Kipkemoi v Republic (Criminal Appeal E007 of 2023)
[2025] KEHC 1899 (KLR) (Crim) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1899 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E007 OF 2023

K KIMONDO, J

FEBRUARY 13, 2025

BETWEEN

SGT. ROBERT KIPKEMOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the decision in Court Martial No. 20 of 2021 held at Kahawa Garrison (B. Ochoi, Judge-Advocate) delivered on 5th October 2023)

JUDGMENT

1. The appellant is aggrieved by the conviction and sentence handed down by the Court Martial on two counts of conduct to the prejudice of good order and service discipline contrary to section 121 of the *Kenya Defence Forces Act* 2012 (hereafter the Act). He was imprisoned for six months on each count; the sentences to run concurrently.

2. The particulars were that on diverse dates between 9th February 2021 and 11th April 2021 he solicited money from Joseph Kimutai Choge and Mercy Chepkemoi Choge on the pretext that he had influenced the recruitment of the latter into the Kenya Defence Forces.

3. I should point out that on 12th November 2021, the prosecutor amended the charges. It now referred to section 131 of the Act and detached the complaints by Joseph Kimutai Choge and Mercy Chepkemoi Choge into separate counts. The appellant maintained his plea of innocence.

4. I should add that on 16th January 2024, the High Court granted him bail pending the hearing of this appeal and later reviewed the terms on 19th January 2024. But by that time, he had served a substantial part of the sentence.

5. The petition of appeal is dated 11th October 2023. It is not just against the conviction and sentence but also challenges interlocutory decisions by the Tribunal on two notices of motion dated 26th September 2023 and 29th September 2023. On the latter aspect, the appellant seeks a declaration that the proceedings amounted to a mistrial. He also prays for reinstatement to his rank.

6. The draftsmanship of the petition is inelegant. The 22 grounds and sub-grounds urged are often overlapping and repetitive. They can conveniently be compressed into seven. Firstly, that the Tribunal was not properly constituted or exceeded its powers. Secondly, that the Judge-Advocate or members displayed bias with the result that the trial was unfair. On that score, it was contended that they unfairly waded into the realm of the investigator or prosecutor. It is argued that the rights of the appellant to a fair trial were violated and in breach of the *Constitution*

7. Thirdly, that the Tribunal erred by relying on uncorroborated evidence from a single witness. Fourthly, that the entire evidence was contradictory, unreliable and did not prove the charges beyond reasonable doubt. Fifthly, that the sentence was harsh and failed to take into account that the appellant had been detained without trial for 157 days from 12th April 2021 to 15th September 2021 and a cumulative period of 908 days.

8. Sixth, that the Tribunal gave "superficial or no consideration" to the evidence tendered by the appellant while it placed "undue and disproportionate weight to that brought by the prosecutor.

9. Seventh, that the the decisions on two interlocutory applications be set aside. Regarding this issue, the appellant had lodged a notice of motion dated 26th September 2023 praying for recusal of the members. A ruling was reserved for 2nd October 2023. In the meantime, he lodged another notice of motion dated 29th September 2023 to arrest delivery of the decision. The Tribunal declined to give the reliefs.

10. The appellant's learned counsel filed detailed submissions dated 22nd April 2024.In a synopsis, the appellant's case is that the conviction was unsafe and that the ensuing sentence was high handed. Regarding the impugned interlocutory decisions, the appellant submitted that they vitiated the proceedings and amounted to a mistrial. I was thus implored to set aside the conviction and sentence and to restore the appellant's rank.

11. The entire appeal is contested by the Republic through written submissions dated 20th September 2024. Learned prosecution counsel submitted that all the elements of the charges were proved beyond reasonable doubt; and, that the appeal is for dismissal.

12. On 17th December 2024, I heard further arguments from the learned counsel for the appellant and the respondent.

13. I take the following view of the matter. This is a first appeal to the High Court. I have thus examined the record; re-evaluated the evidence and drawn independent conclusions. There is a caveat because I neither saw nor heard the witnesses. Njoroge v Republic [1987] KLR 19, Okeno v Republic [1972] E. A. 32.

