



**Chemjor v Republic (Criminal Appeal E041 of 2021)
[2023] KEHC 132 (KLR) (Crim) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E041 OF 2021
JM BWONWONG'A, J
JANUARY 19, 2023**

BETWEEN

MAJOR BEN KIPKOGEI CHEMJOR APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of two years imprisonment imposed by the Court Martial (Col. E.W. Ndegwa, Lt. Col. E.O. Okello, M.M. Saba, Capt. P.W. Mbugua, Capt. V.N. Mikya and Lt. F.F. Safari, being sitting members dated 10th March 2022 at Kabawa Garrison, with the waiting members being Capt S.O. Sango and Lt. G.A. Mayore, in Court Martial Case No. 12 of 2021, Republic vs Major Ben Kipkogei Chemjor)

JUDGMENT

1. Major Ben Kipkogei Chemjor was charged with three counts of the offence of committing a civil offence contrary to section 133 (1) (b) of the *Kenya Defence Forces Act*, 2012 that is to say, obtaining by money false pretences contrary to section 313 of the *Penal Code* (Cap 63) Laws of Kenya.
2. In the alternative he was charged with three (3) counts of the offence of conduct to the prejudice of good order and service discipline contrary to section 121 of the *Kenya Defence Forces Act* 2012.
3. He was acquitted of the main charges and found guilty and convicted on the three alternative counts charged.
4. He was sentenced to serve one-year imprisonment in counts one and two, and two-years imprisonment in count three, which sentences were ordered to run concurrently.
5. Being dissatisfied with the decision of the Court Martial, he filed a petition of appeal dated March 25, 2022.



6. The grounds raised in the appeal are that the learned Judge Advocate and the sitting members erred in law and fact by relying on inadmissible electronic evidence, when there were glaring omissions that it did not meet the mandatory provisions of section 106B of the *Evidence Act*; relying on incoherent circumstantial evidence marred with gaps and missing links; convicting the appellant based on suspicion without appreciating the totality of the evidence with regard to the identification of the owners and/or subscribers to the telephone numbers allegedly used in the impugned transaction; misapplication of the law on the alternative charges and whether the offences he was convicted of could be considered as minor and cognate offences; ignoring the admission of the investigating officer that the alleged communication and money transactions did not influence the performance or conduct of the appellant; failing to give due regard to the appellant's defence failing to give due weight to the appellant's defence or any reasonable grounds of rejecting the appellant's defence from the evidence adduced; meting out an unjustified sentence.
7. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno vs. Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs. R* [2013] e-KLR, that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
8. No. 37335 Col Christine Wangare Kuria (Pw 1) testified that she was the Senior Recruiting Officer and supervised the appellant in his role as a recruitment officer. It was her evidence that during the recruitment exercise in Tana River and Kilifi Counties, she did not know of any malpractices that took place. On cross-examination, she testified that she never saw or heard the appellant take any money as an inducement in the process of recruitment.
9. No. 157387 Private Benard Kiplimo (Pw 2) testified that the appellant gave him a phone (model: smart hoppers LL110) to keep for him. The mobile phone had no sim card. He also told the court that thereafter he was called by his superiors and told to record a statement. On cross-examination, he could not conclusively say when and where the appellant gave him the mobile phone.
10. Francis Ngua Mwandenge (Pw 3) testified that he attended an army recruitment exercise in Malindi District. That after the exercise, he met the requirements and was issued with a calling letter requiring him to report on April 12, 2021 at the Recruit Training School. On the said date, he reported and was issued with a service number. He told the court that after two days, he was summoned by the Military Police who inquired how he got the job to which he explained. They were however adamant and inquired whether he had paid any money to induce his recruitment, which he denied. He was later informed that his father, Emmanuel Ngua Mwandenge who was a former Air Force officer had paid some money, which he did not know. He was instructed to call his father in their presence. In his testimony, the witness stated that he did not know anything concerning the case.
11. Abdulaziz Shambaro (Pw 4) told the court that he attended a recruitment of the Kenyan Army in Tana River County. Upon completing the exercise, he was issued with a calling letter. He later met his brother (Mohammed Barisa Shambaro) in the company of friends in a nearby hotel, who informed him that he could be assisted by being recruited. He testified that at the hotel his brother gave the individual a sum of Kshs. 300,000/=. On cross-examination, he could not tell the court whether the form of transfer used.
12. Gladys Muthure (Pw 5) the assistant registrar of marriages based in Nairobi told the court that the appellant was married to one Amanda Chemjor as per the certified copy of the marriage certificate produced.



