The charges leveled against the appellant consisted of two counts, namely:

1. ***Shtaka la kwanza****: kifungu C32 cha Sheria ya Nidhamu Jeshini.*
   KUMPIGA ASKARI AMBAYE KWA CHEO NI MDOGO KWAKE.
   Maelezo*: Kwamba yeye mnamo tarehe 04 Januari 2011 akiwa ofisi ya malipo 521 Kikozi cha Jeshi alimpiga kofi MT 58495 Sajini Naumu Andrew Sarakikya wa 521 Kikosi cha Jeshi.*

2. ***Shtaka la Pili****: Kifungu C. 64 (1) cha Sheria ya Nidhamu Jeshini.*
   KITENDO CHENYE KUHARIBU MURUA NA UTIIFU WA KIJESHI.
   Maelezo*: Kwamba yeye mnamo tarehe 04 Januari 2011 akiwa ofisi ya malipo 521 Kikozi cha Jeshi alimpiga kofi mfuasi wake ambaye ni MT 58495 Sajini Naumu Andrew Sarakikya wa 521 Kikosi cha Jeshi ikiwa ni kitendo cha kuharibu murua na utiifu wa Kijeshi.*

It is obvious from the grounds of appeal that the appellant does not dispute the merits of the findings of fact by the trial Court Martial. His complaint touches upon matters purely of law forming two limbs—the legality of the proceedings as a whole, and the legality of the sentence.

Before us in this appeal, the appellant was represented by Lt. Col. S.J. Nnko (retd.), learned advocate. The respondent was advocated for by

Capt. Karumuna from the Office of the Judge Advocate General. Counsel Nnko's argument in support of the first ground of appeal is to the effect that the General Court Martial had no jurisdiction to try his client and convict him, because he had already been punished for the same offence. Counsel cites Regulations 112.05 (5) (d) and 112.24 of the **Defence Forces Regulations** (hereinafter "the Regulations") to support his contention.

This issue was earlier raised in the Court Martial as a "**plea in bar of trial**", in terms of the said Regulation 112.24. It was determined by the presiding Judge Advocate (Major G.F. Benda, sitting alone, under Regulation 112.06). The learned Judge Advocate disagreed with the then defence counsel, one Mr. Mjumbe, who argued that his client had been given a "**Reproof**".

On the contrary, the Judge Advocate sided with the prosecutor, Capt. Chalamila, who argued that the appellant had only been given a "**Formal Warning**" under the **Defence Forces Routine Orders** (hereinafter "FRO") No. 36 of 1966, whose effect is described by Article 3 of the FRO as "*not considered as a substitute for disciplinary action*". Having reached that finding, the Judge Advocate ruled that the Court Martial had jurisdiction to try the appellant, and the trial proceeded.

The appellant has now raised the issue again as his first ground of appeal, contending that the holding was an error at law. His counsel, Lt. Col. Nnko, submitted that the error on the part of the Judge Advocate was the result of what counsel considered a wrong interpretation of the terms "Formal Warning" and "Reproof", as the two terms are essentially different and have different consequences to the offender.

At this juncture, in order to comprehend the controversy surrounding the first ground of appeal, which centers on the terms "Reproof" and "Formal Warning", it is pertinent to pay a brief visit on the relevant law.

Reproof is provided for under Regulation 101.11 (1) to (4) and amplified by **Forces Routine Orders** Serial No. 14, 36-37 of 16th October, 1966. Essentially, the two provisions only serve to complement each other. FRO No. 36-37 states, in paragraph 2:

2. *A Reproof is given as a disciplinary matter with respect to a single incident of misbehaviour or shortcoming. It is intended to complete the corrective action needed in the case as opposed to Formal Warning procedure set out in FRO 35 which sets up a probationary period during which the commanding officer must decide whether he will recommend that this individual be retained in the TPDF or be released."*

The tenure of proof is provided for in paragraph 6 of the FRO as follows:

6. *A Record of Reproof shall remain on the individual's confidential files for a period of 12 months from the date of the Reproof. Immediately upon the expiry of the twelve months period, the Record of Reproof shall be removed from the files and destroyed."*

Regulation 101.11 (4) of 1st Schedule the **National Defence Act**, Cap 192, states:

101.11(4) Conduct for which a Reproof has been administered should not subsequently form the subject of a charge.

