



**Otieno v Republic (Criminal Appeal E001 of 2021)
[2022] KEHC 12385 (KLR) (Crim) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 12385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E001 OF 2021
DO CHEPKWONY, J
MAY 24, 2022**

BETWEEN

MAJOR ERASTUS HEZBON OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence by the Court Martial at Kabawa Garrison, Court Martial Case No. 2 of 2019 delivered on 1st April, 2021)

JUDGMENT

1. The appellant herein, erastus hezbon otieno was charged before the court martial with six counts;
 - a. In the first count, he was charged with the offence of Committing a Civil Offence contrary to section 133(1) (b) of the [Kenya Defence Forces Act](#), which is to say Conspiracy to defraud contrary to section 317 of the [Penal Code](#).

The particulars were that;

“On 18th February, 2019 at Langata Barracks within Nairobi County, the accused person conspired with others not before court to defraud Jemos Quick Investments of quantity 500 Anti locks Jam pins worth Kshs.14,850,000.00 by pretending to Mrs. Gladys Maisiba and Miss Caroline Muthui, agents of Jemos Quick Investments false contract Ref. No.MOD/423(01009) 2018/2019 dated 12th February, 2019 for supply of quantity 500 Anti-Lock Jam pins to Ministry of Defence purporting it to be genuine contract between the Ministry of Defence and Jesmon Quick Investments”.



- b. In alternative charge in count II, the appellant was charged with the offence of conduct to the prejudice of good order and service discipline contrary to section 121 of the [Kenya Defences Forces Act](#).

The particulars are the same as in the main charge save for;

“That the appellant and accomplices not before court are stated to have attempted to obtain the Anti-lock jam pins by false pretense”.

- c. In count iii, he was charged with the offence of conduct to the prejudice of good order and service discipline contrary to section 121 of the [Kenya Defence Forces Act](#).

The particulars are that:-

“On 18th February 2019 at Langata Barracks within Nairobi County, he was found in possession of a false contract Ref. No.MOD/423(01009)2018/2019 dated 12th February 2019 for supply of quantity 500 Anti-Lock Jam pins worth Kshs.14,850,000.00 and a false letter Ref MOD/423(01009)2018/2019 dated 11th February 2019 titled “Evaluation Results On Anti-lock Jam Pin (ART105KCP) Samples” purporting to originate from the Ministry of Defence addressed to Jemos Quick investments”.

- d. In Count IV, he was charged with the offence of Committing a Civil Offence contrary to section 133(1)(b) of the [Kenya Defence Forces Act](#), that is to say Personification contrary to section 382 (1) as read together with section 36 of the Penal code.

The particulars were that:

“On 18th February 2019 at Langata Barracks within Nairobi County, the accused person with intend to defraud Jemos Quick Investments falsely represented himself to Mrs. Gladys Maisiba and Miss Caroline Muthui agents of Jesmos Quick Investments as Major Were.

- e. As an alternative in count v, the accused person was charged with an offence of Conduct to the prejudice of Good Order and Service Discipline contrary to section 121 of the [Kenya Defence Forces Act](#).

The Particulars being that:

“The accused person on 18th February 2019 at Langata Barracks within Nairobi County, he falsely represented himself to Mrs. Gladys Maisiba and Miss Caroline Muthui as Major Were.

- f. In count (vi), he was charged with 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 being that:

“On the 18th February 2019 at Langata Barracks within Nairobi County, he facilitated the entry of Mrs. Gladys Maisiba and Miss Caroline Muthui into Langata Barracks and hosted them at Officer’s Mess where Mrs. Gladys Maisiba was made to sign a false contract”.



