



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.119 OF 2015

(An Appeal arising out of the conviction and sentence of the Court Martial (Hon. D.R. MOCHACHE - Judge Advocate) delivered on 1st October 2015 at Moi Airbase, Court Martial Case No.436 of 2014)

TUMAINI KEA GOME.....
.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Tumaini Kea Gome was charged with **committing a civilian offence** contrary to **Section 133(1)(b)** of the **Kenya Defence Forces Act, 2012**, that is to say, **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on diverse dates between 4th August 2012 and 28th February 2013 at Nairobi, the Appellant, with the intent to defraud obtained Kshs.337,055 from Ms. Binti Mohammed Mwinyi Sumuni by falsely pretending that he would influence and secure the recruitment of Mr. Hamadi Sumuni Mwinyi and Mr. Masudi Omari Magaba into the Kenya Defence Forces. When the Appellant was arraigned before the Court Martial, he pleaded not guilty to the charge. After full trial, he was found guilty as charged and sentenced to serve thirty (30) months imprisonment. He was further 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 had been convicted on the basis of insufficient and unsupported evidence. He was of the view that there were material contradictions and gaps in the prosecution's case which the Court Martial did not take into account. He was aggrieved that the trial court had given undue weight to the prosecution's case and ignored the evidence that the Appellant had adduced in his defence. The Appellant faulted the Court Martial for admitting into evidence, evidence that had been illegally obtained and thereby infringing the Appellant's right to fair trial. The Appellant was aggrieved that the Court Martial had admitted that evidence even after the same had been withheld from the Appellant and thus denied him an opportunity to properly defend himself against the charge brought against him. The Appellant faulted the Court Martial for relying on hearsay and uncorroborated evidence to convict him. In any event, the Appellant was of the view that the evidence adduced by the prosecution was not sufficient to sustain his conviction to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction of the Court Martial and set aside the sentence that was imposed.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Masake for the Appellant and by Ms. Aluda for the State. Mr. Masake submitted that the Appellant was essentially convicted on the basis of a computer printout of M-pesa transactions in respect of the mobile phone registered to the Appellant. Learned Counsel submitted that this evidence was illegally obtained in contravention of **Article 50(2)(j)** of the **Constitution**. He explained that the defence was not given the evidence in advance before the prosecution produced it in court. He emphasized that the Appellant was entitled to be supplied with all the evidence that the prosecution was to rely on before the commencement of the trial. He pointed out that **Exhibits No.4** and **6** were illegally obtained from Safaricom Limited without a court order. He submitted that under **Article 50(4)** of the **Constitution**, any illegally obtained evidence cannot be used or relied on during a criminal trial. The Appellant submitted that the Court Martial believed the evidence adduced by the prosecution witnesses yet it was clear that at the material time there was no recruitment into the Armed Forces nor were the persons said to have paid the money to be recruited in the Armed Forces qualified to be so recruited. The Appellant was aggrieved that the trial court had failed to take into account his explanation that he was paid the money by the complainants in the course of a business transaction. The Court also failed to take into consideration the fact that he was related with the complainants. The Appellant attributed the complaints lodged by the complainants to have been motivated by a family disagreement which escalated into the criminal case. He urged the court to re-evaluate the evidence and reach an appropriate decision allowing the appeal, quashing his conviction and setting aside the sentence that was imposed on him.

Ms. Aluda for the State opposed the appeal. She submitted that the prosecution was able to establish to the required standard of proof beyond any reasonable doubt that the Appellant obtained money from the complainants after falsely promising them that he was in a position to recruit two of his cousins into the Armed Forces. The said cousins were made to travel to Eldoret where they spent three weeks in a hotel while allegedly waiting to join the Recruits Training School at Eldoret. This was not to be because the two were arrested on suspicion of being members of Al Shabaab. After investigations, they were released. Ms. Aluda disputed the submission made by the Appellant which was to the effect that part of the evidence that was adduced against him, especially the M-pesa records had been illegally obtained. She explained that the prosecution obtained a court order which enabled them to procure the said evidence. She however conceded that a certificate was not produced in court to support the production of the said computer printouts. She was of the view that this was a technicality which the court should take into account and which, nevertheless, should not distract the court into reaching a just decision. Otherwise she urged the court to dismiss the appeal as it lacked merit.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching 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 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] e.a 336, Ruwalla v. R [1957] E.A 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt.

On re-evaluation of the evidence adduced before the trial court, it was clear to this court that the trial court appreciated the charge that the prosecution was supposed to prove in order to secure the conviction of the Appellant. The Appellant was charged with a civilian offence of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. At Page 107 of the Court Martial proceedings, the Court stated thus:

“False pretence is defined as “any representation whereby words, writing or conduct of a matter of fact

either past or present which representation is false and which the person making it knows it to be false or does that which he believes it not to be true.” The ingredients proving this offence are:-

- a. *That a representation made by words in writing or by conduct must be made:-*
- b. *That the representation must relate to a matter of fact which is made to mislead:-*
- c. *That the representation is false in fact and*
- d. *That the person making it knows it to be false or does not believe it to be true.”*

