REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL APPEAL NO. 11 OF 2017

(An Appeal arising out of the conviction and sentence of the Court Martial at Embakasi delivered on 3rd November 2017 in Embakasi Barracks CR. Case No.11 of 2016)

JOSHUA GATOBU MBERIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Joshua Gatobu Mberia was at the material time a member of the Kenya Defence Force. He was charged with four (4) counts of **committing a civilian offence** contrary to **Section 133(1)(b)** of the **Kenya Defence Forces Act** 2012. The civilian charges brought against the Appellant were **obtaining by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offences were that on diverse dates between 6th and 18th October 2015 at Nanyuki town, with intent to defraud, the Appellant obtained the sum of Kshs.300,000/- from Ms. Janice Karimi Ayub, Kshs.300,000/- from Ms.Faith Muthoni Muli, Kshs.250,000/- Ms. Catherine Kambura Kimathi and Kshs.137,000/- from Japheth Kinyua Isaack in the pretext that he would influence and secure recruitment for their relatives into the Kenya Defence Forces.

The Appellant was further charged with three (3) counts of **committing a civilian offence** contrary to **Section 133(1)(b)** of the **Kenya Defence Forces Act**. The particular charges were **uttering false documents** contrary to **Section 353** as read with **Section 349** of the **Penal Code**. The particulars of the offences were that on 8th October 2015 at Nanyuki town, the Appellant knowingly and fraudulently uttered forged letters of recruitment to Martin Mutuma, Japheth Kinyua Isaack and Benson Mutinda David purporting them to be genuine letters of recruitment of the said individuals into the Kenya Defence Forces. When the Appellant was arraigned before the Court Martial, he pleaded not guilty to the charges. After full trial, he was found guilty of all the seven (7) counts. In respect of the first four (4) counts, he was sentenced to serve one (1) year imprisonment on each count. The sentences were ordered to run concurrently. In respect of the last three (3) counts, the Appellant was ordered to serve four (4) years imprisonment on each count. The sentences were ordered to run concurrently. In addition, the Appellant was ordered dismissed from the Kenya Defence Forces. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds challenging his conviction and sentence. He was aggrieved that he was tried and convicted by a Court Martial that had been improperly constituted contrary to **Section 160(3)(b)** of the **Kenya Defence Forces Act 2012**. He took issue with the fact that the Court Martial convicted him in the absence of any sufficient or cogent evidence. In that regard, he was of the view that the evidence adduced did not support the charges that were brought against him. The Appellant challenged the evidence that was adduced by prosecution witnesses to be uncorroborated. He faulted the Court Martial for sentencing him to serve an excessive and illegal sentence. He was finally aggrieved that he had been dismissed from the Kenya Defence Forces under **Section 181(4)** of the **Kenya Defence Forces Act 2012** which provision did not apply to him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Oonge for the Appellant and by Ms. Atina for the State. He submitted that the Court Martial was improperly constituted under **Section 160(1)(b)** & **(c)** of the **Kenya Defence Forces Act**. He explained that the lowest rank officer who should have been part of the Court Martial was 2nd Lieutenant. However, the lowest rank officer in the Court Martial that tried the Appellant was a 1st Lieutenant. Learned counsel submitted that the Appellant being a Sergeant, the Court Martial was improperly constituted. He urged the court to adopt the written submission that he had presented before the Court Martial. Regarding the charges brought against the Appellant, he submitted that the evidence on record did not support the charges. The evidence referred to other places other than Nanyuki which was said to be the place where the offence took place. In that regard, learned counsel submitted that the evidence adduced by the prosecution witnesses did not support the charges. He submitted that the evidence adduced by the prosecution witnesses was not corroborated. He stated that only one witness adduced evidence in support of each count thereby rendering the evidence uncorroborated and therefore untenable.

Learned counsel submitted that the sentence that was imposed by the Court Martial was illegal in that the Appellant was sentenced to serve four (4) years imprisonment instead of the maximum period of three (3) years imprisonment that is provided by the law. As regard the further order dismissing the Appellant from the Kenya Defence Forces, learned counsel submitted that **Section 181(4)** of the **Kenya Defence Forces Act** did not apply to the Appellant as he was a Sergeant and not a serviceman. He submitted that the Appellant ought to have been sentenced under **Section 181(5)** of the **Kenya Defence Forces Act**. As regard the custodial sentence that was imposed on the Appellant, learned counsel submitted that the Court Martial failed to take into account the period of 364 days that the Appellant had been placed under close arrest and the period of 309 days that he had been placed under open arrest. He urged the court to take this period under consideration when considering the sentence to be meted out to the Appellant in the event that the appeal on sentence is not allowed. He urged the court to allow the appeal in its entirety.