2. The appellant was arraigned before the court Martial 11th June, 2019 for plea taking and pleaded not guilty to all charges against him. Upon considering the evidence of the twelve (12) prosecution witnesses and the material presented before it, the Court Martial acquitted the Appellant on Counts I, II, and IV but convicted him on Counts III, V, and VI. In addition, he was dismissed from the Kenya Defence Forces.
3. Being dissatisfied by the decision, the Appellant lodged the instant appeal vide Petition of Appeal dated 6th April, 2021, wherein he set out the following Grounds for Appeal:
 - a. That the court martial erred in law and fact as it failed to evaluate the evidence on record properly thereby arriving at a wrong conclusion which has occasioned injustice to the Appellant.
 - b. That the court martial erred in law and fact as it failed to appreciate that there was no connection of the alleged charges against the Appellant with the alleged complainants.
 - c. That the court martial erred in law and fact when it failed to recognize that the alleged contract in connection had been signed at an earlier date and not the date of the arrest yet at the time of signing of the alleged contract the parties to the contract had not met the Appellant or communicated to him.
 - d. That the court martial erred in law and fact when it failed to appreciate that the Appellant never facilitated entrance of anyone into Langata Barracks.
 - e. That the court martial erred in law and fact when it considered irrelevant facts and failed to consider relevant facts in relation to this case thereby occasioning injustice to the Appellant.
 - f. That the court martial erred in law and fact by convicting the Appellant on offences which had not been proved beyond reasonable doubt.
 - g. That the Court Martial erred in law and fact when it failed to appreciate the fact that there was no nexus between the alleged complaints and Jemos Quick Investments.
4. The Appellant then filed submissions in support of his appeal canvassing the argument that the offences he was convicted of were not proved to the standard of proof beyond reasonable doubt. He therefore craves for the court to allow the Appeal, quash the conviction, set aside the sentence, and reinstate him back to employment.
5. The Respondent opposed the appeal and filed submissions dated 7th March, 2022 which were later highlighted on 14th March, 2022 by the learned counsel, Mr. Kirangu. He submitted that on Count III which is indicated as charge 2, the prosecution proved its case beyond reasonable doubt through the evidence of PW1, Major Andrew Onyamo who testified that he had received information that PW8 and PW9 had been invited to the Barracks for signing of a contract by an officer identifying himself as Major Were. Acting on that information, he mobilized PW2, PW6 and PW10 and consequently arrested the Appellant with a letter awarding the contract produced as exhibit 4 and the fake contract produced as exhibit 5. Furthermore, the evidence of PW8 and PW9 that they were meant to sign the contract in the Appellant's presence shortly before the arrest corroborated the evidence of PW1, PW2, PW6 and PW10 and the court was asked to make a finding that there was overwhelming evidence beyond reasonable doubt that the offence was committed at the barracks.
6. As regards Count V, which is an alternative to charge 3, it was submitted that PW8 and PW9 testified that the accused person identified himself to them as Major Were when they first met at the barracks gate.



7. With respect to Count VI, it was submitted that PW8 and PW9 stated that they were picked at the gate by Appellant and this was corroborated by the testimony of PW6 that he had seen the Appellant dressed in Military attire at the visitor's waiting room. It is thus submitted that the prosecution's case was determined on the merit of facts devoid of any errors or contradictions and the Court Martial was proper to convict the Appellant.
8. This being the first appellate court, it has the duty to re-analyze and re-evaluate the evidence on record, then come up with its independent decision while taking due consideration that it has not had the opportunity to hear the evidence and see the demeanour of the witnesses. That was the principle set in the reknown case of *Okeno -vs- Republic* [1972] EA32.
9. As reflected in the Record of Appeal, the prosecution called a total of twelve witness in support of its case. PW1, Major Andrew Onyamo, deployed as The Commanding Officer, Military Police Special Investigation Unit, stated that he received information on 18th February, 2019 from the Chief Provost Martial informing him of some conmen who had invited contractors at 7-Kenya Rifles (Langata Barracks) for signing of a contract. He was then given the names and contacts of the contractors who testified as PW8 and PW9 respectively. He then liaised with PW6 who was stationed at the barracks gate to monitor the arrival of the contractors before he could commute to the barracks where he arrived at around 0920hours in the company of PW2.
10. PW1 testified that, after twenty minutes PW8 and PW9 arrived at the barracks and he saw them proceed to be booked at the gate. Later, after about five minutes, he was informed by PW6 that an officer in the rank of Major had gone to the gate and boarded a civilian vehicle with both PW8 and PW9. He then learnt that they were headed to the Officer's Mess and by the time he reached, the officer who is the Appellant herein, together with PW8 and PW9, were walking out of the Mess with the Appellant holding a brown envelope which he was reluctant to hand over to PW1. Consequently, PW1 ordered PW2 to take the envelope, which he did.
11. According to PW1, there were two documents in the envelope, a contract dated 12th April, 2019 for supply of 500 anti-lock Jam pins at a value of Kshs.14,850,000/= and a letter dated 11th February, 2019 from the Ministry of Defence to Jemos Quick Investments indicating that the sample provided had been approved through a test. He then produced the letter and the contract as Exhibit 4 and 5 respectively which he confirmed y were fake. He was also shown the booking register which confirmed that PW8 and PW9 were booked as guests to Major Were.
12. On cross-examination, PW1 conceded that he had been in constant communication with PW8 and PW9 before the arrests although they were unable to tell who the Major they had gone to see was.
13. PW2 was Sgt Mohammed Said who was then working at the Defence Headquarters Camp Administration Unit under the Directorate of the Military Intelligence. His testimony was that on 18th February, 2019 he was directed by Major Foroh to accompany PW1 to Langata barracks as there were conmen. That when they got there, they were informed that the conmen were headed to the Langata Officer's Mess, and together with PW1, they deployed themselves inside the Mess. His further evidence was that while in the Mess, he saw a gentleman wearing military uniform in the rank of Major with a brown envelope in company of two ladies. PW1 then approached the officer and asked for the envelope which the officer was hesitant to hand over thus prompting him to take it by force. He also confirmed that Exhibits 4 and 5 were found inside the envelope.
14. PW3, Brigadier Elijah Mwasi Mwanyika who working with the Defence Staff College, testified that sometimes in April 2019, while working as Colonel s at the Defence Headquarters, was asked to answer questions about non-existent goods purchased from his office through the Engineering Department.



