



**Mulewa v Republic (Court Martial Appeal E001 of 2023)
[2024] KEHC 11353 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
COURT MARTIAL APPEAL E001 OF 2023
DR KAVEDZA, J
SEPTEMBER 30, 2024**

BETWEEN

ALFRED JEFWA MULEWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by the Court Martial at Kahawa Barracks no. 12 of 2022 Republic vs Alfred Jefwa Mulewa)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of conduct to the prejudice of good order and service discipline contrary to section 121 of the [Kenya Defence Forces Act, 2012](#) in that he on diverse dates between June and December 2019 at Kilifi county within the Republic of Kenya, obtained the sum of Ksh. Five Hundred and Seven Thousand (Ksh.507,000/=) from Edward Kalama of ID number 223xxxxx and his wife Kanze Shikari of ID No. 364xxxxx on the false pretense that he was in a position to secure the recruitment of their two sons Mr. Salim Kalama of ID Number 364xxxxx and Ali Katana of Id Number 343xxxxx into the Kenya Defence Forces an Act he knew or ought to have known constitutes an offence. He was sentenced to serve five (5) months imprisonment to run from the date of conviction.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his appeal, he raised grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He argued that the court failed to consider his defence and mitigation. He urged the court to quash the conviction and set aside the sentence.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task



must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno vs Republic* [1973] EA 32).

4. PW1, Kanze Shikari Karume, testified that the appellant is a relative and neighbour. She said her son, Jefwa, informed her that the appellant was helping people join the Kenya Defence Forces. Her children had previously failed to secure recruitment on previous occasions, she therefore contacted the appellant who confirmed he could assist her sons, Ali Katana and Salim Jefwa, for a fee of Ksh. 250,000 per child. She sold her cattle to raise Ksh. 607,000, including Ksh. 50,000 from her husband. Despite paying, her sons were not recruited. Her husband, a former KDF member, knew about the payments.
5. PW2, Salim Jefwa Kalama, son of PW1, testified that he was a taxi driver in Malindi. In 2019, he overheard passengers saying that the appellant was helping people join the KDF. He informed his mother, who then contacted the appellant, a relative. The appellant agreed to help but demanded Ksh. 250,000 per child. PW2 received Ksh. 300,000 from his mother, which he gave to the appellant. They later sold their remaining cattle and sent more money. Before the recruitment, they met the appellant, who asked for an additional Ksh. 1,000. Despite paying, they were not recruited and never received the recruitment letters.
6. PW3, Edward Kalama Mlewa, a retired Armed Forces officer and husband to PW1, testified that in 2019, his wife informed him that the appellant promised to help their sons, Ali and Katana Jefwa, join the armed forces for a Ksh. 300,000 deposit. Although sceptical, he agreed to give the money, which he had set aside to buy a tuk-tuk. After the initial payment, the appellant demanded more, so they sold their remaining cattle. Despite paying Ksh. 250,000 per child, their sons were not recruited. The appellant promised to refund the money but failed, leading PW3 to report him to the authorities.
7. PW4, Ali Katana Kalawa, son of PW1, supported the testimonies of his parents and sibling (PW2). He confirmed that in early 2019, the appellant requested money to help recruit him and his brother into the armed forces. Despite receiving the money, the appellant did not fulfil his promise or return the funds.
8. PW5, No. 85527 Cpl George Omusugu, a Military Police investigator, testified that after receiving a complaint about the appellant conning civilians out of Ksh. 507,000, he conducted investigations. He verified that Ksh. 306,000 was remitted by PW2, Ksh. 150,000 was deposited in the appellant's bank account and Ksh. 50,000 and Ksh. 1,050 were sent via Mpesa by PW3 and PW4, respectively. The appellant agreed to refund the money but only repaid Ksh. 50,000, leaving a balance of Ksh. 457,000, and was subsequently recommended for charges.
9. PW6, Loise Wangare Nganga from Equity Bank's legal department, presented the court with the account details and statements for account number 0120196xxxxx, which was registered to the accused. She confirmed that several deposits were made by PW2 into the account. During cross-examination, she explained that deposit slips are usually issued for deposits made through agents.
10. PW7, Ambrose Munyoki, a data analyst from Safaricom, provided the registration details and Mpesa statements for phone number 0721620178, registered to the accused. He highlighted transactions where the appellant received funds from PW3 and PW4 via Mpesa.
11. In his defence, the appellant acknowledged knowing PW3, Edward Kalama Mlewa, and his family as neighbours, relatives, and former colleagues in the KDF. He denied ever asking for or receiving money from Edward or his wife to help recruit their sons into the KDF. The appellant claimed that PW3 known for his temper, once beat his wife over missing money, believing she knew where it was. The appellant tried to intervene, but their relationship worsened. The appellant said that PW3 had a



