

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 69/2018

CIV /APN 361/2017

In the matter between:

LIKOTSI MOKOMA

APPELLANT

AND

COMMANDER OF THE DEFENCE FORCES

1ST RESPONDENT

PRESIDING OFFICER-SUMMARY TRIAL

2ND RESPONDENT

PROCEEDINGS OF THE LESOTHO DEFENCE FORCE

MINISTRY OF DEFENCE

3RD RESPONDENT

MINISTRY OF FINANCE

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

CORAM: P.T. DAMASEB, AJA

M.H. CHINHENGO, AJA

N.T MTSHIYA AJA

HEARD: 13 OCTOBER 2020

DELIVERED: 30 OCTOBER 2020

Summary

Summary trial in the Defence Force of Lesotho- appeal against sentence passed under summary trial on a retired member of the Lesotho Defence Force- sentence imposed under the wrong provision of the act-matter referred to summary trial court for it to pass sentence in terms of the law.

Judgment

MTSHIYA AJA

INTRODUCTION

[1] This is an appeal against the sentence passed on the appellant under summary trial in the Defense Force of Lesotho. The appellant, who was a Major, has since retired from the Defense force. He retired on 17 November 2016.

[2] On 26 January 2016, upon pleading guilty to an offence of disobeying a military order, the appellant was convicted on his own plea and demoted from the rank of Major to that of Captain with effect from 3 February 2016.

[3] On 12 February 2016, displeased by the sentence imposed on him, the appellant filed a petition for a review of the summary proceedings. In the in house petition, filed in terms of regulation 29

of the Defence Force (Discipline) Regulations 1998, the appellant, in mitigation, pointed out that:

- a) he had served in the force for a period of 35 years.
- b) was a first offender
- c) had faithfully served the force throughout his period of service and had adhered to all principles to be observed under the oath of office.
- d) had successfully overseen a military base rehabilitation project worth sixty seven million (M67, 000, 000-00); and
- e) the demotion had an adverse financial effect on him.

His petition was dismissed.

[4] In October 2017, displeased with the dismissal of his petition, the appellant made an application to the High Court seeking the following relief:

- “1. That the applicant be granted condonation for the late filing of review in the event of the court finding the review to have been filed out of time.
2. That the 1st and 2nd respondents be ordered to file with court and in terms of Rule 500 of the High Court Rules 1980 a record of proceedings of the summary trial proceedings of the applicant.
3. That the proceedings against the applicant be reviewed, corrected and set aside.
4. That in the alternative to prayer 3 above, the sentence handed down against the applicant be reviewed, corrected and set aside.
5. That upon granting of prayers 3 or 4 above, it be decided that the applicant retired on the rank of Major.

6. That the respondents are ordered to calculate and pay the applicant's pension and other retirement benefits on the scale applicable to the rank of Major.
7. That the respondents be ordered to pay costs of this application.
8. That applicant be granted such further and alternative relief."

[5] On 19 September 2018 the matter was heard in the High Court and on 21 November 2018, the High Court dismissed the appellant's application with costs.

[6] The appellant now appeals against the above order of the court *a quo* listing the following grounds of appeal:

- "1. The learned judge erred in not giving reasons for judgment.
2. The learned judge erred in dismissing the application because on the facts and the law, the Applicant had proved that the conclusion arrived at by the decision-maker in the disciplinary case was not supported and as such an irregularity was committed for the conclusion arrived at could not be reached by a reasonable decision-maker in the circumstances of the case.
3. The appellant reserves the right to file additional grounds of appeal upon receipt of written judgments."

[7] At the time of noting the appeal, the appellant claimed that he had not yet received the judgement of the court *a quo*. However, when the appeal was heard, the said judgement was now in place. That being the case the first ground of appeal indicated above fell away. It will be noted that the second ground of appeal was an attack on the entire judgment. However, during the hearing of the appeal the appellant indicated that he was only appealing against sentence and not

conviction. In his application to the High Court he had indeed prayed for the sentence to be set aside and replaced with a sentence which would see him retaining his rank of Major. Such a position would upon retirement entitle him to the benefits attaching to that rank .

[8] The notice of appeal, filed on 21 February 2020 was accompanied by an application for condonation for late filing of appeal. The condonation application was granted by consent.