14. I have also kept in mind that the legal and evidential burden rested squarely on the prosecutor. Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332.

15. I will commence with a procedural matter. The appellant submitted that the records of the Tribunal lack "due process or authenticity" or that they are unreliable "given the evident falsehoods and variations in the record". Despite this, learned counsel then proposes that although the record is "evidently incomplete and incompetent" the High Court "should proceed and render a judgment on it considering the irreparable prejudice and injustice to the appellant".

16. It is important to clarify that the High Court does not have any handwritten transcript of the proceedings. This is not surprising because the proceedings at the Court Martial are attended by shorthand typists. In the instant case, Margaret Onsanya and Magalene Lagat, among others, are listed as the stenographers and took an oath to provide an accurate record.

17. Furthermore, at page 143, there is a certificate of transcription by the said stenographers and confirmation by the Judge-Advocate on 29th November 2023 (page 144) "that the transcribed proceedings of the Court Martial as prepared by the shorthand writers are correct and accurate".

18. The practice at the High Court is that in the event of an appeal, a certified copy is filed at the Registry by the Defence Court Martial Administrator. In this case, a certified true copy was lodged to the High Court by the administrator on 30th November 2023. So much so that I can only proceed to make a determination on the basis of that record.

19. I will now turn to the validity of the charge sheet. When the appellant was first presented to the tribunal on 15th September 2021, he pleaded not guilty to conduct to the prejudice of good order and service discipline contrary to section 121 of the Act. The Judge-Advocate noted that since it related to two complainants, there ought to have been two counts.

20. On 12th November 2021, the charge was amended and now carried two counts in respect of each complainant and the dates more particularized in paragraph *2* of this judgment.Of note however is that the offences were now stated on the record to be contrary to section 131 of the Act. Learned counsel for the appellant thus contends that the charge was defective.

21. My take is that the substance of the charge on both counts was related to conduct to the prejudice of good order and service discipline through solicitation of monies from both complainants. The particulars did not change. The correct provision of the law was thus section 121 of the Act. Doubt is completely removed because section 131 deals with attempted offences.

22. The appellant thus knew the nature and particulars of the allegations facing him from the very beginning. I am unable to find that the error occasioned any substantial prejudice to him. Furthermore, the discrepancy in the amended charge is curable under section 382 of the *Criminal Procedure Code*.

23. I will then turn to the empanelment of the Tribunal. It was at first headed by Hon D. Mochache, Chief Magistrate and the Judge Advocate. She was succeeded by Hon B. Ochoi, Principal Magistrate, who presided over the judgment that is now the subject of the appeal. The original members were Lt. Col. E. O. Okello, Maj. M. M. Saha, Maj. S. Kantuli, Capt. P.W. Mbugua and Lt. F.F. Safari.

24. The appellant's case is, firstly, that since Maj. Saha and Col. Okello were part of the "supernumerary pool" and serving in the United Nations, they violated the Standing Orders. Secondly, that Col. Okello should not have participated in the conviction and sentence in view of an earlier ruling vacating his position as a member.

25. Firstly, and regarding the alleged participation of Col. Okello in the final deliberations on the verdict and sentence, it is clear from the coram of 5th October 2023 (page 137 to 141) that he did not sit or participate.

26. Secondly, on the date of plea, the appellant confirmed on the record that he had no objection to any of the sitting members and proceeded to answer to the charges. I have then studied section 160 of the Act which provides as follows-

    (1) In the 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 ineligible in accordance with section 164.

(3) At least one of the members provided for in subsection (1) shall be—

(a) of equivalent rank as the accused person where the accused person is an officer; and

(b) the lowest ranking officer in the Defence Forces who is available at the time where the accused person is a service member.

(4) The Chief Justice may make rules generally to regulate the administration and proceedings of the courts martial.

27. The Tribunal was always headed by a Judge-Advocate sitting with 5 members which complied with section 160. The Standing Orders would never override the Act. The mere fact that Maj. Saha and Col. Okello were part of the supernumerary pool or were seconded to the United Nations did not strip them of their rank or capacity to serve in the court martial. I note that from the record that Col. Okello was seconded to the United Nations but was allowed to continue attending the Tribunal virtually.