- He stated that although there were engineers in his office, there was no Engineering Department and the person known as D.O Ochieng who had allegedly signed the fake contract was not only unknown to him but also not from his office. He denied knowing the author of the letter and the contract.
15. PW4 was Lieutenant Colonel Francis Ng'ang'a, who testified that he was working as a Staffing Officer 1 Supply at the time and this case arose when Exhibits 4 and 5 were represented to him. That the exhibits had quoted Tender No.MOD/423(01009) 2018/2019 which existed in the Ministry of Defence for the supply of Mercedes motor spare parts, but not anti-lock jam pins as stated in the exhibits presented to him. He confirmed that the contracts and the anti-lock jam pins were unknown to him and the Ministry of Defence. On cross-examination, he stated that the tender documents he had stated were for procurement of motor vehicle spare parts were unavailable to be presented to court since the process was still incomplete. He also conceded that although the letter identified as Exhibit 4 was stated to originate from the permanent secretary, he did not conduct him to confirm its genuity.
 16. Corporal Albert Simiyu testified as PW5 and told the court that on 18th February, 2019, he was working as a barman at Langata Barracks Officer's Mess and while taking stock, he was approached by Corporal Owiso who told him that someone was sited at the bar. He approached the said person and on inquiry, the person told him that he was a civilian and was waiting for Major Otieno. That PW5 did not go further to ask who Major Otieno was or the name of the civilian. He decided to report the matter to Sergeant Muli and on his way out, met the accused person who was dressed in military attire in company of two ladies. However, on passing the information, Sgt Muli told him to continue with his duties as normal as there was something happening at the Mess. He went back and another civilian entered the Mess and said he was working with KDF. PW5 added that he later saw the two ladies and the two civilians outside the Mess. On cross-examination, he stated that before a person enters the barracks, he or she has to be booked at the gate and all their details captured in the book.
 17. Sgt. Godfrey Wambua testified as PW6 and stated that on 18th February, 2019 while at Langata Barracks Military Duty Room, he received a call from PW1 instructing him to conduct undercover operations at the main gate since there were two vehicles Registration Nos.KCP 766C Toyota Rumio and KCP 979 F Toyota Lexus which were being expected at around 0900hrs. He stated that his obligation was to identify the vehicles, the host, and the destination. That he and PW10 changed to civilian clothes at exactly at 0930hours when they noticed the said vehicles arrive at the gate. Shortly thereafter, he saw an officer dressed in the attire of a Major at the visitors waiting room and the said officer went through the main gate and boarded the Motor Vehicle Registration No.KCP 979 F Toyota Lexus together with two ladies and they drove towards the officer's Mess. He followed them and informed PW1 that the host and the guests had entered the Mess. According to PW6, in a short while PW1 and two other men entered the Mess shortly thereafter and the meeting ended about ten (10) minutes later. That the Appellant was arrested while leaving the Mess. On cross-examination, he stated that he had not seen the Appellant with any envelop or anyone else leaving the Mess.
 18. Aggrey Kituyi, the then Assistant Director Supply Chain Management at the National Treasury testified as PW7. He testified that on 24th April, 2019, PW12 presented to him some tender documents (Exhibits 4 and 5) to confirm their authenticity. He confirmed that no such contracts were entered into between the Ministry of Defence and the supplier named in the contract presented to him and that there was also no procurement plan for anti-lock jam pins. He also confirmed that there was no officer known as D. O. Ochieng who had purportedly signed the contract. When examined, he confirmed that although the Ministry of Defence had many departments, he did not inquire from all the departments to establish if they had dealt with the contract.
 19. PW8 was Gladys Martha Maisiba. Her testimony was that sometimes on 6th February, 2019, she met Macharia through her friend Caroline (hereinafter referred to as PW9) who later introduced her to one



