



**Kibet v Republic (Criminal Appeal E006 of 2024)  
[2024] KEHC 6945 (KLR) (10 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6945 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E006 OF 2024  
DR KAVEDZA, J  
JUNE 10, 2024**

**BETWEEN**

**FRANKLINE KIBET ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by the Court Martial sitting at TAEW Moi Air Base Court Martial no. 11 of 2022 Republic vs Frankline Kibet)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted for four counts of offences under the [Kenya Defence Forces Act](#): Counts I and II, being in possession of a firearm and ammunition without holding a firearm certificate in force under clause 4 (2) (a) as read with section 4 (3) (b) of the [Firearms Act](#) Chapter 114 of the Laws of Kenya. In count III, committing a civil offence contrary to section 133(1) (b) of the [Kenya Defence Forces Act](#) 2012 that is to say conspiracy to commit a felony contrary to section 393 of the [Penal Code](#) that is to say conspiring to acquire a firearm without holding a firearm certificate. In count IV, retaining public property contrary to section 87(1)(b) as read together with section 87(2) of the [Kenya Defence Forces Act](#). He was found guilty and convicted on the four counts charged. He was sentenced to serve 7 years each in counts I and II, 5 years in count III, and 2 years imprisonment in count IV. Counts I, II, and IV were to run concurrently while count III was to run consecutively. Cumulatively he was sentenced to 12 years imprisonment.
2. Being dissatisfied with the decision, he filed a petition of appeal dated 12<sup>th</sup> February 2024. In his petition of appeal, the appellant raised 9 grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He contended that the trial court failed to consider his defence. He argued that the sentence was harsh and excessive and failed to take into account the period of 2 years spent in remand custody. He urged the court to quash his conviction and set aside the sentence imposed.



3. 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).
4. The prosecution's evidence is as follows. PW1, CPL Francis Korosian testified that he was deployed in Amisom activities in Somalia, where he met the appellant and discussed purchasing a pistol. PW1 made a deposit for the firearm, as reflected in his Mpesa statement. Both were in Dhobley, Somalia, during these discussions. Later, PW1 returned to Kenya and changed his mind about acquiring the firearm. In February 2021, he demanded the return of Ksh 70,000 (Kenya Shillings Seventy Thousand) he had sent to the appellant, but the appellant refused. This occurred in February 2021. He later learnt that the appellant had been arrested with a pistol and ammunition, claiming he was delivering them to him, which PW1 denied. On 31st March 2022, PW1 recorded a statement disassociating himself from the firearm acquisition discussions.
5. PW2, Diana Cheruyot Langat, a cousin of the appellant and an employee at Nation Media Group, testified that on 25th February 2022, the appellant called her at work at Nation Media Center on Kimathi Street. They met, and he left his rucksack with her, saying he needed to go to the bank. When he took longer than expected, she decided to return to the office. At the entrance, the black bag was scanned, revealing a suspicious item. She was reluctant to open the bag because it wasn't hers, but it was eventually opened, revealing a military uniform, a gun wrapped in a metallic black box, and other personal items. The metallic box was wrapped in a black T-shirt.
6. The matter was referred to Mr. Mathenge, the head of security (PW3), who called the police. Diana was interrogated and asked to call the appellant. She did, and when he arrived, she identified him to the police, who arrested him. The bag and its contents were handed over to the police. Diana was later released after questioning and identified the items in court as those from 25th February 2022.
7. PW3, Dickson Mathenge Muriuki, head of security at Nation Media Group, testified that on 25th February 2022, he was informed about a staff member found with a firearm. He found Diana (PW2) with security officers, and her bag, scanned at the entrance, contained a military uniform, personal documents, and a metallic box with a pistol and ammunition. Diana confirmed the bag belonged to the appellant, who was at the bank. PW3 called the police, and when the appellant returned, he was arrested. PW3 identified the bag and its contents in court, and an inventory was prepared and signed.
8. PW4, Faith Kerubo Nyagaka, a security officer at Nation Center, testified that on 25th February 2022, her colleague Zephania Sigilai detected a pistol in a bag during screening. The bag belonged to Diana (PW2). She searched the bag in Diana's presence and found a military uniform, a metallic box, and personal documents. The metallic box contained a pistol and ammunition, which she identified in court.
9. PW5, Ibrahim Gahivi Palapala, a security officer at PDM, testified that Faith (PW4) called him about the incident. He went to Nation Center, where Faith briefed him about finding a pistol in a staff member's bag during screening. He notified the head of security, PW3, but did not search the bag himself, relying on Faith's information.
10. PW6, Ambrose Mukura Kivuva, an inspector of police at Central Police Station, testified that on 25th February 2022, he was summoned by the OCS, Chief Inspector Moses Shikhulu, to respond to an emergency at Nation Center. At the office of Mr. Mathenge (PW3), the head of security, they were briefed about a pistol found in a bag belonging to Diana (PW2). Kivuva identified the bag, the box, the pistol, and the ammunition. Diana told them the bag belonged to her cousin, Frankline Kibet. She



