



**Muriuki v Republic (Court Martial Appeal E001 of 2024)  
[2025] KEHC 7969 (KLR) (Crim) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
COURT MARTIAL APPEAL E001 OF 2024**

**AB MWAMUYE, J**

**MAY 2, 2025**

**BETWEEN**

**MAJOR JK MURIUKI (130358) ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the original conviction and sentence by Judge Advocate  
Hon. H.M. Ng'ang'a on 17th November 2023 in Court Martial No. 5 of 2021)*

**JUDGMENT**

1. The Appellant, Major J.K Muriuki, was convicted of four charges of conduct to the prejudice of good order and service discipline and was sentenced to serve 1 year imprisonment in each count to run concurrently.
2. Being dissatisfied with both the conviction and sentence, the Appellant filed a Petition of Appeal dated 22<sup>nd</sup> November 2023 seeking this Court to allow the appeal and also to quash and set aside the sentence that was imposed upon the Appellant and reinstates him back to employment.
3. The Appeal is anchored on the following eight (8) grounds of appeal which are espoused as hereunder:
  - i. That the trial Court erred in law and in fact by convicting the Appellant in a case which had not been proved beyond any reasonable doubt as envisaged in law.
  - ii. That the Court Martial erred in law and in fact when it failed to evaluate the evidence on record properly thereby failed to appreciate that the Prosecution's own witnesses had exonerated your Appellant.



- iii. That the trial court erred in law and fact when it failed to appreciate that the Prosecution had left several gaps in their case by failing and avoiding to use the available and necessary evidence which would have ascertained the truth in the case.
  - iv. That the trial court erred in law and in fact when it failed to appreciate that crucial persons who could create a link between the Appellant and the alleged offences were never interrogated or called as witnesses by the prosecution.
  - v. That the trial court erred in law and in fact when it failed to consider relevant facts and dwelt on irrelevant facts which led to the miscarriage of justice.
  - vi. That the trial court erred in law and fact when they failed to consider the evidence on record which stated clearly that it was not possible for the Appellant to influence recruitment of any person without colluding with other members.
  - vii. That the trial court erred in law and fact when it failed to appreciate that the Appellant had taken more than the maximum sentence prescribed for the offences for which he was charged with.
  - viii. The Court was not properly constituted as the Senior member was sitting while out of the country on a United Nations assignment hence was not under the command of Kenya Defence Forces.
4. Parties agreed to canvass the Appeal by filing written submissions.
  5. The Appellant filed written submissions dated 22<sup>nd</sup> January 2025 to which he averred that there were evidential gaps that were not considered by the trial court in arriving at its verdict. The Appellant averred that PW1 gave evidence that had nothing to do with the Appellant but with someone called Leboo. The Appellant also averred that PW2 testified that due to the chain in command the person who was the Senior Recruiting Officer and not the Appellant which was also affirmed by PW3.
  6. The Appellant submitted that PW4, PW5 and PW6 testified that there was no nexus between them and the Appellant and further stated that the Appellant never asked for money from them. PW6 also testified that the cell phone numbers he extracted information from were not the ones mentioned in the Court order and at the same time the order he relied upon was undated and unverified. PW7 also testified that he never retrieved anything from the Appellant's phone and the numbers he read in court were not in his report.
  7. The Appellant further submitted that PW8 adduced evidence that he never discussed the issue of money with anyone before recruitment including the Appellant and only gave money after recruitment. He further stated that he wasn't aware of the reason why the Appellant had been charged. According to the Appellant, PW9 equally stated that he did not send any money to the Appellant and PW10, who was the Investigating Officer testified that nobody adduced evidence or testified as having given the Appellant money and in addition no evidence was produced that Paul Mutai and Robert ever communicated with the Appellant.
  8. The Appellant contends that from the records, there was no evidence that could sustain the charges against him hence there was no need of even placing the Appellant on his defence in the first place.
  9. The Appellant submitted that the trial court failed to appreciate the fact that the accused had actually spent more time than the maximum period stipulated for the offence he was charged with. He contends that he was sentenced to serve 1 year imprisonment in respect to charges one, two, three and four which