- Paul, a Military Officer allegedly attached to Langata Barracks. She then met with Paul who informed him that there was need for supply of Anti-lock Jam Pins at the Barracks and if interested he would guide her on the process. Paul then directed her to Colonel Shop in Industrial Area where they could find the items and she bought a sample for Kshs.35,000/= but no receipt was issued. Paul had send them a picture and told them that the Anti-lock jam pins are used in guns. Later, she met Paul again and handed him the sample and a quotation. That Paul promised that he would contact her after two days within which time they would sign a contract at Langata Barracks. However, the meeting to sign the contract was postponed on several occasions but they eventually decided to sign it on a Monday. She then gave Paul her car registration number and also the registration number of PW9's car.
20. On 18th February, 2019, PW8 and PW9 went to sign the contract and in PW8's testimony, when they reached the barrack's gate, she called Paul who told her that Major Were would address them. Indeed, an officer came to the gate and introduced himself as Major Were, then took them to the Mess stating that they could not use the office for the reasos that there were meetings going on. They found Paul at the officer's Mess, and he handed over the documents to the said Major who then showed them where to sign. After signing, they started walking out but were accosted and sorrouned by five (5) men in civilian clothes. That Major Were was arrested at the door of the Mess and the said documents taken from him. They were then taken to Langata Police Station to record statements where they were informed that the person they were referring to as Major Were was Major Otieno, the Appellant herein. When asked about the contract, she stated that although she signed on behalf of Jemos Quick Investments on February 18, 2019, the contract had already been signed on February 12, 2019 by Torome Saitoto and Rotich K on behalf of the Department of Defence.
 21. On cross-examination, PW8 stated that she signed the contract as an agent of Jamos although there was no indication that she had such authority to sign. She confirmed that she had not known the Appellant prior to the date of signing the contract and the documents taken from him had been given to him by Paul. However, she stated that after the Appellant was arrested, Paul went behind the building.
 22. Caroline Muthui testified as PW9 and told court that a friend known as Macharia had informed her that there was some business to supply Anti-lock Jam pins and introduced her to Paul and Kennedy so that they could arrange on how to get the tender. The buying price however turned out to be too high for her, and she approached PW8 for funding so they could perform the contract jointly. That on February 18, 2019, they went to Langata Barracks for purposes of signing the contract and when they reached the gate, she called Paul who told her that he had sent Major Were to pick them. Later, the said Major Were who she later learnt was Major Otieno, took them to the Officer's Mess where they met Paul with the documents. That upon signing the documents, the Appellant informed them that they would later come to inspect their office. Besides the contract they had signed, PW9 testified that they were also given a certificate confirming the sample Lock jam pin they had presented had passed the standard with an average score of 87.5%.
 23. After signing the contract, while walking out of the Mess they were confronted and Major Were arrested. The Arresting Officers then informed them that the documents were fake and fraudulent. They were taken to Langata Police Station to record statements and together with the officer, went to Kolonel Holdings where they found the offices closed and their contacts unreachable. She added that they also tried to call Paul but his contacts were switched off.
 24. In cross-examination, PW9 stated that it was Paul who stamped the above-mentioned documents and then gave the envelope with the documents to Major Were. She did not see Major Were open the envelope before he was eventually arrested with the same envelope.