- called the appellant, who was then arrested and identified himself as a military officer. The appellant admitted the bag and its contents were his. The matter was handed over to the Military Police for further investigation.
11. PW7, P.C. Mbae Geoffrey Murangiri, corroborated PW6's testimony. He identified the black box, bag, pistol, ammunition, and documents belonging to Frankline Kibet. He recorded statements from the appellant and PW2. Once it was confirmed that the appellant was a military officer, the case was handed over to the Military Police, and the exhibits were transferred accordingly.
  12. PW8, Chief Inspector Moses Shikuku, O.C.S. at Central Police Station, testified that on 25th February 2022, he received a call from Mr. Mathenge (PW3), head of security at Nation Center, about a suspicious item detected at the building entrance. Shikuku, along with PW6 and PW7, responded and found a black bag containing a metallic box with a pistol, a fully loaded magazine, a military uniform, and documents in the name of Frankline Kibet. Diana (PW2) claimed the bag belonged to her cousin, the appellant. She called him, and he was arrested and admitted the bag was his. The matter was handed over to the Military Police.
  13. PW9, Corporal Hassan Jilani Mugo, a D.O.D. Military Police investigator testified that he investigated the circumstances under which Frankline Kibet was found with a firearm. He confirmed the appellant's arrest and booking on 25th February 2022. The appellant claimed he was delivering the firearm to CPL Korosian (PW1), which Diana corroborated, stating that Frankline had left the bag with her while he went to the bank. Security screening revealed the pistol. Mugo identified the metallic box, pistol, and documents as exhibits. PW9 also retrieved Mpesa statements confirming the payment but no refund. The ballistic report confirmed the firearm was functional. The appellant was charged with disobeying KDF standing orders by gambling and possessing the firearm without a certificate.
  14. PW10, Senior Superintendent of Police Florence Karimi, a ballistic expert, produced the ballistic report confirming the firearm's functionality. Ambrose Munywoki, a data analyst from Safaricom, testified as PW11, producing Mpesa statements and call data, validated by a certificate of electronic evidence from the Kibera Law Court.
  15. In his defense, the appellant recounted his time in Dhobley in 2020, assisting with military police duties. He met David, who offered to help him acquire a pistol. Upon David's suggestion, he informed CPL Korosian (PW1), who instructed him to purchase the pistol. The CPL provided funds for the transaction, which he transferred to David, but he never received the firearm. He later refunded the money to PW1. In February 2021, he received a call to collect a parcel for PW1, a black box, which he held onto until PW1 could retrieve it. On 25th February 2022, he carried the box for delivery, stopping at Nation Centre to see his cousin Diana (PW2). He left her with the bag, unaware of its contents, and learned of the pistol after security screening. Upon arrest and taken to Central Police Station, he denied the charges and sought release.
  16. In counts I and II, the appellant was charged with the offence of being in possession of a firearm and ammunition without holding a firearm certificate in force under clause 4 (2) (a) as read with section 4 (3) (b) of the [Firearms Act](#) Chapter 114 of the Laws of Kenya.
  17. the issue for determination is whether indeed the appellant was found in possession of the firearm and ammunition. Testimony from multiple witnesses, including Diana Cheruyot Langat (PW2), Dickson Mathenge Muriuki (PW3), security officers Faith Kerubo Nyagaka (PW4) and Ibrahim Gahivi Palapala (PW5), and Chief Inspector Moses Shikuku (PW8), testified about the discovery of a firearm and ammunition in a bag belonging to the appellant. The firearm, a fully loaded magazine, a military uniform, and other personal documents were found in the bag belonging to the appellant. Corporal Hassan Jilani Mugo (PW9), a D.O.D. Military Police investigator investigated the circumstances



surrounding the appellant's possession of the firearm. He confirmed the arrest of the appellant and retrieved evidence, including the metallic box containing the pistol and ammunition. Senior Superintendent of Police Florence Karimi (PW10), a ballistic expert, produced a report confirming the functionality of the firearm, which further corroborated the evidence of possession. Evidence from Mpesa statements, presented by data analyst Ambrose Munywoki (PW11), indicated financial transactions related to the acquisition of the firearm, strengthening the case against the appellant.