13. No. 34633 Sgt Julius Onyango Omullo (Pw 6) from the Kenya Navy Headquarters in Mtongwe told the court that he was involved in the recruitment exercise of February 2021 in Tana River and Kilifi Counties. On February 11, 2021, his wife informed him that he had received an amount of money totalling Kshs. 170,000/= in an envelope from a person in a red t-shirt. Upon receipt of the money, she sent the money to the appellant via a number provided by the appellant. In cross-examination, he told the court that he did not know the person who delivered the money and the purpose. That he only acted on the instructions of the appellant.
14. No. 21683 Captain Stephen Wanjama (Pw7) gave evidence that he knows Captain Kimutai who was the administrator of Garrison IFC. He testified that he did not know the appellant or his connection to the case.
15. Symon Bitok (Pw 8) of Safaricom security department testified that on March 16, 2021 he received an order to provide, M-pesa statements and call data records for the following phone numbers 0715047XXX, 0707919XXX, 0720211XXX, and 0746591XXX. His findings were that 0715047XXX was registered to Amanda Jeruto Kigen and 0707919XXX was registered to Marion Nafula Waswa, and 0720211XXX was registered to Nicholas Gitau Nduma He told the court that the purpose of the report was to show communication between the numbers.
16. The witness went through the Mpesa statements of the transactions involving the numbers in question. Of note is the transaction of Kshs. 150,000 from 072140xxxx registered to Emmanuel Ngua Mwandenge to 0715047XXX.
17. On cross-examination, he stated that number 07079191XXX was registered to James Onyango but had been recycled, which meant that the ownership was different from the actual owner having been registered and used by two different individuals. It was his evidence that the account holder of 0715047XXX was Benjamin Kasiva. The witness did not produce any records of the numbers which were in communication with the numbers in issue at the particular time. The report indicated communication between 0707919XXX and several other numbers.
18. Pw 8 then produced a certificate under section 166B of the *Evidence Act* (Cap 80) Laws of Kenya as exhibit 10. The certificate indicated that the computer print outs were produced during the period the computer was regularly used to store or process information for the purposes or activities regularly carried out over that period. Additionally, the said certificate also indicates that the said computer was operating properly and the data contained in the documents is reproduced from the data supplied to the computer in the course of the ordinary course of business.
19. Celestine Achieng Odero (Pw 9) testified that she is the wife of Sgt Julius Omullo (Pw 6) of Kenya Navy Mombasa. She narrated that on February 10, 2021, she received a phone call that instructed her to collect an envelope from an individual not known to her. She did not question her husband's instructions and proceeded to collect the envelope. It was her evidence that she did not know the reasons why she was collecting the said envelope.
20. Emmanuel Ngua Mwandenge (Pw 10) testified that when his son was interested in joining the KDF he approached a friend by the name of Fredrick Kyalo who offered to assist him. The said individual asked for Kshs. 200,000/= in order to guarantee his recruitment. He told the court that he could only raise 150,000/= which he sent to a number issued by Fredrick Kyalo. It was his evidence that he was neither introduced to the person who would assist him nor did he meet him. He could also not identify the person he sent the money to. The witness could also not recall the phone number to which he sent the funds to. He was also not aware whether the money assisted in the recruitment of his son or not.



