



REPUBLIC OF KENYA



KENYA LAW
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**Nzioka v Republic (Criminal Appeal 74 of 2023)
[2024] KEHC 2125 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 74 OF 2023
DR KAVEDZA, J
MARCH 5, 2024**

BETWEEN

ERICK NGYEMA NZIOKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 12th May 2023 at Lang'ata Barack in Court Martial No. 31 of 2021 Republic vs Erick Ngyema Nzioka)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of committing a civil offence contrary to section 133 (1)(b) of the *Kenya Defence Forces Act*, in counts I, II, and III. He was found guilty and convicted on the three counts charged. He was sentenced to serve two years imprisonment for each count. The sentences were to run consecutively. Being dissatisfied with the decision, he filed a petition of appeal dated 26th May 2023.
2. In his appeal, the appellant raised 10 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 martial failed to take into consideration his defence. He contended that the sentence imposed was harsh and manifestly excessive. It was further averred that the time spent in pre-trial custody was not considered during sentencing. 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 v Republic* [1973] EA 32).

5. The prosecution called 10 witnesses in support of their case. PW1, Samuel Katodo Kakuko, a Kenya Police officer stationed at Kasarani police station, Zimmerman police post told the court that In January 2021, his friend Isaac Maina, a Kenya Defense Forces (KDF) employee, offered to facilitate the recruitment of a KDF cadet through his superior, Mr. Hassan. He intended for his daughter, Maximilla Chepng'etich, to be recruited and requested her documents along with facilitation fees. PW1, through his wife Elizabeth Chepkemoi, sent money to the appellant under the guise of recruitment facilitation. Despite receiving the funds, the appellant failed to secure Maximilla's recruitment. The appellant was arrested following a tip from Maina, who had been arrested earlier.
6. PW2, Godfrey Matun Chemei, testified that he was introduced to the appellant, known as Morris Makau Mkenyi at the time, by Senior Private Maina through Stephen Musili (PW 4). The introduction aimed to facilitate the recruitment of Chemei's relatives into the Kenya Defense Forces (KDF). Chemei enlisted other potential recruits, and their parents entrusted him with money for alleged KDF slots. The appellant provided a different number to transfer the funds, registered under Morris Makau. PW2 used two different numbers for transactions. On the day of the recruitment, they travelled to Eldoret with the recruits, but the appellant instructed them not to attend the Recruit Training School. Chemei stated that both the appellant and Maina received over Ksh. 3 million from potential cadets and recruits, which has not been refunded.
7. PW3, Ann Musoba, testified that in January 2020, along with PW2, Brian Musto, and the late Limo, they met Maina and Morris in Hurlingham for KDF recruitment letters. The appellant and his accomplice demanded money, totalling Kshs. 500,000, sent by her father John Musoba through PW2, with an additional Kshs. 20,000 sent directly to Maina. Despite payment, she was never recruited into the KDF as promised.
8. PW4, Stephen Nzioka Musili, met Maina in October 2019 in Kitui, who asked for contacts of Form Four graduates for KDF jobs. In December 2019, Musili connected PW2 and Maina, meeting in Nairobi. The appellant and Maina claimed that they could offer KDF slots for Kshs. 500,000. Despite payments, they were never recruited to join the KDF.
9. PW5, Daniel Hamisi, from Safaricom's security department, testified about his role in liaising with law enforcement. He acted on court orders to investigate accounts, providing registration details and Mpesa statements for specified periods. He produced statements for accounts 0724xxxxxx and 0707xxxxxx registered to PW2 Godfrey Matun Chemei, and 0712xxxxxx registered to Morris Makau Mukenyi. Additionally, he provided a certificate to comply with the requirements of the *Evidence Act*.
10. PW6, Major Emmanuel Passiany, a Military Police Officer, testified that he conducted an identification parade on July 6, 2021, following complaints of fraud involving the appellant and Corporal Erick Nzioka and Senior Private Isaac Mwangi Maina. The appellant, known to the complainants as Morris Makau Mukenyi, was identified twice. The identification parade reports were submitted as Prosecution Exhibits.
11. PW7, Brian Kipsang Musto, identified the appellant and testified that he was promised recruitment into the Kenya Defence Forces (KDF) as a Cadet Officer in late December 2019 and early 2020 through Matun (PW2) and Musili (PW4). They met in Nairobi where PW2 handed over Kshs 300,000 to the appellant in two batches. Despite assurances from the appellant and Isaac Maina, they were never recruited, despite receiving letters promising recruitment. He knew the appellant as Morris Makau and his true identity was revealed during the identification parade.