The law on Formal Warning is under FRO No. 36 of FRO Serial No. 13 of 16th October 1966. Paragraphs 1 and 2 of FRO No. 36 cover, *inter alia*, "behavior in a manner unbecoming of a member of the TPDF". It is meant to be:

> *"…a final attempt to salvage a soldier's career, and shall be instituted only after counselling and guidance have failed to rectify deficiencies in personal character or habits or in the performance of service duties. It will provide a period of probation during which the member must show that he can improve to satisfactory standards."*

A Formal Warning is "normally" to be given for a period of six months, but the Commanding Officer may set a shorter period if he feels warranted, including where the deficiencies are sufficiently overcome before the end of the probation period. Where the individual concerned fails to respond to probation, the probation may be terminated in favour of a recommendation for release. One of the conditions applying to Formal Warning is that it:

> *"…shall not be considered as a substitute for disciplinary action. Shortcomings attributable to misconduct shall be dealt with under the Code of Service Discipline, but may by their seriousness or repetition also call for Formal Warning."*

During the probation period, the member concerned is put under close observation and supervision, on the basis of which an interim report at the end of the improvement achieved during the initial phase of probation (paragraph 15) is to be submitted. Upon completion, a final report shall be submitted, and shall include a definite recommendation for retention or release of the member concerned. Successful completion would result in his removal from probation, with a confirmation of this action being sent to Defence Forces Headquarters by the Commanding Officer (paragraph 16).

In his submissions, Mr. Nnko for the appellant argued that the appellant was served with "*Onyo Rasmi*", which is a Kiswahili term for "Formal Warning", and placed under probation for six months. Counsel Nnko concedes that his client's case is one involving a Formal Warning and not a Reproof. He however states, relying on paragraph 15, that a report on his client was to be tendered on 6th July 2011 and, in terms of paragraph 17, the probation was supposed to have been terminated or action taken pursuant to paragraphs 14 and 16 if the relevant authority was of the opinion that his client had not overcome the censored shortcoming.

Mr. Nnko's complaint is that the authorities' decision to arraign his client on a charge that was signed on 14th November, 2011, well after expiry of the Formal Warning, which subsisted for only six months (from 6th January 2011 to 5th July 2011), was not legally allowed and thus unlawful.

In view of this, argues learned counsel, the general effect of the appellant's continued contravention of FRO No. 36, if any, would have been a release from TPDF and not a trial by the General Court Martial. That is the basis for counsel's argument that the General Court Martial that tried his client did not have the requisite jurisdiction, that he had been tried *"for committing no offence at all"*, and that the trial was *"a travesty of military justice"*. He further reasoned that the trial was in respect of the same act which had led to the Formal Warning, an act which had "become history from 6th July 2011 onwards", after which the records of the incident in his file were to be destroyed.

In reply, it was submitted by Capt. Karumuna on behalf of the respondent that counsel Nnko's argument (that the learned Judge Advocate erred in translating the Formal Warning as synonymous with Reproof and thus wrongly conferred jurisdiction upon itself) as intended to mislead this Court. Mr. Karumuna stated that the matter that was disputed before the trial Court was whether the appellant was granted a Formal Warning or a Reproof. The Judge Advocate General determined the issue as follows:

> *Kwa mujibu wa kielelezo DE-1 mshatakiwa tarehe 6 Januari alitia saini maandishi yenye kichwa cha habaro "Onyo Rasmi". Maandishi hayo yalisainiwa na mkuu wa Kikosi 521 KJ Meja Jenerali SS Salim tarehe 6 Januari, 2011….Kwa hiyo, bila kuzunguka P10445 Captain Njau Boniface Yesaya wa 521 KJ, ambaye ni mshtakiwa tarehe 6 Januari 2011* ***alipewa Onyo Rasmi kutoka kwa Mkuu wa Kikosi 521 KJ Meja Jenerali SS Salim****.* [emphasis ours]

With respect, we agree with learned counsel Karumuna. The issues before the General Court Martial was whether the appellant was given a Formal

Warning or a Reproof. A clear distinction between the two was apparent in the arguments presented and in the determination of Major G.F. Benda, who presided over the General Court Martial. His ruling was also a correct application of Sub-Regulations (2) (3) and (4) of Regulation 101.11 of the **Defence Forces Regulations**, which provide:

> *(2) A Reproof shall be reserved for conduct which although reprehensible is not of sufficiently serious nature in the opinion of the officer administering the Reproof to warrant being made the subject of charge and brought to trial. A Reproof is not a punishment and shall not be referred to as such.*
>
> *(3) A Reproof shall not be entered on a conduct sheet but a record of it shall be made and maintained among the service records of the officer or warrant officer concerned for a period of twelve months from the date of the Reproof. Immediately upon the expiry of the twelve-month period the record of the Reproof shall be destroyed.*
>
> *(4) Conduct for which a Reproof has been administered should not subsequently form the substance of a charge.*

Given these legal provisions, it is possible to conclude that a Formal Warning is employed in a more serious case than a Reproof, and subjects the offender to a maximum probation period of six months (lesser if warranted, in the opinion of the Commanding Officer). A Reproof, on the other hand, is obviously a lesser measure than a Formal Warning. It is not to be entered on a conduct sheet. Only a record of it is made and maintained for a period of twelve months, and is to be destroyed upon expiry of that period. Two other important provisions are worth noting, and would go to buttress the contention that a Formal Warning is more serious: While a Formal Warning **"shall not be considered as a substitute for disciplinary action**", a conduct for which a reproof has been administered **"shall not form the subject of a charge"** [emphasis ours].

Mr. Karumuna contends that neither a Formal Warning nor a Reproof falls in the categories of scale punishments as provided under section C.68 of the Code of Service Discipline, which mean that they are both administrative in nature and not disciplinary. He further argues that the appellant never served the requisites of his Formal Warning because on 10th May 2011, before the expiry of his six-months' probation period, he was transferred from 521 Lugalo General Military Hospital, Dar es Salaam, to Bububu Military Hospital in Zanzibar. If we got Mr. Karumuna correctly, it is his argument that the transfer terminated the appellant's probation and consequently his Formal Warning, which rendered the Formal Warning a nullity, meaning that, in law, he was never issued with a Formal Warning.

With due respect, we are unable to accept Mr. Karumuna's argument. We do not think that the law would have intended it to be so—that the fact that TPDF decided, less than two months before the end of the appellant's probation, to transfer him to another posting contrary to the applicable law, meant that he is deemed never to have served his probation at all, and that the Formal Warning issued to him on 6th January 2011 was a nullity. In the absence of clear words to the contrary in the law, or an express rescission thereof by the Commanding Officer, we would hold that the fact that the appellant was transferred from his post to another at the will of the TPDF had no effect on his Formal Warning, and that, despite the transfer, he must be deemed to have served his probation period to the end.

That said, we would be in a position to determine the issue raised by the first ground of appeal, *viz.*, whether the General Court Martial translated the terms "Formal Warning" as synonymous with "Reproof". From the above discussion, it is clear that the General Court Martial was not called upon to determine the issue raised in this ground. It is clear that the learned Judge Advocate correctly appreciated the difference, and resolved the issue in favour of the position that the appellant was served with a Formal Warning as distinct from a Reproof.