BACKGROUND

[9] The facts of this case are that the appellant, a male adult Mosotho of Haleqebe, residing in Maseru, is a retired member of the Lesotho Defence Force.

[10] Under paragraphs 4 and 5, of his founding affidavit the appellant states that upon joining the army on 1 April 1981, as a Private soldier, he rose through the ranks to the rank of Major in 2012. Upon reaching the age of fifty-five years, he retired from the army on 17 November 2016. He had thus served the army for a period of thirty-five (35) years.

[11] On 19 January 2016 the appellant was part of the protocol delegation receiving the then Honourable Prime Minister of Lesotho, Dr Pakalitha Mosisili, who was arriving at Moshoeshoe 1 International Airport from a trip to Botswana. As part of the Lesotho Senior Officials on the receiving line, the appellant was then ordered by the

Provost Marshal to marshal the fixed wing aircraft. The appellant did not comply with the order arguing that the aircraft, being guided by staff in the tower, had already stopped at the right place and there was therefore no need for marshaling. The appellant was then immediately arrested and detained for failure to carry out the order given by the Provost Marshal.

Charge and Sentence.

[12] For the purposes of trying the appellant for the offense committed, the first respondent appointed a Superior Authority in the following terms:

“I, the Rt Hon, Lieutenant General KT Kamoli , The Commander of the Lesotho Defence Force by virtue of powers vested in me in terms of regulations 40 (1) (a) read with regulation 2 of the Defence Force (Discipline) Regulations No.29 of 1998, do hereby appoint Col Kaibe as a Superior Authority for the purposes of trying summarily no.5338 Maj Mokoma of LDF Airwing.

Pursuant to the provisions of the said regulations the officer shall have powers of punishment of Superior Authority in terms of Regulation 22 (1) (a)(i) and (ii) of the Defence Force (Discipline) Regulations ,no.29 of 1998.

“ (My own underlining).

[13]An official charge sheet was subsequently served on the appellant. The charge sheet was prepared as follows:

“ CHARGE SHEET

The accused No.5338 Maj.L Mokoma of LDF Airwing, An officer of the Regular Force is charged with:

STATEMENT OF OFFENCE

Disobedience to particular orders, an offence arising out of military service contrary to section 51 (1) of the Lesotho defense Force Act No 4 of 1996.

PARTICULARS OF OFFENCE

On the 19/01/16, at or near Moshoeshoe 1 international Airport in the district of Maseru, the said accused unlawfully and intentionally disobeyed lawful orders given to him by Col Nkei to assist in marshalling the Botswana Defence Force (BDF) aircraft which was conveying the Right Honourable Prime Minister and his entourage.

The accused said to Col Nkeli ‘Sefofane se se se eroe.’ Did not do as he was ordered.’ (My own underlining).

[14] On 3 February 2016, on the basis of the above Charge Sheet, the appellant appeared before Col Kaibe for summary trial .He was convicted on his own plea and sentenced to demotion from Major to Captain. It is that sentence that his challenging in this appeal on this basis that it was severe.

The Law

[15] In order to have a clear appreciation of the actions of the 1st respondent ,I quote here below the provisions of the regulations under which he acted, namely Regulations 40 (1)and 22(1) (a) (i) and (ii) of the Defence Force (Discipline) Regulations , no. 29 of 1998.

The said regulations provide as follows:

“40. (1) The Commander may appoint any officer-

(a) as a superior authority;

- (b) as a commanding officer;
- (c) as an officer commanding;

in whom shall vest the powers and functions prescribed by these regulations.

Provided that in making any such appointment the Commander may, in writing, limit the extent to which the powers on prescribed in regulation 23 may be exercised such officer.”

.....

22 (1) Where, on a summary trial in terms of Regulations 23 and subject to the subregulation (10) of that Regulation, a presiding officer has determined that an accused is guilty of a charge, he shall record a finding of guilty and may, subject to this Regulation and, if appropriate, section 110 of the Act, impose any of the following punishments-

- (a) in the case of a superior authority-
 - (i) where the accused is an officer-
 - A. a fine not exceeding the equivalent of 30days’ basic pay or one thousand Maloti whichever is the lesser;
 - B. forfeiture of seniority of rank;
 - C extra duties over a period not exceeding 40 days;
 - D. a severe reprimand or a reprimand;
 - E. an admonition;
 - F. were the offence has occasioned any expense, loss or damage, stoppage not exceeding M500;
 - (ii) where the accused is a non- commissioned officer-