28. Since the appellant held the rank of sergeant he was a non-commissioned officer. Doubt is removed by the definition of "officer" and "non-commissioned officer" respectively in section 2 of the Act. So much so that by dint of section 160 (1) (c), a quorum of three members would have been sufficient.

29. The appellant rightly contends that at least one of the members should have been the "lowest ranking" officer in the force being a 2nd Lieutenant. Whereas that may be so, it is not mandatory because section 160 (3)(b) only applies when the lowest ranking officer in the Defence Forces is available at the time where the accused person is a service member.

30. The submission that the proceedings of 14th March 2023 were defective is not right for the following reasons. Three members, Col. Okello, Lt. Safari and Maj. Kantuli attended virtually and at least two of them addressed the Judge-Advocate (see page 87 of 144 of the record). I also note that no substantive hearing took place on that day. It was only for directions when the succeeding Judge-Advocate took over and directed that the matter proceeds from where it had reached.

31. In a notice of motion dated 26th September 2023 before the Tribunal, the appellant had sought to have all the members recuse themselves on among other grounds, bias and that the Tribunal was improperly constituted for want a "lowest ranking" officer in the force being a 2nd Lieutenant. I have already dealt with the issue of the lowest ranking officer and the composition of the Tribunal.

32. I have then studied the considered ruling delivered by the Judge-Advocate on 5th October 2023 dismissing the motion. He analyzed the precedents and sections 160 and 167 of the Act. I find that he arrived at the correct finding that the Tribunal was properly constituted; and, that the threshold of bias as a ground for recusal was not met. In addition, none of the members was disqualified under section 164 of the Act.

33. That takes me to the other grievances on the above notice of motion and whether the ruling should have been arrested. As I have stated, the appellant had lodged a notice of motion dated 26th September

2023 for recusal of members. A ruling was reserved originally for 2nd October 2023. In the meantime, he lodged another notice of motion dated 29th September 2023 to arrest delivery of the decision.

34. From the record at pages 139 and 140, the appellant had lodged an affidavit of one Collins who claimed to have heard Maj. Saha directing or commenting on the sentence to be made. The Judge-Advocate rightly found that irrespective of whether or not such a conversation was overheard, the guilt or innocence of the appellant had not yet been determined and that the application to arrest the ruling was unmerited.

35. I will now analyse the evidence of the prosecution and the defence witnesses. The prosecution called three witnesses. The first was No. 137878 Chepkemoi Mercy Choge. She was recruited into the Airforce on 9th February 2021 at the Londiani Centre. She claimed to have retrieved the appellant's cell number 0710858293 from her boss' phone (a nominated MCA) and called the appellant a day before the recruitment. She said she had authority to access the MCA's phone and would receive or make calls on her behalf. I think the witness was hiding her complicity in the matter: The manner in which she got an easy recruitment into the Air Force betrays a hidden hand.

36. PW1 made the call to line 0710858293 from her number 0722689203. She also sent a WhatsApp message. She claimed that it was the appellant's line because it was saved in the MCA's directory as "Mutai Airforce". She then attended the recruitment the next day and was hired. She had not met the appellant and he was not at the recruitment centre. Her only impression of him was the WhatsApp image.

37. When she went home after the recruitment, she claimed that the appellant visited on 10th February 2021 in the company of the personal assistant to the MCA, Cheruiyot Kirui (DW3) where they stayed until about 9:00 p.m. The visit was confirmed by her father, Joseph Kimutai Choge (PW2).

38. PW2 was emphatic that the appellant was soliciting for Kshs 400,000 or a commitment from him for assisting his daughter (PW1) to join the force or as a "thank you". PW1 and PW2 did not have the funds. PW1 testified that the appellant also made follow-up calls or threatened to "disqualify" her from employment.