21. Mohammed Shambaro Barisa (Pw 11) told the court that he gave Kshs. 300,000/= to one Mr. Kipkorir Tonui to secure the recruitment of his brother to the KDF. He testified that after the recruitment exercise, Mr. Tonui approached him and told him that his brother had already been recruited and he should give him the money. That he proceeded to give the sum of Kshs. 300,000/= to him. He told the court that he did not speak to or know the army officer who assisted his brother in the recruitment.
22. No. 19862 Major Andrew Onyamo (Pw 12) the investigating officer in his evidence testified that the appellant had received Kshs. 170,000/= from Celestine Achieng Odero (Pw 9) and Kshs. 150,000/= from Emmanuel Nguwa Mwandenge (Pw 10) through 0715047XXX, which number he was using at the time and was registered to his wife. It was his evidence that 0707919XXX was being used by Capt. Kiprotich Mutai and belonged to Marion Wafula Waswa. He told the court that there was communication between the appellant and Fredrick Burangi prior to the date of the recruitment.
23. From the record, the appellant was found to have a case to answer and was put on his defence. In his defence, he made an unsworn statement and distanced himself from the charges preferred against him. He told the court that he never solicited any money from Pw 3 and Pw 4 to influence their recruitment to the Kenya Armed Forces. He also denied giving Pw 2 a phone to keep for him.

Analysis and determination.

24. In ground 1, the appellant challenged the electronic evidence adduced by the prosecution. The appellant submitted that the evidence had glaring omissions that did not meet the mandatory provisions of section 106B of the *Evidence Act*. It was argued that the certificate produced was not authenticated as required.
25. Conversely, respondent submitted that the use of electronic evidence conformed with the provisions of the *Evidence Act*. Learned prosecution counsel argued that Symon Bittok (Pw 8) conformed with the provisions of the law and that evidence was properly presented in court. Further that the evidence presented in support of the case was cogent, credible, corroborated and admissible.
26. Section 106B of the *Evidence Act* (Cap 80) Laws of Kenya states as follows:
 - (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
 - 2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so



- contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
- (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—
- (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in subsection(2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.
- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate



equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.

27. The prosecution filed a certificate dated 14th September expressed to be made under section 65 (8) as read with section 106A and 106B of the *Evidence Act*. The appellant contends that the certificate does not comply with the provisions of the *Evidence Act*. Having examined the relevant provisions relating to the admissibility of electronic records and the call log print outs. I find that the certificate indicated the type or particulars of the device used to produce the documents. The certificate indicated that the computer used to generate the print out was under the lawful control of Symon Bitok, the witness who produced it and he was duly authorized to extract and print documents from it. The evidence was therefore admissible within the provisions of the law.
28. In grounds 2, 3 and 4 of the appeal, the appellant challenged the totality of the prosecution evidence in proving the case against him. The appellant submitted there were discrepancies which are witnessed in telephone No. 0707919XXX, which was allegedly being used by Captain Kiprotich Mutai. Whereas the subscriber details reveal that it was registered in the name of Marion Nafula Waswa, the call and SMS logs indicate that the number belonged to James Onyango. In summation, the witnesses who had allegedly also used the numbers in issue were never called to testify with the court left to speculate. The prosecution's case on the identity of the owners and/or subscribers of the numbers in issue was marred with mere suspicions and speculations.
29. From the record, the appellant was convicted of three counts for the offences of conduct to the prejudice of good order and service discipline contrary to section 121 of the *Kenya Defence Forces Act, 2012*. This was an alternative charge as he was acquitted of the main charge. For this charge to succeed, the prosecution was required to provide proof beyond reasonable doubt that particular acts allegedly committed by the appellant were prejudicial to good order and discipline in line with section 121 of the *Kenya Defence Forces Act, 2012*.
30. The evidence adduced by the prosecution thereof intended to prove that the appellant while deployed as a service recruiting officer in the Kenya Army received amounts of money in the pretext that he intended to recruit Abdulaziz Barisa Shambaro and Francis Mwandenge in the Kenya Defence Forces. Particulars of the 3rd alternative count were that the appellant using mobile number 0715047XXX registered to his wife Amanda Jeruto Kigen and received monies from Celestine Ochieng Odero being monies obtained as recruitment inducement.
31. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. Section 121 of the *Kenya Defence Forces Act* states that:
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.
32. The evidence by the prosecution proved that indeed the appellant was employed as a recruitment officer and took part in the recruitment exercise of the KDF. Pw 3 and Pw 4 went through the recruitment process and were subsequently recruited. On his part Francis Nguu Mwandenge (Pw 3) told the court that he did not give any money and was not aware whether any monies were given to secure his recruitment. On the other hand, Abdulaziz Shambaro (Pw 4) testified that his brother gave an unknown individual a sum of Kshs. 300,000/= after he had been issued with the recruitment letter as inducement. He could however not link the individual to the appellant. In addition, Emmanuel