- A. of the rank of sergeant or below, reduction to the ranks or any less reduction in rank;
- B. a fine not exceeding the equivalent of 30 days' basic pay or four hundred Maloti whichever is the lesser;
- C. Forfeiture of seniority of rank;
- D. Extra duties over a period not exceeding 40 days;
- E. A severe reprimand or reprimand;
- F. An admonition;
- G. Where the offence has occasioned any expense, loss or damage, stoppages not exceeding M400;"

It is common cause that the sentence imposed was not as had been authorized by the 1st Respondent. The sentence was not imposed in terms of 22(1) (a) (i) and (ii) quoted above. For reasons not explained, it was imposed in terms of section 82 which provides as follow:

"82 1) The punishments which may be awarded under this Act to an officer by sentence of a military court are those set out in the scale in subsection (2), and in relation to an officer references in this Act to punishments provided by this Act are references to those punishments.

(2) The scale referred to in subsection (1) is-

- a)
- b)
- c)
- d)
- e) reduction in rank, except that an officer appointed directly from cadet training shall not be reduced to a rank below that of second lieutenant;
- f)
- g)
- h)
- i)

[16] A look at the charge sheet reveals that the appellant was charged with an offence under section 51 (1) which prescribes the sentence to be imposed. Section 51 (1), in full, provides as follows:

“ 51.(1) Any person subject to this act who, in such manner so as to show defiance of the authority, disobeys any lawful command given or sent to him personally commits an offence and shall, on conviction be liable to imprisonment for a term not exceeding 2 years.

(2) Any person subject to this act, who whether willfully or through neglect, disobeys any lawful command commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding 2 years.”

In terms of law, the offense attracts a custodial sentence not exceeding 2 years. It was therefore, in my opinion, irregular for first respondent to authorize a punishment other than the one prescribed under section 51(1). Rule 23 referred to in Regulation 40 relates “to the procedure on summary trial by a presiding officer”. The 1st respondent had no authority to authorize sentencing outside a clearly stated provision of the law.

My finding therefore, is that, notwithstanding the issue of the severity of the punishment, the said punishment was in fact imposed outside the law. Upon the appellant pleading guilty to the offence and making submissions on mitigation, what remained was for the presiding officer to impose a sentence of not more than 2 years.

[17] Upon pointing this position to the parties, the respondents’ Counsel quickly conceded. Accordingly, given the concession by Advocate L Molati that the sentence was indeed not imposed in terms

of the law and also the fact that the appellant was properly convicted, nothing more turns on this matter, except to ensure that a proper sentence is imposed in terms of the law.

[18] If the law had provided for a mandatory sentence this court could have simply set aside the sentence of the summary trial and substituted it with the correct sentence. However, *in casu*, the law requires that a sentence of not more than 2 years be imposed. There is therefore a discretion on the part of the presiding officer to impose a sentence he or she may think is warranted provided the sentence does not exceed 2 years. I therefore think the proper course to take would be to remit this matter to the summary trial court for it to impose a proper sentence in terms of the law.

[19] I have exercised my mind on the fact that the appellant has since retired from the army. That raises the question of whether the tribunals of the army still have jurisdiction over the appellant. In looking at this matter I have taken into account the fact that the appellant brought his appeal before the civil courts 19 months after retirement. That means the court has to examine his appeal in terms of the law that led to his misery. To that end I hold the view that he has placed himself under the law that is applicable within the army. His case can therefore still be dealt with in terms of the law applicable in the army.

Both Advocates Molati and Sethati agreed with the court's decision to remit the matter to the summary trial court of the army.

[20] In view of the foregoing, I therefore order as follows:

1. The appeal succeeds.
2. The order of the court *a quo* be and is hereby set aside and substituted with the following:


The matter is remitted to the 1st respondent for him/her to cause a proper sentence to be imposed on the appellant in terms of the law.

3. There is no order as to costs in respect of this appeal and the application in the High Court.



**N.T MTSHIYA
ACTING JUSTICE OF APPEAL**

I agree



**P.T DAMASEB
ACTING JUSTICE OF APPEAL**

I agree



M.H.CHINHENGO
ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV L MOLATI

FOR RESPONDENTS: ADV M SEKATI