39. According to Captain Festus Ondiemo (PW3), he received the complaint from PW1 and commenced investigations. he monitored the movements of the appellant and arrested him at the medical verification tent which was a restricted area for the recruits and medical personnel. He also produced by consent Safaricom data (exhibit 1) confirming the line used by the appellant was registered to him under national ID 26682765 (exhibit 2).

40. The appellant made an unsworn statement denying all the allegations. He admitted he had contacts with PW1 and visited her home but was emphatic that he never solicited any money. Regarding his appearance at the medical clinic, he said he went to check on PW1 because she had a muscle-ache.

41. His first witness WOII Menjo (DW1) testified that the appellant was arrested in the medical tent. But the appellant's evidence was that he was arrested in some field carrying out physical exercises or demonstrations for recruits. His second witness, Sgt Simon Yego, was not quite sure whether the arrest was outside or inside the medical tent. But he said that the practice was for physical trainers to sit outside the tent waiting for the recruits.

42. DW3 was Cheruiyot Kirui. He is a business man and a personal assistant to the MCA. He admitted that on 10th February 2021, the appellant called him at about 16:00 hours to take him to meet PW1 at a church near her home. He said the purpose was to deliver congratulations to PW1 and that there was no demand for money.

43. The issue of the identity of the appellant was live before the trial and a major ground in this appeal. Obviously, neither PW1 nor PW2 knew the appellant before this incident. PW1 had a vague impression from the WhatsApp image. At that stage, all she could say was that the appellant's number was saved by her boss as "Mutai Airforce". If matters had ended there, there would have been some doubt on his identity.

44. But there is then the direct evidence of DW3 who knew the appellant as an Airforce officer and who led him to the home of the complainants. I have no cause to doubt PW1 and PW2 that the mission was to extort funds or a "thank you". Since no monies were forthcoming, it was followed by the threats to disqualify PW1 from the force and may explain the appellant's sojourn to the medical tent where the new recruits were undergoing tests.

45. Secondly, there is no question that the appellant was an Airforce employee. He was on official leave at the material time. According to DW1, leave ran from 2nd February 2021 to 5th March 2021 corresponding well with the time of the visit to the complainants. The claim by the appellant that he and DW3 were invited by PW1 is unbelievable.

46. In addition, there was evidence from Safaricom data that the mobile number he used to communicate with PW1 was registered in his name. Finally, that line was registered using his national identity card number. Exhibits 2 and 3 links that card to service number 109666 for Sergeant Robert Kipkemoi.

47. Lastly, the appellant admitted in his defence that he communicated on cell phone with the complainant, that he visited their homestead on the material day and that he was arrested at the Recruits Training School (pages 79 to 84 of the record).

48. I am thus satisfied that the appellant was positively identified as the person who communicated with the complainant on 8th February 2021, visited her home on 10th February 2021 and arrested at the Recruits Training School on 12th April 2021. See generally, Wamunga v Republic [1989] KLR 424.

49. From my analysis of the prosecution's evidence, the defence tendered by the appellant and his three witnesses is evasive and cast no doubt on his culpability. I thus readily find that all the elements of the offence were proved beyond reasonable doubt. It follows that the appeal against conviction is dismissed. It also follows that the court cannot order for his reinstatement into the armed forces.

50. I will now turn to the sentence. Section 354 (3) of *Criminal Procedure Code* empowers this court to review the sentence. The appellant was imprisoned for six months on each count; the sentences to run concurrently. The penal provision provided for a sentence of up to two years imprisonment.

51. I stated earlier that by the time the appellant was released on bail pending appeal, he had served a substantial part of the sentence. In the event of earning a full remission, his earliest date of release would have been on or about 5th February 2024. If he failed to earn the remission, his stay was going to exceed the date he was released on bail pending this appeal.

52. I have also taken into account that he remained on close arrest for a long period during his trial and is a first offender. Doing the best that I can and in the interests of justice, I reduce the punishment to the period already served.

53. Save for that relief on the sentence, the remainder of the appeal is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of: -

The appellant.

Mr. Sang for the appellant instructed by CK Advocates.

Ms. Awino for the respondent instructed by the office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.