Ms. Atina for the State opposed the appeal. She submitted that the Court Martial was properly constituted because the lowest ranking member in the Court Martial was 2nd Lieutenant Kimanzi. She explained that the **Kenya Defence Forces Act** did not provide for a Sergeant to be a member of the Court Martial. As regard the charge sheet, the prosecution submitted that taking into totality the evidence that was adduced, the location where the offences took place is a minor matter which can be cured under **Section 382** of the **Criminal Procedure Code**. She submitted that the factors that the court ought to take into account is whether the Appellant was embarrassed or prejudiced in the presentation of his defence. In that regard, Ms. Atina was of the view that the Appellant was not prejudiced.

As regard whether the evidence adduced by the prosecution witnesses were corroborated, learned state counsel submitted that the oral evidence adduced by the witnesses was corroborated by documentary evidence which was produced in court and proved to the required standard that the Appellant received the money in question. As regard sentence, learned state counsel conceded that the sentence of four (4) years imprisonment that was imposed by the Court Martial in respect of the last three counts was illegal. She stated that the Court Martial ought to have sentenced the Appellant to serve a maximum of three years imprisonment. As regard whether the court considered the period that the Appellant was in closed arrest, she submitted that the Court Martial did so. It also took into account that the offence was prevalent and the fact that the victims who lost the money had not been restituted. As regard the order of dismissal of the Appellant from the Kenya Defence Forces, Ms. Atina submitted that the order was legal in view of the provisions of **Section 181** of the **Kenya Defence Forces Act**. She urged the court to uphold the decision of the Court Martial and dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs-Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

The issue for determination by this court is whether the prosecution established to the required standard of proof beyond any reasonable doubt the charges of **obtaining by false pretences** contrary to **Section 313** of the **Penal Code** and the charges of **uttering false documents** contrary to **Section 353** as read with **Section 349** of the **Penal Code**.

This court has carefully re-evaluated the evidence that was adduced before the Court Martial. It has also considered the submission, both written and oral that was made before this court by the parties to this appeal. There are several issues that came to the fore for determination by this court. The first issue is whether the Court Martial was properly constituted. According to the Appellant, the Court Martial was improperly constituted in that the lowest ranking member was not a 2nd Lieutenant but a 1st Lieutenant. The court understood the Appellant to say that a member of the Kenya Defence Forces of the rank of Sergeant should have been included as a member of the Court Martial for the Court Martial to be properly constituted. The prosecution was of a contrary view. Having perused the proceedings in that regard and also having considered **Section 160** of the **Kenya Defence Forces Act** which provides that:

> ***"Constitution of the courts martial***
>
> ***(1) In case of any proceedings, the courts martial established under Article 169 of the Constitution shall consist of –***
>
> ***(a) a Judge Advocate, appointed under Section 165, who shall be the presiding officer;***
>
> ***(b) at least five other members, appointed by the Defence Court-martial Administrator if an officer is being tried; and***
>
> ***(c) not less than three other members in any other case.***
>
> ***(2) The members of the court martial shall be officers so qualified and not illegible in accordance with section 164.***
>
> ***(3) At least one of the members provided in the sub-section (1) shall be –***
>
> ***(a) of equivalent rank as the accused person where the accused is an officer; and***
>
> ***(b) the lowest ranking officer in the Defence Forces who is available at the time when the accused is a service member."***

This court holds and finds that the Court Martial that tried the Appellant was properly constituted. From the coram of the court, the lowest

ranking officer was 2nd Lieutenant L.K. Kimanzi. There is no requirement for a member of the Armed Forces of the rank of Sergeant, the same rank of that of the Appellant, to be a member of the Court Martial under the **Kenya Defence Forces Act**. The Appellant's ground of appeal in that regard lacks merit and is dismissed.