- personal vendetta against him, partly due to a debt of Ksh. 357,000 owed by the appellant's wife to PW1.
12. DW2, DW3, DW4, and DW5 all confirmed the dispute between the appellant and PW3's family, acknowledging attempts by elders to resolve it at the Chief's office in vain. They testified that PW2 had a difficult and unpredictable character, with DW2 claiming to have overheard PW2 threaten to "fix" the appellant using his KDF connections. DW3 mentioned attempts to mediate the sour relationship between the families. DW4 stated that he witnessed the accused giving Ksh. 50,000 to PW3, which he believed was a loan repayment. DW5 testified that he was present when the appellant gave Ksh. 100,000 to PW3 in front of other family members, related to the debt dispute between their wives.
 13. On re-evaluation of the evidence adduced before the trial court, it was clear to this court that the trial court appreciated the charges that the prosecution was supposed to prove in order to secure the conviction of the Appellant.
 14. This court has re-evaluated the evidence adduced before the trial court. It has also considered the submission made by the parties to this appeal. Section 121 of the *Kenya Defence Forces Act* states thus:

"Any person subject to this Act who commits any act, conduct, or neglect to the prejudice of good order and service discipline commits an offence and shall be liable, on conviction by a Court Martial, to imprisonment for a term not exceeding two years or any lesser punishment provided for by this Act."
 15. On the merits, it was the prosecution's case that the appellant had obtained money from the complainants by falsely pretending that he was in a position to have them recruited to the armed forces. The prosecution's evidence against the appellant includes testimonies from multiple witnesses detailing fraudulent KDF recruitment schemes. PW1, Kanze Shikari Karume, testified that the appellant, a relative, promised to help recruit her sons into the Kenya Defence Forces (KDF) for Ksh. 250,000 per child. After selling her cattle, she and her family raised Ksh. 607,000, which they paid to the appellant. Despite this, her sons were not recruited. PW2 confirmed that he handed Ksh. 300,000 to the appellant after hearing he was helping people join the KDF. PW3, who was PW1's husband, also confirmed giving the appellant money, although he was initially sceptical. He testified that after the initial payment, the appellant demanded more, leading them to sell their remaining cattle. PW4, one of the sons, supported the testimonies, stating that the appellant did not fulfil his promise or return the money.
 16. PW5, a military police investigator, confirmed that Kshs. 306,000 was remitted by PW2, Kshs. 150,000 deposited in the appellant's bank account, and smaller amounts sent via Mpesa. PW6 from Equity Bank and PW7 from Safaricom corroborated the financial transactions. Although the appellant agreed to refund the money, he only repaid Kshs. 50,000, leaving a balance of Kshs. 457,000.
 17. The question for determination is whether the prosecution provided a nexus between the transactions, the complainant, and the appellant. Moreso because section 121 of the *Kenya Defence Forces Act*, 2012 does not outline what specific acts would prejudice an officer's good order and service discipline. That is left for the authorities to decide.
 18. Thus, in my view, to prove such misconduct just like any other criminal offence, the state ought to establish both actus reus and mens rea on the part of the appellant. In this case, the actus reus was shown since the appellant received the money from the appellant. Secondly, the appellant was in a position to induce the recruitment of army officers. In addition, the prosecution established a link between the appellant and the monies paid.



19. In *Ali v R* (1990) KLR 154. The court stated that,

“for a conviction based on circumstantial evidence to be deemed proper, the inculpatory facts relied on as circumstantial evidence must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary to be sure that there are no other co-existing circumstances which could weaken or destroy the inferences of an accused person’s guilt, derived from circumstantial evidence”

20. The key question is, does the defence offered by the appellant in the lower court raise doubts as to his guilt? Does it rebut the above ingredients? Is it reasonable in the circumstances?

21. The appellant denied receiving money to recruit PW3’s sons into the KDF, citing a personal dispute over a Kshs. 357,000 debt between their wives. DW2-DW5 confirmed the family dispute and attempts to resolve it, with some witnessing payments believed to be loan repayments. Considering the evidence presented, I find the appellant’s defence to be highly improbable and challenging to accept. The appellant’s explanation lacked reasonableness and failed to counter the compelling evidence presented by the prosecution.

22. After weighing the explanation offered by the appellant and the prosecution evidence, I find that the prosecution evidence is truthful, credible, and probable as opposed to the highly improbable defence offered by the appellant. The appellant’s defence did not raise any reasonable doubts on the prosecution case. Overall, the evidence suggests the appellant played a central role in the fraudulent recruitment operation, leading to charges against him.

23. The prosecution provided evidence that confirmed the exchange of money between the complainants and the appellant. This court therefore holds that the prosecution did prove, to the required standard of proof beyond any reasonable doubt that the Appellant obtained the said sums from potential KDF recruits by falsely pretending that he was in a position to secure their recruitment into the Armed Forces. This fact the Appellant knew to be false. The Appellant’s defence in that regard did not dent the otherwise cogent, consistent, and culpatory evidence that was adduced against him by the prosecution witnesses.

24. The appellant argued that the trial court failed to consider his defence and mitigation. However, I have perused the summing up by the judge advocate. I find that the appellant’s defence was summed up and the same was therefore considered before a verdict of guilty was reached. His mitigation was also considered before the sentence of five months imprisonment was issued. The ground of appeal therefore fails. The upshot of the above is that the appellant’s conviction and sentence by the court martial was safe and is affirmed.

25. I find that the appeal lacks merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present



Maroro for the Respondent
Achode Court Assistant

