



**Olukohe v Republic (Criminal Appeal 71 of 2023)
[2024] KEHC 11334 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11334 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 71 OF 2023
DR KAVEDZA, J
SEPTEMBER 30, 2024**

BETWEEN

FESTUS MAUNYA OLUKOHE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by the Court Martial at Lang'ata Barracks no. 22 of 2021 Republic vs Festus Maunya Olukohe)

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. The particulars of the offence are that he on 27th December 2019 at about 1325 Hrs received Kshs. 30,000 from Grace Mandere to influence the recruitment of her brother Henry Mandere into the Kenya Defence Forces, an act he knew or ought to have known constitutes an offence. He was sentenced to serve one-year imprisonment to run from the date of his conviction.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal dated 2nd June 2023, he challenged the totality of the prosecution's evidence against which he was convicted. He maintained that the ingredients of the offence charged were not proved beyond reasonable doubt. He urged the court to quash his conviction and set aside the sentence imposed. The appeal was canvassed by way of written submissions, which have been duly considered.
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 v Republic* [1973] EA 32).



4. In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the appellant on the charges of conduct to the prejudice of good order and service discipline contrary to Section 121 of the [Kenya Defence Forces Act](#) preferred against him to the required standard of proof beyond any reasonable doubt.
5. 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.”
6. The prosecution presented a case centered on financial transactions and alleged deceit involving the appellant, Festus Maunya Olukohe, and members of the Mandere family. On 26th December 2019, Grace Mandere (PW4) received instructions from her brother, Henry Mandere (PW5), to remit Kshs 30,000 via Mpesa to the appellant. The following day, she transferred an additional Kshs 30,000 but could not recall the recipient’s number or the purpose of these funds.
7. Henry Mandere (PW5) testified that the appellant approached him with a promise to secure a "state letter" for employment through his uncle, a Major in the Kenya Defence Forces (KDF). Trusting the appellant, PW5 requested his sister to transfer Kshs 60,000 to facilitate this opportunity. However, despite meeting the accused and the alleged uncle, no job offer materialised, leading PW5 to suspect he had been defrauded and report the matter to the police.
8. Cpl Victor Mwale (PW2), a cousin of the appellant and a KDF officer, recounted a meeting in October 2019 with the appellant and PW5. The appellant disclosed that PW5 had lent him money and sought assistance for KDF recruitment. However, PW2 later learned from Henry that he was past the recruitment age limit, ceasing further communication until March 2021, when military police summoned him regarding the appellant's dealings.
9. Private Israel Mandele (PW3), another relative of PW5, revealed that in November 2020, PW5 claimed the appellant owed him Kshs 80,000 for a job placement. After contacting the appellant, PW3 was promised repayment. He also recounted assisting the appellant in 2018 by facilitating a Kshs 10,000 loan for a hospital bill, which the appellant repaid.
10. On 16th February 2021, Lt. Col. Dennis Munene (PW1) was informed by Lt. Alasava and Cpl. Miriti about the allegations against the appellant, specifically regarding the Kshs 60,000 allegedly received to facilitate Henry Mandere’s recruitment into the KDF. Investigations confirmed that the accused received Kshs 30,000 from Grace Mandere via Mpesa on 27th December 2019, alongside a cash payment.
11. Daniel Hamisi, a Safaricom PLC employee in the security department, testified that he was served with a court order to produce the Mpesa statement for account 0705xxx271, registered to Festus Maunya Olukohe, for the period from 1st July 2019 to 31st May 2020. He presented the statement, highlighting a transaction on 27th December 2019, where Kshs 30,000 was received from account 0722xxx277 registered to Grace Mandere.
12. Corporal Geoffrey Miriti (PW7), as the investigating officer, established that the appellant had solicited funds from Henry Mandere under the guise of securing a KDF position. His inquiries corroborated the financial exchanges, culminating in charges being filed after completing the necessary internal procedures.



13. On the merits, it was the prosecution's case that the appellant had obtained money from the complainant by falsely pretending that he was in a position to have him recruited into the armed forces. The prosecution's evidence against the appellant includes testimonies from multiple witnesses detailing fraudulent KDF recruitment schemes. PW5 testified that the appellant promised to help him get a recruitment letter into the Kenya Defence Forces (KDF) for Kshs. 60,000. He raised Ksh. 30,000 which he gave the appellant in cash, and asked his sister to send the balance via Mpesa. Despite this, he was recruited.
14. PW4 confirmed she sent the money to the appellant via MPesa using her number. However, she did not know the purpose of the money sent. Daniel Hamisi (PW6), a Safaricom employee, provided the Mpesa statement detailing the transaction involving PW4 and the appellant.
15. 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.
16. 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. 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”
17. 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?
18. In his defence, the appellant testified that he had been friends with the complainant, PW5 since 2018 having been introduced by Henry's brother, PW3. In December 2019, he borrowed Kshs 30,000 from Henry's sister, PW2, to pay for his children's school fees. He denied involvement in KDF recruitment, stating PW5 was 28 and too old for the process, which was limited to those aged 18-26. He further explained that poor communication while stationed at the border led PW5 to believe he was avoiding repaying the debt. The appellant maintained that they often lent money to each other as friends and that he had never participated in KDF recruitment, clarifying that a "calling letter" is only given to already qualified soldiers.
19. In my assessment, the appellant's explanation lacked reasonableness and failed to counter the compelling evidence presented by the prosecution. 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 about the prosecution case. Overall, the evidence suggests the appellant played a central role in the fraudulent recruitment operation, leading to charges against him.
20. 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 the complainant by falsely pretending that he was in a position to secure his recruitment into the Armed Forces, a 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.

21. The upshot of the above is that the appellant's conviction by the court martial was therefore safe.
22. Upon conviction, the appellant was sentenced to serve one year imprisonment. Section 121 of the KDF Act provides for a term not exceeding two years or any lesser punishment provided upon conviction. From the trial court's record, the appellant spent 1 year, 10 months, and 6 days in remand custody. During sentencing, this period was not considered. Guided by the law, the court is of the view that the application ought to be considered, as failure to do so would amount to denying the applicant a right due to the failure of the court to discharge an obligation bestowed upon it by law.
23. Having considered the circumstances of the case, and the time already spent in prison, the appellant is released forthwith, unless otherwise lawfully held as time served is sufficient punishment.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2024.

D. KAVEDZA

JUDGE

In the presence of:

Ms. Nyaaga for the Appellant

Maroro for the Respondent

Achode Court Assistant.