This finding would lead us to draw the conclusion, with regard to the two measures and thus the first ground of appeal, to the effect that the General Court Martial did not translate a "Formal Warning" as synonymous with "Reproof". Hence, contrary to what Mr. Nnko asserts, the trial Court Martial did not err.

However, having so held, it becomes pertinent for us to also resolve the issue, arising as a direct consequence of the finding, and touched upon in the first ground of appeal, as to whether the General Court Martial had jurisdiction to try the appellant after having served his probation.

As stated earlier, once a Reproof has been administered, it remains effective for twelve months, after which it is to be removed from the records. Under Regulation 101.11 (4) of 1st Schedule the **National Defence Act**, a conduct the subject of a Reproof **should not subsequently form the subject of a charge**. The position with regard to a Formal Warning is different. It is described as "a final attempt to salvage a soldier's career" (paragraphs 1 and 2 of the **Forces Routine Orders** Serial No. 36 of 16th October 1966), and is "**not to be considered as a substitute for disciplinary action**" [emphasis ours].

In fact, depending on the Final Report on his behavior during probation, the officer concerned may be retained or removed from service. The latter is obviously a more serious punishment than a trial leading to a demotion. It is thus difficult to accept the contention that the army authorities had exceeded their jurisdiction by having him face the General Court Martial on a disciplinary charge that led to his demotion for the same offence the subject of his probation, as that is clearly allowed by paragraphs 1 and 2 of the FROs just cited.

To conclude on Ground No. 1 therefore, it is also not correct to contend that the General Court Martial did not have jurisdiction to try the appellant as it did. The said ground is thus dismissed.

With this holding, it is incumbent upon to determine whether or not it was proper at law for the General Court Martial to impose the sentence that reduced his rank from Captain to Lieutenant. This sentence forms the core of the appellant's grievance contained in the second ground of appeal, where he challenges "**the legality of the whole sentence of reduction in rank from Captain to Lieutenant**" [emphasis ours]. The appellant laments in the particulars accompanying this ground that the General Court Martial:

> *"…erred in law and in fact by imposing the above cited punishment which placed the appellant far below the statutory rank (substantively) held by officers of his profession under the Career Requirements of Medical Corps (Personnel) in the Armed Forces, of which punishment was illegal for people of his profession."*

In his written submissions in support of this ground, Mr. Nnko made reference to several relevant provisions. With regard to career development for professionals within the TPDF, these are set out in **The Forces Routine Orders No. 5-6, Serial No. 5 of 24th March 1992**, which state, under Order 18, as follows:

> *18. Afisa Mwanafunzi atakayefuzu mafunzo ya uafisa mwanafunzi atatunukiwa kamisheni na Rais wa Jamhuri ya Muungano wa Tanzania kufuatana na utaratibu ufuatao:*
>
> > *f. Kamisheni itatunukiwa katika cheo cha Luteniusu. Kupanda cheo papo hapo kutafuatana na sera ya maendeleo ya utumishi wa kila taaluma.*

The Forces Routine Orders No. 5-6, Serial No. 5 of 24th March 1993, which is cited as "SERA YA MAENDELEO YA UTUMISHI KWA MAAFISA WA TIBA", is introduced with the following remarks:

1. *Amri hii inaweka sera ya maendeleo ya utumishi kwa maafisa wa taaluma katika kundi la wataalamu na itasomwa pamoja na Amri ya Utaratibu wa utumishi ya tarehe 24 Mar 92 yenye kichwa cha maneno "SERA YA*

MAENDELEO YA UTUMISHI (CAREER DEVELOPMENT POLICY FOR OFFICERS).