25. PW10, Cpl Timothy Mdachi testified that on February 18, 2019 at 0850 hours, he was instructed by PW6 to change into civilian clothes and accompany him to Langata Barracks gate to monitor some two vehicles which were expected to arrive within the same time. He then went to monitor while outside the gate and PW6 remained inside. That, after about 30 minutes later, the two motor vehicles arrived and they were directed to the visitor's carpark to await their host. PW10 told court that minutes later, an officer dressed on attire in the rank of Major came and collected their identification documents and proceeded to book them. They later drove towards the Mess in one vehicle. PW6 then drove behind them and asked PW10 to follow and bring handcuffs, which he did. Further, PW10 added that by the time he got to the Officer's Mess, he found one officer already arrested and two ladies complaining of a fake tender, although they did not say who had tricked them.
26. PW11, Sgt Geoffrey Langat Rono testified that on 18th February, 2019 at around 0940hours, he was deployed to Langata Barracks main gate as Guard Commander, when two ladies came to the gate and said they were Major Were's visitors. He added that he booked and told them to wait at the visitor's room where their host would meet them. He produced the register as Exhibit 6 and took the court through the entries he had made therein. He said that he continued with his duties and never saw any Major Were coming for the ladies.
27. In cross-examination, PW11 testified that it was not his duty to book visitors but in this case he booked because the officers who were taking over from him were still preparing them. He also confirmed that he booked PW9 with her driving license as opposed to an ID card and captured her numbers incorrectly. It was his further evidence after the booking is done, the host has to present his Identity Card at the gate in order to pick up the visitors.
28. Major Daniel Leiyan testified as PW12. He was the Investigating Officer in this case and told the court that after being tasked with the investigations of the case, he interviewed PW1, PW2, PW6, P10 & PW11. From their evidence, he stated that he was able to identify that PW1 and his team got a tip off that an officer of the KDF was about to obtain money at Langata Barracks by false pretenses and they trailed the victim's vehicle. They were then able to arrest the officer in the presence of the complainants (PW8 and PW9) and one Paul who was in possession of the contract in question. He added that the documents identified as Exhibits 4 and 5 were confiscated from the accused person by PW1 which, when he presented them for authentication, he confirmed that they were not genuine.
29. On cross-examination he confirmed that there were some contradictions in the evidence on how PW8 and PW9 were booked at the material day, and he never established how the said Paul accessed the Barracks on that even date. He confirmed that the accused person/Appellant never asked for money from PW8 and PW9 and the documents he had, had been given to him by Paul, and neither did the Appellant introduce himself as Major Were at the gate.
30. When placed on his defence, in his unsworn testimony, he told the court that since he was a PHD student at the Kenyatta University, he had gone to Langata Barracks to download a thesis and it was not the first time he had gone there for such purposes. He stated that while entering the Barracks gates, he met two ladies who asked him for the direction to the Mess, and on a purely humanitarian ground, he boarded the back of the seat in their car to show them the direction to the Mess. Nonetheless, that when they got to the Mess, he saw the two ladies talk to the person referred to as Paul but did not bother to confirm whom this Paul was. He also added that there was communication between the two ladies, Brigadier Mark Oketch and PW1 and since he had seen PW1 who is known to him in the Mess could be having unclean intentions, he would have aborted them.
31. As regards the circumstances of his arrest, the Appellant said that the gentleman known as Paul requested him to hold an envelope for him as he walked out and before he could take back his envelope,



PW1 and other officers bumped into and arrested him. He added that he has never introduced himself as Major Were nor did he know the contents of the envelope he had been asked to hold.

32. DW2, Josias Mugendi, told the court that he was working at the Office of Attorney General in the Business Registration Services. He produced the certificate of registration for Jamos Quick Investments as a business name only licensed to supply stationaries. He added that the registered proprietors of the enterprise were James Omwega Maisiba and Haron Mosiria Nyaloti but not the PW8 and PW9 who are the complainants herein.