Ngua Mwandenge (Pw 9) testified that he paid some money to an unknown number to assist in the recruitment of his son Pw 3.

33. The prosecution called an expert witness, Symon Bitok (Pw 8) from Safaricom in an attempt to link the appellant with the monies paid as inducement. The witness went through the Mpesa statements of the transactions for several phone numbers allegedly linked to the appellant. The first was 0715047XXX which he claimed was registered to the appellant's wife and had received Kshs. 150,000 from 0721404XXX registered under Emmanuel Ngua Mwandenge. On cross-examination, it was however pointed out that the account holder of the number was one Benjamin Kasiva. In respect of number 07079191XXX Pw 8 told the court that it was registered to James Onyango but had been recycled which meant that the owner was different from the ownership having been registered and used by two different individuals.
34. The witness's evidence was shaken on cross-examination and could not conclusively explain the discrepancies in the registration number, the ownership and who were the actual account holders. Further, he could not establish whether there was any communication between the appellant and the proxies of the recruits through which the money monies were transferred. Both the evidence of Pw 10 and Pw 11 could not connect appellant to the alleged offence. He did not provide a nexus between the appellant and the numbers in issue beyond reasonable doubt.

The extent and scope of summing up by the Judge Advocate.

35. The major ground raised in the petition of appeal is whether the alternative offences of conduct or neglect to the prejudice of good order and service discipline in respect of which the appellant was convicted could be considered as minor and cognate offence.
36. I find that the learned Judge Advocate (Hon. Diana Mochache, CM), who is the presiding officer of the court martial, erred in law in her summing up to the members of the court martial that the offences with which the appellant was convicted were minor and cognate offence to the offence of obtaining money by false pretences. First, the offence of obtaining money by false pretences is in relation to offences against property. Second, the offence of prejudicial conduct to good order and service discipline is in relation to military discipline. The charging of these offences in the alternative does not make them minor and cognate offences. The main offences charged and those charged in the alternative are distinct and substantive offences.
37. In this regard, this court (J M Bwonwonga, J) had occasion to consider what constitutes a minor and cognate offence in the case in *Republic v Musa Lotolim Chakartin and 8 others*, Kapenguria High Court in Criminal Case No. 11 of 2016. In that case the accused had been charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya. The prosecution failed to prove the offence of murder. As a result, the accused were acquitted of murder. However, the prosecution proved the offence of common assault contrary to section 250 of the *Penal Code* against some of the accused and were accordingly convicted of that offence on the basis that the offence of common assault was a minor and cognate offence to murder. In the course of proving the offence of murder the prosecution only managed to prove common assault. The murder and assault offences involved the use of personal violence against the deceased and proof of the offence of murder involved the proof of assault.
38. It is clear therefore that the learned Judge Advocate misdirected the court martial in her summing up that the offences of prejudicial conduct to good order and service discipline were minor and cognate offences to that of obtaining money by false pretences. This in itself is fatal to the verdicts of the court



martial. In view of this finding, it is academic or moot to consider the remaining grounds of appeal. See generally *Attorney General v Ally Kleis Sykes* (1957) EA 257

