



REPUBLIC OF KENYA



**Busenei v Republic (Criminal Appeal 76 of 2023)
[2024] KEHC 1553 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1553 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 76 OF 2023
DR KAVEDZA, J
FEBRUARY 21, 2024**

BETWEEN

SPTE RONALD BUSENEI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of the Court
Martial sitting at Langata Barracks on 15th December 2022 in
Court Martial No. 28 of 2021 Republic vs SPTE Ronald Busenei)*

JUDGMENT

1. The appellant was charged and after a full trial convicted of two counts for the offence of committing a civil offence contrary to section 133 (1) (b) of the *Kenya Defence Forces Act*, that is to say, obtaining by false presences contrary to section 313 of the *Penal Code*. He was sentenced to serve 2 years and 10 months on each count which were to run consecutively.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his appeal, he raised grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He argued that the court failed to consider his defence. He contended that the sentence imposed was manifestly harsh and excessive. He urged the court to quash the conviction and set aside the sentence.
3. The respondent filed grounds of opposition to the appeal. They contended that the appellant was properly convicted and that the trial court discharged the burden of proof beyond reasonable doubt. In addition, the appeal lacks merit and should be dismissed.
4. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task



must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno vs Republic* [1973] EA 32).

5. AHS (PW1) told the court that was approached by the appellant, who promised him a job after hearing of his search through Rahma the barber. PW1, confirming his need for employment, referred the appellant to his brother MM. Corporal Inyangala verified the appellant's acquaintance but doubted his job prospects. Upon meeting, the appellant demanded a deposit before proceeding. PW1's mother sent Kshs 300,000, which PW3 (MMA) handed over to the appellant.
6. PW 1 and PW 3 travelled to Nairobi, facilitated by Corporal Inyangala, staying at his friend's place. Medical exams were conducted, and a meeting was arranged with the appellant's purported boss. After waiting for promised letters of employment, PW1 deposited an additional Kshs 300,000 upon the appellant's request. However, the appellant failed to deliver, citing issues with the letters' serial numbers. PW1, PW3, and Corporal Inyangala later traveled to Nairobi, hoping for jobs, but returned empty-handed. PW1 reported the incident, claiming to have given a total of Kshs 600,000 to the appellant for recruitment.
7. Corporal Peter Joakim (PW5) investigated allegations of recruitment malpractice involving the appellant and Corporal Inyangala. Two civilians reported being promised jobs by them. PW5 confirmed cash transactions and deposits, with the appellant allegedly receiving Kshs 300,000 and depositing Kshs 250,000 in his bank account. Additionally, Corporal Inyangala received Kshs 100,000. Despite promises of repayment, they failed to do so.
8. Legal Officer Loise Wangare (PW4) provided bank statements, revealing cash inflows and outflows from the appellant's account, along with a certificate of electronic evidence. PW4 elaborated on transactions, including cash deposits and debits. These investigations were prompted by reports to the Inuka Police Station and subsequent court orders.
9. In his sworn defence, the appellant claimed he only encountered PW 1 in court and denied any prior interactions. He refuted having transactions with PW1 or PW2, asserting that any money deposited into his account was done by Ramadhan under Munyi's instructions for container purchases, not recruitment. He denied traveling to Nairobi with the complainants, insisting he traveled to Lamu. He argued for his alibi, suggesting the Investigating Officer (PW 5) should have checked his phone's location, confirming his presence in Lamu. Additionally, he asserted he was unaware of the agreement until served with prosecution documents during the trial.
10. 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*.

“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:-

- i. That a representation made by words in writing or by conduct must be made:-
- ii. That the representation must relate to a matter of fact which is made to mislead:-
- iii. That the representation is false in fact and



iv. That the person making it knows it to be false or does not believe it to be true.”

11. 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 them recruited to the armed forces. The corroborated evidence revolves around a recruitment scam involving the appellant, targeting PW 1 and PW 3 for KDF slots. The appellant upon hearing that PW 1 was in need of a job approached him and offered a job. The appellant posing as a KDF recruiter received a total of Kshs. 600,000. Kshs. 300,000 was given to him in person and the balance was deposited to his Equity Bank Account. Despite this, PW 1 and PW 3 were never recruited. Additionally, PW 4, a Legal Officer at Equity Bank elaborated on transactions, including cash deposits and debits in the appellant’s bank account which collaborated with the financial aspect of the prosecution’s evidence.
12. The prosecution provided evidence that confirmed the exchange of money between the complainants and the appellant. 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 PW 1 and PW 3 by falsely pretending that he was in a position to secure their recruitment 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.
13. The appellant argued that the trial court failed to consider his defence. However, I have perused the summing up by the judge advocate. I find that the appellant’s defence was summed up and the same was therefore considered before a verdict of guilty was reached. The ground of appeal therefore fails.
14. On sentence, the appellant was sentenced to serve 2 years and 10 months on each count. The sentences were to run consecutively. The [Sentencing Policy Guidelines](#) provide as follows: -

“7.13 – Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively”.
15. The Court of Appeal has defined the phrase ‘same transaction rule’ in the case of *Republic –vs- Saidi Nsabuga S/O Juma & Another* [1941] EACA and revisited it again in *Nathan –vs- Republic* [1965] EA 777 where the court stated as follows: -

“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”
16. In the instant case, the charges in count I and II indicate that the offences therein were committed in a transaction involving the same complainant’s being PW 1 and PW 3. The said offences were committed with the intention to defraud them and were connected in proximity of time and the criminal intent. In my view, the trial court ought to have ordered the sentences in counts I and II to run concurrently. The trial court indeed acted on wrong principles in that regard.
17. The upshot of the above analysis is that the appeal partially succeeds. The sentence imposed in counts 1 and II is substituted with a sentence of 1 year’s imprisonment on each count. The sentences are to run concurrently from the date of his arrest.

It is so ordered.



JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF FEBRUARY, 2024

D. KAVEDZA

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JUDGE

In the presence of:

Ms. Ntabo for the state

Appellant present in person

Kang'ahi for the Appellant

Nelson Court Assistant