Analysis and Determination

33. As a first Appellate court, it is upon me as the Appellate court to re-analyze and re-evaluate the entire proceedings of the trial court so as to come up with an independent decision while reminding myself that I did not have the benefit of hearing or seeing the witnesses. (See the case of Okeno -vs- Republic [1972] EA32).
34. Having considered the evidence and submissions by both the Appellant and the learned State Counsels, with regard to the Grounds of Appeal, I find the main issue for determination to be whether the charges the Appellant was convicted of were proved beyond a reasonable doubt. I will not delve on the charges he was acquitted for because they are not contested in this appeal.
35. The compelling version which this court draws from the record is that the Appellant was only 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 the only difference in the three Counts he was found guilty of, and the prosecution was required to prove beyond reasonable doubt that those particular acts allegedly committed by the accused person were prejudicial to good order and discipline in line with Section 121 of the *Kenya Defence Forces Act*. In Charge 2 (Count 3), it was alleged that on 18th February, 2019 at Langata Barracks, the Appellant was found in possession of a false contract Ref. No.MOD/423(01009) 2018/2019 dated 12th February, 2019 for supply of quantity 500 Anti-Lock Jam pins worth Kshs.14,850,000.00 and a false letter Ref No.MOD/423(01009)2018/2019 dated 11th February, 2019 titled “Evaluation Results On Anti-lock Jam Pin (ART105KCP) Samples”.
36. The evidence adduced by the prosecution in support thereof indeed proved beyond reasonable doubt that the subject contract and letter were indeed false. PW3, testified that although the two documents are referenced to infer that they had been drawn from his office through the Engineering Department, the same were ungenune and unknown to him. He clarified that there was no Engineering Department in his office and the signatories of the contract were not only unknown to him but were also not of the employees under the Ministry of Defence as misrepresented in the contract.
37. PW4, similarly testified that he was presented with the same documents to investigate if they were genuine and he established that the tender number reference MOD/423(01009)2018/2019 quoted in the letter and the contract, existed in the Ministry of Defence but was for supply of motor vehicle spare part and not anti-lock jam pins as represented in the two documents. PW4 added that the anti-lock jam pins, subject of the contract is unknown to him, and none had been procured/supplied to the Ministry of Defence.
38. In the premises, the court finds that the prosecution had proved to the required standard that the contract and the letter were ungenune and false.
39. As to whether the Appellant was found in possession of the two documents, PW1 testified that while undertaking the operation to arrest the conman officer, he confronted the Appellant when he was



- about to exit the officer's Mess with a brown envelope in his hands which he was hesitant to hand over. He (PW1) then instructed PW2 to take the envelope from the Appellant by force, which he did. PW2, on the other hand testified that while in trail to arrest the Appellant, he positioned himself strategically inside the Officer's Mess together with PW1 and he saw the Appellant talking to PW8 & PW9 who are victims of the false contract. He added that PW1 then approached the Appellant demanding for the envelope but the Appellant was reluctant to hand it over, thus prompting PW1 to take it by force.
40. On the other hand, in their testimonies, PW8 and PW9 concurred that they had not met the Appellant before his arrest and the envelope had been handed over to him by Paul who had lured them into signing the contract. On his part, the Appellant did not deny that the envelope was in deed taken from him. What he alleged is that, while on his way to exit the officer's Mess, the gentle man referred to as Paul requested him to hold the envelope for a short while as he (Paul) picked up something else. It is at this moment that PW1 and other officers accosted and arrested him.
41. In my view, there I find inconsistencies in the prosecution's evidence with regard to how and who took the envelope from the Appellant. While PW1 testified that he instructed PW2 to take the envelope from the Appellant as he (the Appellant) was exiting the Officer's Mess, PW2 testified that he was inside the Mess with PW1 when he (PW1) forcefully took the envelope from the Appellant. PW8 and PW9 did not identify who between PW1 and PW2 took the envelope from the Appellant. Nonetheless, section 121 of the *Kenya Defence Forces Act* does not per se outline what acts or conducts of negligence would prejudice an officer's good order and service discipline. That is left for the authorities to determine.
42. Thus, in my view, to prove such misconduct just like in any other criminal offence, the state ought to establish both the actus reus and mens rea on part of the accused person, but in this case, the mens rea was not shown. The prosecution did not tender evidence to rebut the evidence that the envelope was all along in the possession of someone known as Paul which was affirmed by PW8 and PW9. It is also not denied that the envelope was snatched from the Appellant immediately Paul passed it to him. Had the prosecution proved that the Appellant had conspired with Paul to lure PW8 and PW9 into signing the contract, then it would be safe to convict the Appellant with the offence of Conduct to prejudice of Good Order and Discipline for being found in possession of a false contract. In premises, this court finds that the Court Martial erred in finding the Appellant guilty under Charge 2 and the verdict is hereby set aside.
43. On the Alternative Charge to Charge 3, the accused person was found guilty for falsely representing himself to Mrs. Gladys Maisiba and Miss Caroline Muthui as Major Were. The only relevant evidence presented in support thereof is that of PW8 and PW9. Their testimony was in agreement that they had been invited to Langata Barracks by one Paul who had told them that he was an army officer based at Langata Barracks. However, when they got at the gate and called Paul, he informed them that an officer known as Major Would pick them up. They were then booked at the gate as visitors to Major Were by PW11. All this while, they had not met the Appellant or heard of him but in their testimony, they said that the Appellant came to the visitor's room and introduced himself as Major Were. They were able to identify the said Major Were as the Appellant before the court although they had not met him before. However, as per the testimony of PW11, the Guard Commander at Langata Barracks, before a host picks up his guests, he must show his identity card so as to confirm that he is the person who booked them and also for security purposes. But this seems not to have been adhered to in this case and the neglect is attributable to the officers in charge of booking.
44. In my view, the Appellant would have committed an offence under section 121 of the *Kenya Defence Forces Act* had he presented a fake identity card describing him as Major Were when picking PW8 and PW9 as his guests. Similarly, I am not convinced that the prosecution proved its case beyond reasonable