39. Furthermore, even on the evidence the offences charged in the alternative were not proved beyond reasonable doubt. There was no evidence to support and prove the ingredients of the offences charged in the alternative.
40. Additionally, the participation of the learned Judge Advocate in her summing up to the members of the court martial in respect of the sentence to be imposed upon the appellant warrants attention. The learned Judge Advocate directed the sentences imposed by the court martial were to run concurrently as opposed to running consecutively. Such a direction is not within the functions of the Judge Advocate. It is ultra vires. The Judge Advocate should only advise the court martial that it is within their discretion to order the sentences to run concurrently or consecutively. The role of the Judge Advocate is that of an impartial and neutral legal adviser on issues of law and the application of that law to the facts of the case.
41. Furthermore, the sitting members of the court martial are the only ones who are authorized to determine whether the accused has a case to answer or not at the close of the prosecution case. Similarly, If the court martial finds the accused has no case to answer, they will acquit the accused; which in law is a final judgement. The law in this regard has exclusively vested this power in the sitting members of the court martial. In doing so, it has avoided the controversial situation that prevails in trials before a judge and a jury in the USA, UK and Australia, in which the judge directs the jury to acquit if the prosecution has not made out a case to require the accused to put on his defence. The rationale behind that practice in those countries is that the issue of whether there is a case to answer is one of law and it is for the judge alone to decide. In a trial before a court martial the members of the court martial are simultaneously judges of law and fact and have to decide both issues.
42. Furthermore, the Judge Advocate, based on section 176 (7) (2) (3) and (4) of the [Kenya Defence Forces Act](#), advised the sitting members of the court martial that the determination by the court martial is by a majority of the votes of the sitting members. She further advised the members that the Judge Advocate does not vote and that if there is an equality of votes on the findings the court shall acquit the accused. This was a proper direction.
43. The Judge Advocate also directed the court martial that if there is equality of the votes on sentence, she has a casting vote. I find this to be a misdirection on the part of the Judge Advocate; for if there is a tie the sitting members of the court will call upon the waiting members (also known as alternative members) of the court martial to break the tie.
44. In view of the immediate foregoing, this court (J M Bwonwong'a) in [Volker Edambo & 5 others v The Independent Policing Oversight Authority \(IPOA\) & 7 others](#), Nairobi Constitutional Petition No. E499 of 2022, observed that it is always good practice to have an odd number of judges in matters of constitutional litigation where a need arises to constitute a bench of judges to resolve a dispute. That court pointed out that this is intended to avoid a dead lock in such matters. In that regard the court pronounced itself as follows:

“ Additionally, our own constitutional litigation history through the case of *Stanley Munga Githunguri v R* (1986) KLR 1, has taught us to avoid a situation where there is an even bench of judges (Schofield and Owuor, JJ), which failed to reach a unanimous decision with the result that the then Acting Chief Justice (Madan, Ag. CJ) divested it and proceeded to order the application to heard afresh by a bench of three judges of the High Court.



45. I find that in this case that the court martial was made up of an even number of six sitting members and two waiting members. This is improper, because in the event of a tie in voting a waiting member must be called to participate in the voting in order to break the tie. It is good judicial practice that there should be an odd number of the sitting members of the court martial with two or more waiting members in the interests of an effective and expeditious trial of the accused.
46. Reference to the practice that obtains in the constitutional litigation in this country is instructive in respect of the Chief Justice in constituting an odd number of judges, where a substantial question of law has been raised in terms of article 165 (4) of *the Constitution* of Kenya. This provision provides that:
- “(4) Any matter certified by the court as raising a substantial question of law
47. under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”
- In the premises, I find that the appellant’s appeal succeeds.
48. His appeal is hereby allowed with the result that the convictions and sentences by the Court Martial in the alternative charges are hereby quashed.
49. The appellant is hereby ordered released unless he is lawfully held on other warrants.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF JANUARY 2023.

J M BWONWONG’A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Mr. Nanda holding brief for Mr. Ogola for the appellant

Appellant present in person.

Mr. Kiragu for the Respondent