12. PW8, Timothy Kibet Simatwa, a teacher, sought KDF recruitment for his son after his unsuccessful Kenya Prisons application. He paid Kshs. 500,000 through Matun for recruitment, but the appellant demanded more money. His son never joined the Recruit Training School (RTS), despite preparation and delivery of the sums asked for. He never met the appellant but paid the funds through PW2.
13. PW9, Duncan Wambugu Macharia from Cooperative Bank provided bank statements for account 011164xxxxxxx opened by PW2, Godfrey Matun Chemei, as per court orders.
14. Major Collins Alulu (PW10), the investigating officer, detailed interactions between PW2, the appellant (now known as Morris Makau Mukenyi), and parents for KDF recruitment. Transactions and meetings where money changed hands were described, implicating the appellant in the recruitment scheme. Parents like PW8, Timothy Kibet Simatwa, and PW3, Ann Musoba paid substantial sums to PW2 for recruitment but received no enlistment for their children. PW1, Samael Garang Kakuko Katodo, initiated the case after his daughter wasn't recruited despite giving money to the appellant and Maina leading to their arrest. It was the prosecution's case that the appellant played a significant role in the fraudulent scheme, as confirmed by various witnesses and evidence presented during the trial.
15. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. He gave sworn evidence and did not call any witnesses. He detailed his friendship with Isaac Maina since their employment in 2009 at Kahawa Barracks Transport Battalion. He told the court that in January 2020, he borrowed Kshs. 30,000 from Isaac Mwangi Maina for an ear problem, sent under the name Morris Makau. Despite admitting to receiving money via Mpesa, the appellant did not produce any evidence to authenticate the transactions. He maintained that the interactions he was accused of by the complainants involved Maina, under whose instructions he was receiving the money under the name Morris Makau Mukenyi.
16. On re-evaluation of the evidence adduced before the trial court, it was clear to this court that the trial court appreciated the charges that the prosecution was supposed to prove in order to secure the conviction of the Appellant. The Appellant was charged with three counts for 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.”
17. 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 prosecution's evidence against the appellant includes testimonies from multiple witnesses detailing fraudulent KDF recruitment schemes. PW1, a police officer, described how the appellant, through his friend Maina, promised KDF recruitment for a fee but failed to deliver. PW2 testified about financial transactions between parents and the appellant for supposed KDF slots, corroborated by PW3 and PW4.



18. PW7 and PW8 recounted similar experiences of promises unfulfilled despite payments. The identification parade conducted by PW6 confirmed that indeed it was the appellant who was receiving money under the name Morris Makau Mukenyi as he was positively identified through an identification parade. Safaricom records produced by PW5 further implicated the appellant. Bank statements provided by PW9 and investigations led by PW10 further supported the prosecution's case, demonstrating the appellant's involvement in the scam. Overall, the evidence suggests the appellant played a central role in the fraudulent recruitment operation, leading to charges against him.
19. 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 potential KDF recruits 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.
20. 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. The upshot of the above is that the appellant's conviction by the court martial was therefore safe.
21. On sentence, the appellant was sentenced to serve 2 years for each of the three counts he was facing. The sentence was 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”.
22. The Court of Appeal has defined the phrase 'same transaction rule' in the case of *Republic v Saidi Nsabuga S/O Juma & Another* [1941] EACA and revisited it in *Nathan v 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.”
23. In the instant case, the charges in counts I, II, and III indicate that the offences therein were committed in a transaction involving several complainants. The said offences were committed with the intention to defraud the complainants which acts were connected by the proximity of time, criminal intent, by the relation of cause and effect, constituting the same transaction. In my view, the trial court ought to have ordered the sentences in counts I, II, and II to run concurrently. The trial court indeed acted on wrong principles in that regard.
24. The upshot of the above analysis is that the appeal partially succeeds. The sentence imposed of two years of imprisonment each, in counts 1, II, and III is maintained. However, the sentences shall run concurrently from 26th August 2021, having spent the entirety of his trial in remand custody.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 5TH DAY OF MARCH, 2024



D. KAVEDZA

JUDGE

In the presence of:

Mr. Genga h/b for Mr. Kirimi for the Appellant

Ms. Tumaini for the Respondent

Joy/Omwoyo Court Assistants