- were to run concurrently and had been waiting for trial for 2 years 9 months and 5 days which is more than the two years maximum period prescribed under Section 221 of the [Kenya Defence Forces Act](#).
10. Reliance was placed on the case of *Spite John Kwirichs v Republic* [2017] KEHC 9738 (KLR) where the court held that records of the proceedings shows that the Court Martial was aware that the Appellant had been in custody for 25 months which exceeds the maximum sentence provided by the law but still went ahead and sentenced him to 12 months. The court proceeded to state that taking into account that the offence is a misdemeanor and the Appellant had exceeded the period of the maximum sentence provided in law by the number of days in close arrest, the Court Martial ought to have set him free. The Appellant equally relied on the case of *Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi v Republic* [2018] KECA 743 (KLR) and the case of *George Onyango Makokha v Republic* [2017] KEHC 9044 (KLR).
  11. The Appellant finally concluded that the [Kenya Defence Forces Act](#) prescribes the procedure of *the constitution* of the Court Martial and also prescribes the mode of hearing. He stated that the Act did not envision a scenario where a Member of the Court Martial would be sitting virtually as Section 169 of the Act provides that the Court Martial shall sit in open court and in presence of the accused.
  12. The Appellant contends that on 17<sup>th</sup> November, 2023 the Judge Advocate confirmed that two of the members were sitting virtually that is Colonel E.O. Okello and Major M.M. Saha contrary to the provisions of Section 169 (3) of the [Kenya Defence Forces Act](#) and that the two members were outside the jurisdiction of the court.
  13. The Respondents filed written submissions to which they averred that on conviction, PW1 testified that on 12<sup>th</sup> February 2021 in the Company of the IO they went to Lemek Recruitment Centre, Narok which was the scene of the crime and arrested the Appellant. in addition, they submitted that PW3 who was the Senior Recruitment Officer confirmed being in-charge of the recruitment officers and the Appellant was one of them and that one Gunner Leboo was sending messages directly to the Appellant to recruit certain individuals.
  14. The Respondent submitted that PW6, a data analyst produced Exhibit 8 which showed that 0711xxxxxx belonged to Kimeiywa Leboo and the owner of 0715xxxxxx is the Appellant. He further stated that the report shows the Appellant communicated saying that his secure line is 0791xxxxxx which was ascertained by Exhibit 8 as belonging to Vincent Kinyua Njue, a cousin to the Appellant.
  15. The Respondent further states the Investigating Officer testified that the Appellant gave number 0791xxxxxx to Gunner Leboo who was in constant communication via Whatsapp during the recruitment period where particulars and academic certificates of potential recruits were sent by Leboo to the Appellant.
  16. On sentence, the Respondent averred that the sentence meted out against the Appellant was within the provision of Section 121 of the [Kenya Defence Forces Act](#). Reliance was placed on the case of *Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi v Republic* (2018) KECA 743 (KLR) where the court held that taking into account the period spent in custody must mean considering that that period so that the imposed sentence is reduced proportionately by the period already spent in custody. They also cited the case of *Ogolla s/o Owuor vs Republic* [1954] EACA 270 as cited in *Republic v Stephen Mweinzela Mutuku & 2 others* [2020] eKLR where the court stated that the Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.
  17. They submitted that the Court was properly constituted and the mere deployment of the senior member outside the borders of the Republic of Kenya did not amount to him ceasing being under the command of Kenya Defence Forces and the Appellant has not placed any material to ascertain his claim.



18. The Respondent further claim that the Chief Justice vide Gazette Notice Number 2357 dated 4<sup>th</sup> March 2020 issued practice directions in the wake of the Covid pandemic which continue to be in use to date and subsequent directions issued vide Gazette Notice number 189 dated 11<sup>th</sup> January 2022 in regards to virtual courts which guided the court in its proceedings.
19. The Appellant filed further submissions dated 14<sup>th</sup> March 2025 to which reiterated contents of his written submissions dated 22<sup>nd</sup> January 2025 to which he averred that PW5 testified that he called the Appellant after recruitment and not before and even the so-called Gunner Leboo wasn't aware that PW8's son had been recruited. He indicated that it is trite law that suspicion however strong cannot be the basis of conviction. He relied on the case of Republic vs Mary Akinyi Ngesa & Another (2017) Kehc 4999 (KLR).
20. The Appellant stated that evidence adduced by PW6 was misleading as he stated that he examined the Appellant's phone but did not find any information in relation to this case and the insinuation by the Respondent that Vincent Kinyua Njue was a relative to the Appellant is far fetched and without any factual basis or evidence to support the same.
21. He further indicated that PW10 who is the Investigating Officer clearly stated that he did not find out any relationship between the Appellant and Vincent Kinyua Njue. He also stated that the Investigating officer testified that he did not find any communication between the two. He therefore submitted that the Prosecution did not prove its case to the required standard therefore this court should allow the appeal and acquit the Appellant.
22. I have carefully considered the Record of Appeal and the the rival written submissions made on behalf of the Appellant and the Respondent. Having done so, I find that the issue arising for determination is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charges of conduct to the prejudice of good order and service discipline contrary to Section 121 of the *Kenya Defence Forces Act* preferred against him to the required standard proof beyond reasonable doubt.
23. Section 121 of the *Kenya Defence Forces Act* states thus:

“ 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.
24. As outlined above, Section 121 of the *Kenya Defence Forces Act*, 2012 does not outline what specific acts would prejudice an officer's good order and service discipline. That is left for the authorities to determine.
25. In my view, the prosecution must prove that the Appellant herein received money and was also in a position after receiving the amount to induce recruitment of persons to a certain position. In addition, the prosecution must establish a link between the Appellant and the money paid.
26. In *Ali v R* (1990) KLR 154 the court stated as follows:

“ for a conviction based on circumstantial evidence to be deemed proper, the inculpatory facts relied on as circumstantial evidence must be incompatible with the innocence of the accused and incapable of explanation upon any other reliable hypothesis other than that of guilt. It is also necessary to be sure that there are no other co-existing circumstances which could



weaken or destroy the inferences of an accused person's guilt, derived from circumstantial evidence.”

27. The key question that should be answered in after giving circumstantial evidence is, does the defence offered by the Appellant in the lower court raise doubt as to his guilt? Does it rebut the above ingredients? Is it reasonable in the circumstances?
28. It was the prosecution's case that on 11<sup>th</sup> February 2021, while deployed as a Recruiting Officer Team 5 for Olchekut Supat Secondary school recruitment centre within Narok County unduly attempted to influence the recruitment of Daniel Munka Titamae, Nathan Kipkorir, Julius Kipkorir Kiboo, Collins Kipkorir Kibor and John Lanoi Kipyegon. In addition, the prosecution accused the Appellant for obtaining Kes. 50,000.00 from Julius Kiprono to influence the recruitment process in favour of his nephew. It was the prosecution's case that the Appellant's conduct was in prejudice of good order and service discipline contrary to Section 121 of the *Kenya Defence Forces Act*.
29. The prosecution pegged its case on the fact that the Appellant was alleged to have been arrested at the scene of crime during the recruitment process having been one of the recruitment officers. The prosecution allege that the Appellant recruited one Munka Titame through influence of Gunner Leboo but was dropped after the second medical report established that he was not medically fit.
30. The prosecution also relied on testimony from PW5, Gnr. (85100) Charles Rotich who testified that he called the Appellant to inform him that PW8 was appreciative he made to have PW4, Recruit Nathan Kipkorir to be recruited.
31. The prosecution case relied on evidence by the data analyst, Symon Kiptoo who produced a report marked as Exhibit 8 showing registration number 0715xxxxxx belongs to the Appellant. Further, prosecution allege that the report attached as Exhibit 13 show the appellant communicated to Gunner Leboo indicating that his secure line is 0791xxxxxx which was ascertained as belonging to Vincent Kinyua Njue; a cousin to the Appellant.
32. It was the Prosecution's case that the Investigating Officer testified that the Appellant was in constant communication with Gunner Leboo through WhatsApp during the recruitment period where particulars and academic certificates of the potential recruits were sent by Leboo to the Appellant.
33. The prosecution was of the view that the complainants made payments to the Appellant's cousin as kickbacks for facilitating recruitment into the Kenya Defence Forces. This Court notes however that the prosecution failed to establish a nexus between the complainants and the Appellant.
34. It was the testimony of PW1, CPL Dickson Munai that on 12<sup>th</sup> February 2021 at about 0445hrs he was accompanied by Maj. Leiyan to Narok County, Lamek recruiting Centre where there was a tip off that a service member by the name Gnr. Antony Kimeiywa Leboo was receiving money from civilians in pretence that he would help them secure a chance at employment. The court further notes that in his testimony and during cross examination, he does not mention any involvement of the Appellant herein yet he was the arresting officer.
35. This Court also notes that PW2 equally confirmed that he is not aware of any area in which the Appellant might have interfered with the recruitment process. He testified that the Senior Recruiting Officer is the one who had the power to overrule any decision regarding recruitment. This testimony was confirmed by Pw3 who in addition stated that he never saw the Appellant at any point speaking to Leboo at the recruitment centre. He further affirmed that one of the complainants was one of the best candidates and did not require any influence to be recruited. He affirmed that none of the candidates who had been recruited were recruited by dubious means and that whatever happened after



the recruitment process was unnecessary. He concluded by confirming that it is hard for the appellant to work alone and must collude with other officers in the process but affirmed that Daniel Munka Titamae was not recruited through influence but qualification.