18. Overall, the combination of witness testimony, physical evidence, police investigation, ballistic report, and financial transactions provides compelling evidence against the appellant for possession of a firearm and ammunition without a certificate.
19. The *Concise Oxford English Dictionary* (12th edition) defines the word possession as:-

The state of possessing something; visible power or control, as distinct from lawful ownership.
20. The offence of being in possession of a firearm is committed where the person found in possession of the firearm does not have a firearm certificate. The appellant was arrested and the evidence does prove that he had the firearm. In effect, therefore, he was in possession of the firearm as he had the power and control over the weapon. I am satisfied that the prosecution did prove its case beyond reasonable doubt. The defence evidence does not raise any doubt on the prosecution case. The appellant's contention that the firearm did not belong to him is not established. I do find that the evidence on record did prove both counts. The conviction is proper in counts I and II.
21. In count III, the appellant was convicted for the offence of committing a civil offence contrary to section 133(1)(b) of the *Kenya Defence Forces Act* 2012 that is to say conspiracy to commit a felony contrary to section 393 of the *Penal Code* that is to say conspiring to acquire a firearm without holding a firearm certificate. The said section provides as follows;

“ Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.”
22. In Archibold: *Writing on Criminal Pleadings, Evidence and Practice* 1999 3rd Edn. the learned writers observe on pages 2589 and 2590 that: -

“ The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement..... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”
23. From the foregoing, it is clear that the prosecution must prove the existence of an agreement between the appellant and some other person to do the act complained of. In the present case, it was alleged that on diverse dates between 27<sup>th</sup> June 2020 and 27<sup>th</sup> July 2020 the appellant conspired with CPL Francis Korosian to acquire quantity one Chinese Tokarev Quantity Pistol s/no. 7583171 without holding a firearm certificate in force an act which he knew or ought to have known constitutes an offence.



24. At the trial, the alleged co-conspirator gave evidence as a prosecution witness. He admitted that he gave the appellant money for the purchase of the firearm but maintained that he changed his mind and asked for his money back. He contended that the appellant bought the firearm on his own accord. Being a prosecution witness, I do not think the element of agreement involving the Appellant and his alleged co-conspirator as alleged was ever proved. Accordingly, the count III of the charge fails and is acquitted thereof.
25. In count IV, the appellant was convicted for retaining public property contrary to section 87(1)(b) as read together with section 87(2) of the *Kenya Defence Forces Act*. The prosecution contended that the appellant was found in possession of 7 rounds of ammunition calibre 9x19mm lot no. KOFC 50M 11 property of the Kenya Defence Forces having reason to believe to have been fraudulently misappropriated an act he knew or ought to have known constitutes an offence. The specific provision of the law is as follows:
87. Offences concerning public or non-public property
1. A person who is subject to this Act commits an offence if that person—
    - (a) steals or fraudulently misapplies, misappropriates any public or non-public property, or is concerned in or connives at the stealing or fraudulent misapplication of that property;
    - (b) receives or retains any public or non-public property, knowing or having reason to believe it to have been stolen or to have been fraudulently misapplied or misappropriated;
    - (c) willfully damages, or is involved in the willful damage of, any public or non-public property; or
    - (d) by willful neglect causes damage by fire to any public or non-public property.
  - (2) A person who commits an offence under subsection (1) shall be liable, on conviction by a court-martial, to imprisonment for a term not exceeding seven years or any lesser punishment provided for by this Act.
26. The prosecution led evidence to the effect that the round of ammunition found in the appellant's possession was the property of the Kenya Defence Forces. During his tenure as a KDF Officer, his designation was a storeman. He dealt with the issuance of the property in the peacekeeping mission to other KDF Officers. Evidence was presented to the extent that the rounds of ammunition were issued in 2015 and 2018. He did not surrender the ammunition after completing his peace keeping mission. In addition, he did not account for the said rounds of ammunition in his role as a storeman. He conviction on count IV was therefore proper.
27. On sentence, the appellant was sentenced to serve 7 years each in counts I and II, 5 years in count III, and 2 years imprisonment in count IV. Counts I, II, and IV were to run concurrently while count III was to run consecutively. This court has acquitted the appellant on count III and maintained the convictions on counts I, II, and IV.
28. In his submissions, the appellant contended that the sentence imposed was harsh and manifestly excessive. I note that the sentences imposed in counts I and II were 7 years each. The law provides for a minimum sentence of 7 years in count I and 5 years in count II. Sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by



the trial court, in this case, was lawful but considering that the appellant was a first offender, he needs rehabilitation. I am satisfied that the sentence was harsh and manifestly excessive

29. For the above reasons, I hereby set aside the sentence of seven (7) years imposed in counts I and II and substitute them with sentences of four (4) years and two (2) years respectively. The appellant is acquitted in count III. The sentence of two (2) years in count IV is maintained. The sentences shall run concurrently from the date of the appellant's arraignment being 4<sup>th</sup> August 2022 pursuant to section 333(2) of the *Criminal Procedure Code*.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 10<sup>TH</sup> DAY OF JUNE 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Present

Ms. Tumaini Wafula for the Respondent

Joy Court Assistant.