2. *Maafisa wa Taaluma ya Tiba watagawanyika katika makundi (categories) zifuatazo:*

   1) *Category "F"*
      i. *Kundi hili litakuwa la wataalamu wa tiba wenye elimu ya shahada ya Doctor of Medicine (MD) na Doctor of Dental Surgery (DDS) waliyopata katika vyuo vikuu vinavyotambuliwa.*

CHEO CHA UAFISA MWANAFUNZI

3. *Wataalamu wa tiba watafanya mafunzo ya uafisa mwanafuzi ya kozi fupi na ndefu na kutunukiwa kamisheni kama ifuatavyo:*

   1) *Wataalamu wa categories "F" na "G" watatunukiwa kamisheni katika cheo cha luteniusu na papo hapo watapandishwa cheo kuwa Kapteni.*

As a dental surgeon, the appellant fell under category "G", which entitled him to be promoted from 2nd Lieutenant to Captain on the very day of his commission (19th December, 2009). However, following his conviction, the General Court Martial reduced his rank from Captain to Lieutenant. was this legally proper? Capt. Karumuna for the respondent maintains that it was proper, while Lt. Col. Nnko disagrees, and cites Reg. 104.09 of the **Code of Service Discipline** (the 1st Schedule to the **National Defence Act**), which provides as follows, under section C.72:

> *The punishment of reduction in rank shall not—*
> *(a) Involve reduction to a rank lower than that to which under the Defence Forces Regulations, the offender can be reduced."*

The Defence Forces Regulations, as counsel Nnko noted, embody Forces Routine Orders, Unit Standing Orders, Forces Standing Orders, and many orders published daily by the Chief of Defence Forces: Regulation 1.23 and 1.24 of the **Defence Forces Regulations**. It was on the authority of

these Regulations that section C.72 of the **Code of Service Discipline** cited above was promulgated by the Chief of Defence Forces, on the strength of which counsel Nnko wants this Court to find that the General Court Martial was wrong in demoting the appellant from Captain to Lieutenant. The sentence, argues counsel, is contrary to the **Defence Forces Regulations and Orders of Career Development** for medical officers such as the appellant because it places him "at a rank lower than that which is basic for people of his qualifications…"

We think the key to resolving the issue arising out of these arguments lies in clause (b) of section C.72 (2) of the **Code of Service Discipline**, which states:

> ***"The punishment of reduction in rank shall not—***
> ***(b) In the case of a commissioned officer, involve reduction than commissioned rank.*** [emphasis ours]

This provision begs the question as to what does the term "commissioned rank" mean. Section 3 of the National Defence Act defines the term under the word "commissioned officer", who is described as "an officer other than a subordinate officer, and 'commissioned rank' shall be construed accordingly". Furthermore, a "subordinate officer" means "an officer cadet and a provisional second lieutenant." This is the only limitation imposed by law to the power of reduction in rank as a punishment.

Taking the above legal definitions as a guide, it can now be concluded, considering all the circumstances of this case, that under section C.72 (2) (b) of the **Code of Service Discipline**, the General Court Martial could not have reduced the appellant's rank to that of an Officer Cadet or a Provisional Second Lieutenant. The rank of Lieutenant to which the appellant was demoted, however, is higher as it falls in the category of a commissioned rank, and thus within the limits of the law. The culmination of the above findings, therefore, is that the General Court Martial did not err in sentencing the appellant.

This finding resolves that second ground of appeal to the effect that the sentence imposed was perfectly lawful since, as a Lieutenant, the appellant remained a commissioned officer. The said ground of appeal is without merit and it is likewise dismissed.

To borrow Mr. Nnko's terminology, we see no "travesty of military justice" occasioned by the appellant's trial. The appellant was properly charged, the General Court Martial had the requisite jurisdiction to try him, and the sentence imposed upon him was proper and lawful.

In the final result, the appeal is dismissed in its entirety.

DATED at Dar es Salaam this …… day of September 2016.

Z.G. Muruke
JUDGE

F.A. Twaib
JUDGE

S. Bongole
JUDGE

I certify that this is a true copy of the orginal.

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DEPUTY REGISTRAR