36. It is noteworthy also that during examination, PW4 who was one of the recruits allegedly recruited by the Appellant through dubious means testified that he does not know the Appellant and had never met him before seeing him in court. Pw5 equally testified that nowhere did the Appellant influence the recruitment process and only referred to Gnr Leboo as the person who spoke to his uncle and the person who received the money.
37. This court equally notes that despite the allegations by the prosecution that the Appellant used his cousin's phone to access the funds, the cousin to the Appellant, one Vincent Kinywa Njue of ID number 48xxxx and mobile number 0740xxxxxx was never availed before the trial court to verify the allegations against the Appellant. It was the testimony of the investigation officer that he never established the location of Vincent Njue and his whereabouts are unknown. The investigation officer also affirmed that there was no communication between Robert Chelule and the Appellant and that the Senior Recruiting officer Lt. Col. Balata confirmed that all the candidates recruited were recruited on merit and not any dubious means as they met all the qualifications required.
38. Based on the evidence on record and the testimonies by several witnesses, the prosecution cannot solely blame the Appellant herein as being involved in dubious means in the recruitment process since there were different stages for approval before one is recruited and the Senior Recruiting Officer is the one who had the power to overrule any decision regarding recruitment yet he affirmed to the investigating officer and even during his testimony that all the candidates chosen were recruited on merit and met all the qualifications required.
39. A conviction in a criminal case cannot be founded on mere suspicion. The Court of Appeal in *Sawe v Republic* [2003] eKLR held as follows:
- “Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”
40. This Court is of the view that the circumstantial evidence in the present appeal was not sufficient to sustain the Appellant's conviction. There were other co-existing circumstances which weakened the inference of the Appellant's guilt as stated above. The accused person always benefits from any doubt raised. The Court in the case of *Philip Muiruri Ndaruga v Republic* [2016] eKLR held as follows:
- “The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether he balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt...
- To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him...”
41. The Appellant in his defence denied the allegations towards him and that there was no evidence found in his phone in relation to this case. Further, the Appellant testified that he does not know one Robert



Kipngeno Chelule and was never in communication with him. He also confirmed that there was no evidence before court to establish that he received any communication from Gunner Leboo. The Appellant further testified that there was no evidence that anyone was recruited through influence which testimony was affirmed by the Senior Recruiting Officer Colonel Balata who indicated that everyone that was recruited through those stations were recruited in merit.

42. The Appellant contends that it is not easy to influence recruitment alone and one would need representation at all stages. He also affirmed that there was no other person charged together with him as having given any bribe or having received any bribe. Further, it was his testimony that it is impossible for a recruiting officer to recruit any person without the approval of the Senior Recruiting Officer.
43. The above outlined loopholes by the Appellant in the prosecution's case creates doubt in this Court's mind to whether the Appellant was involved in soliciting bribes for recruitment of the complainants to the Kenya Defence Forces. It is the court's re-evaluation of the evidence adduced before the Court Martial that the Appellant might have been made a scapegoat for others and was basically singled out in a chain of several other players.
44. It is also this court's evaluation of evidence that critical witnesses who should have been called by the prosecution were not called. It was clear from the assessment of the evidence that Vincent Njue, the cousin to the Appellant who was allegedly receiving money as a proxy on behalf of the Appellant, was never availed before the trial court to testify on his involvement in this case. There was a gap in the investigations which could only be filled by the testimony from Vincent Njue whom the accused declined knowing or meeting.
45. The only conclusion that this court can reach is that it appears as if the Appellant was first identified as a suspect then investigations were commenced with a view of confirming his culpability without investigations being conducted with an open mind.
46. I find that the Judge Advocate erred in law and fact by relying on untenable circumstantial evidence marred with gaps and missing links and convicting the Appellant based on suspicion without appreciating the totality of the evidence with regard to the identification and connecting the Appellant to the telephone number allegedly used in the impugned transaction
47. For the above reasons, this court holds that the prosecution failed to establish its case before the Trial Court to the required standard of proof beyond any reasonable doubt. This Court therefore finds merit in the appeal lodged by the Appellant. His conviction by the Court Martial in counts 1, 2, 3 and 4 is hereby quashed; and he is acquitted of all the charges. Accordingly, the custodial sentence imposed upon him is set aside and the Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held.
48. Costs of this Appeal are awarded to the Appellant as against the Respondent.

**DATED, SIGNED, AND DELIVERED VIRTUALLY THIS TWENTY-SECOND DAY OF MAY, 2025.**

.....

**BAHATI MWAMUYE**

**JUDGE**