As to the question whether the charge sheet was defective in that the place where the offences are alleged to have taken place did not tally with the evidence that was adduced, on re-evaluation of the evidence, this court formed the view that the place where the witnesses testified that they paid the Appellant the sums stated in the charge sheet in order for the Appellant to secure recruitment for their relatives to the Kenya Defence Forces is not material. The prosecution was required to establish the elements that constitute the offence of obtaining by false pretences in respect of the first four counts that the Appellant was charged with. As was held by Gikonyo J in **Joseph Wanyonyi Wafukho -vs- Republic [2014] eKLR:**

> ***"…the following essential elements of the offence of obtaining through false pretences are discernable: that the person;***
>
> ***(a) Obtained something capable of being stolen***
>
> ***(b) Obtained it through a false pretence***
>
> ***(c) With the intent to defraud."***

In the present appeal, the witnesses who testified before the Court Martial were able to establish to the required standard of proof beyond any reasonable doubt that the Appellant represented to them that he was in a position to facilitate the recruitment of their relatives into the Kenya Defence Forces. The Appellant represented to the witnesses that in consideration of the sums that he requested from them, he would be able to secure recruitment of their relatives into the Kenya Defence Forces. The Appellant knew this fact to be false because he lacked capacity both in law and in fact to facilitate the recruitment of the complainants' relatives into the Kenya Defence Forces. In fact as it later emerged, the Appellant did this with the sole intention of defrauding the complainants of the various sums that were paid to him. The prosecution was able to establish to the required standard of proof beyond any reasonable doubt that the Appellant was paid through his bank account and through Mpesa the various sums that the complainants stated that they had paid to the Appellant. It was therefore immaterial for the prosecution to establish the place the offences were committed. Further, the Appellant's defence to the effect that he was engaged in business with some of the complainants was discounted by the cogent and credible evidence that was adduced by the prosecution witnesses.

As regards the last three counts of uttering false documents, the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant gave the complainants letters of recruitment into the Kenya Defence Forces which the said complainants were supposed to present at the gate of the Recruits Training School at Eldoret. The complainants testified that upon receiving the said letters of recruitment, they travelled to the Recruits Training School at Eldoret but were turned back when they were informed that the letters of recruitment that were given to them by the Appellant were forgeries and were false. The evidence adduced by the Appellant in his defence in that regard, did not displace the strong culpatory, cogent, consistent and corroborated testimony that was adduced by the prosecution witnesses. The upshot of the above reasons is that the appeal against conviction lacks merit and is hereby dismissed.

On sentence, the prosecution conceded that the sentence of four years imprisonment that was imposed in respect of the last three counts was excessive and illegal. **Section 349** of the **Penal Code** provides the maximum punishment on conviction to be three years imprisonment. This court also noted that the Court Martial when rendering the sentence did not specifically take into account the period that the Appellant was in both closed and open arrest prior to his conviction. Although the Court Martial stated that it had taken that period into account, the fact that it sentenced the Appellant to serve the maximum sentence provided by the law, in effect it meant that the Court Martial had not taken this period of the pre-trial detention into consideration. This was contrary to **Section 333(2)** of the **Criminal Procedure Code** that requires the period of pre-trial detention to be taken into account when sentencing a convict. In the premises therefore, taking into account the period that the Appellant was in pre-trial detention, and further taking into consideration the period that the Appellant has been in prison, this court forms the view that the period that the Appellant has been in lawful detention is sufficient punishment. The custodial sentence of the Appellant is therefore commuted to the period served.

As regard whether the Court Martial erred in ordering the Appellant to be dismissed from the Armed Forces in accordance with **Section 181(4)** of the Kenya **Defence Forces Act**, this court agrees with the Appellant that being a non-commissioned officer of the rank of Sergeant, the Appellant could not be sentenced to be dismissed from the **Kenya Defence Forces** under **Section 181(4)** of the **Act.** However, this court disagrees with the submission made by the counsel for the Appellant that the Appellant ought to have been sentenced under **Section 181(5)** of the **Kenya Defence Forces Act** which provides for reduction of rank. The offences that the Appellant committed called for his dismissal from the Kenya Defence Forces. In the premises therefore, this court sets aside the order of dismissal of the Appellant from the Kenya Defence Forces that was made under **Section 181(4)** of the **Kenya Defence Forces Act** and substitutes it with its order directing that the Appellant be dismissed from the Kenya Defence Forces under **Section 181(1)(c)** of the **Kenya Defence Forces Act**.

For the above reasons, the appeal against conviction is dismissed. The appeal against sentence is partially allowed. The Appellant's custodial sentence is commuted to the period already served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. A further order is issued dismissing the Appellant from the Kenya Defence Forces pursuant to Section **181(1)(c)** of the **Kenya Defence Forces Act**. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF MAY 2018

L. KIMARU

JUDGE