doubt under the Charge alternative to Charge 3. I find that the Court Martial held the Appellant guilty on flimsy grounds since it would be tantamount to balancing probabilities in believing the testimony of the two complainants while there is a protocol to be followed before one pick him/her guests. Therefore, the verdict of guilty entered by the court martial on the Charge alternative to Charge 3 is likewise overruled.

45. Lastly On, On Charge 4, the accused person was convicted for having facilitated the entry of PW8 and PW9 to Langata Barracks and hosting them at the Officer's Mess. Again, I wish to reiterate that there was contradiction as pointed out by the Court Martial on how PW8 and PW9 were booked to enter the barracks. One thing is however clear, that before one can access the barracks, he/she has to be booked and his/her host confirmed at the visitor's room. Such was the evidence of Sgt. Geoffrey Langat Rono, PW11 who said that he had booked PW8 and PW9 on the material date as visitors of Major Were. He further told the court that he had never seen the said Major Were and neither did he state what role the Appellant had played to facilitate the booking or otherwise facilitate the entry of PW8 and PW9 into the barracks. Since it is admitted by PW11 that he had booked PW8 and PW9 and allowed their entry to the visitor's room, the court would be entering into the realm of speculation by holding that it was the Appellant who facilitated the entry.
46. As to how PW8 and PW9 accessed the Officer's Mess, this court reiterates that the same was on negligence of the guard officers who were tasked to confirm the hosts picking their guests. It is therefore my conclusion that the prosecution did not prove beyond reasonable doubt in respect of the role the Appellant played to facilitate the entry of PW8 and PW9 into the barracks hence the Appellant cannot be said to have acted contrary to good order and discipline of an officer. Similarly, the conviction entered under Charge 4 by the members of the Court Martial is overruled.
47. In the end, this court finds no cogent evidence to support the charges the Appellant was convicted of by members of the Court Martial. I therefore proceed to quash and set aside the convictions and sentence of the members of the Court Martial on Charge 2, the Alternative charge to Charge 3 and Charge 4. The same is thus substituted with a verdict of not guilty on the said charges.
48. For the aforesaid reasons, I hereby set the appellant free unless detained for some other lawful cause. The order dismissing the appellant from the Kenya Defence Forces is also set aside and the same is substituted with an order directing that the appellant to be reinstated to the position he held or another position related to the same rank.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MAY, 2022

D. O. CHEPKWONY

JUDGE

M/S Ntabo counsel for State

Mr. Were counsel for Appellant

Court Assistant - Gitonga