This court will first deal with the technical aspects of the grounds of appeal raised by the Appellant. The Appellant submitted that the M-pesa transaction records were not firstly, availed to him before the commencement of the trial and secondly, the same was illegally obtained in that the prosecution did not obtain a court order before the said information was secured from Safaricom Limited. On the other hand, the State argued that the said evidence was obtained after the prosecution had obtained a court order to procure the same. This court has perused the proceedings of the Court Martial. There are two aspects to the said M-pesa transactions. Evidence was adduced to the effect that one of the complainants PW3 Binti Sumuni Mwinyi authorized the investigators to obtain her M-pesa transaction records from Safaricom Limited. It was from these records that it was established that monies had been transferred to the Appellant through the M-pesa platform. To confirm this evidence, the prosecution made an application before Kibera Chief Magistrate’s Court in **Miscellaneous Criminal Application No.53 of 2015** where it was applied and authorized to obtain the records of transactions in respect of the Appellant’s M-pesa account. PW7 Inspector Simon Bitok testified that he was a police officer attached to the Investigations Department at Safaricom Limited. He produced before court the M-pesa transactions in respect of the account held by PW3. He also produced the M-pesa transactions in respect of the account held by the Appellant. He told the court that in respect of the Appellant, he did so pursuant to a court order that he was served by the investigators.

On re-examination of this evidence, it was apparent to this court that the claim made by the Appellant that he had been convicted based on evidence that had been illegally obtained has no merit. PW3, one of the complainants authorized the investigators to access her M-pesa account. The evidence thus produced in respect of her account was legally obtained because consent was voluntarily given by the complainant. In respect of the Appellant’s account, a court order was obtained which enabled the investigators gain access to the Appellant’s M-pesa account. During trial, the Appellant doubted that this court order existed. It was conceded by the prosecution that the said court order was not supplied to the Appellant prior to the commencement of the trial before the Court Martial. However, the same was supplied to the Appellant prior to the prosecution closing its case.

The Appellant complains that this infringed his constitutional right to fair trial under **Article 50(2)(j)** of the **Constitution** which requires every accused person to be informed in advance of the evidence that the prosecution intends to rely on and to have reasonable access to such evidence. In the present appeal, this court is of the considered opinion that although the particular court order was not supplied to the Appellant prior to commencement of the trial, he was supplied with the same when he raised the issue during trial. This court is of the view that the Appellant was not prejudiced by this failure by the prosecution to supply him with the court order prior to the commencement of the trial. In the premises therefore, this court finds no merit with the argument advanced by the Appellant in support of his ground of appeal that he was convicted on the basis of illegally obtained evidence, particularly the M-pesa transaction records. That ground of appeal fails.

On the merits, it was the prosecution’s case that the Appellant had obtained money from the complainants by falsely pretending that he was in a position to have two of the complainants relatives recruited into the Armed Forces. The prosecution adduced evidence which established to the required standard of proof beyond any reasonable doubt that indeed monies changed hands between the Appellant and PW3. The Appellant did not dispute that evidence that indeed monies changed hands between himself and PW3. He however explained that the said monies changed hands on account of business transactions that he had with PW3. He did not however explain the nature of the business transaction. The prosecution adduced evidence which established that contemporaneous with the exchange of monies, the Appellant had two of his cousins being, PW5 Hamadi Sumuni and PW6 Masudi Omari, travel to Eldoret ostensibly because he

had secured them admission at the Recruits Training School at Eldoret. The two waited in vain for three weeks until they had to travel back home to Mombasa.

During this period, it was established that the Appellant sporadically sent money to his agent at Eldoret, one Josiah Mwamburi to cater for the accommodation and food for PW5 and PW6. The witnesses testified that they went to Eldoret because they had been made to understand that the Appellant would secure their admission at the Recruits Training School at Eldoret. The money paid to the Appellant by PW3 was to facilitate this admission. Although the Appellant in his defence wants this court to believe that the payment made to him had no connection to the alleged recruitment into the Armed Forces, upon re-evaluation of the evidence adduced before the Court Martial, this court holds that indeed the said sums of money amounting to Kshs.337,000/- was paid to the Appellant in cash and through his M-pesa account.

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 PW3 by falsely pretending that he was in a position to secure recruitment for PW5 and PW6 into the Armed Forces. This fact the Appellant knew to be false. The Appellant's defence in that regard did not dent the otherwise cogent, consistent and culpatory evidence that was adduced against him by the prosecution witnesses. His appeal against conviction therefore lacks merit and is hereby dismissed.

On sentence, this court is of the view that the custodial sentence of three (3) years imprisonment, taking into consideration the entire circumstance of the case was harsh and excessive. That sentence is set aside. However, the order dismissing the Appellant from the Kenya Defence Forces shall stand. Before this court metes out its sentence, it shall give an opportunity to the Appellant to reconstitute the complainants the monies that he obtained from them. The Appellant is granted thirty (30) days to make arrangements to reconstitute the said sum to the complainants. This matter shall be mentioned on **30th June 2016** to confirm whether the Appellant has made good the payment. It is then that the court will sentence the Appellant. The bail granted to the Appellant pending the hearing of the appeal herein is hereby extended to that date. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF MAY 2016

L. KIMARU

JUDGE