



**Maina v Republic (Criminal Appeal 63 of 2023)
[2024] KEHC 12766 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 63 OF 2023
DR KAVEDZA, J
OCTOBER 24, 2024**

BETWEEN

SPTE ISAAC MWANGI MAINA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by the Court Martial at Langata Barracks in Court Martial case no. 32 of 2021 Republic vs SPTE Isaac Mwangi Maina)

JUDGMENT

1. The appellant was charged with six (6) counts of the offence of conduct to the prejudice of an order and service discipline contrary to Section 121 of the Kenya Defence Force Act and with an alternative charge of committing a civil offence contrary to Section 131 (1) (b) of the Kenya Defence Force Act, that is to say, obtaining by false pretence contrary to Section 313 of the Penal Code. He also faced two counts of being Absent Without Leave (AWOL) contrary to Section 75(1) a) as read together with Section 75 (2) of the KDF Act. After a full trial, he was convicted on all counts charged and sentenced to serve a term of two years and six months in counts 1 to 6 and one year and six months in counts 7 and 8. The sentences are running consecutively.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal dated 25th May 2023, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He challenged the sentence imposed as being harsh and excessive.
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 called fifteen (15) witnesses in support of their case. PW1, Samuel Katodo Kakuko, a police officer at Kasarani's Zimmerman post, testified that in January 2021, he was approached by his friend, the appellant herein, a KDF officer, who offered to facilitate his daughter's recruitment into the military. The appellant claimed that his superior, Mr. Hassan, had the authority to recruit a cadet, prompting PW1 to connect the appellant with his wife, Elizabeth Chepkemoi (PW2). On 29th January 2021, Elizabeth sent Kshs. 100,300 to the appellant as a "facilitation fee," but the recruitment never took place. PW1 later arrested the appellant, who also led him to arrest his accomplice, Corporal Erick Nzioka.
5. PW2, Elizabeth, further testified that the appellant coerced her to convince others to pay facilitation fees for their children's recruitment into KDF. She persuaded several individuals namely Susan Nanjala, Esther Rotich, Jackline Loshamoto, and Simon Kalemuyang who transferred money to her, which she forwarded to the appellant. In total, PW2 transferred Kshs. 298,876 to the appellant and made additional payments of Kshs. 300,800 in three installments. Esther Rotich also sent Kshs. 149,000 to the appellant's account to secure her son's recruitment, but none of the promised recruitments materialised.
6. PW3, Caroline Murethi, a worker at Club Image Thika, testified that on 8th April 2021, the appellant requested a room to freshen up after a long journey. After ordering food, the appellant claimed he had neither a Safaricom line nor his national identity card to pay. He arranged for Kshs. 100,000 to be sent to PW3's line number by Susan Nanjala. PW3 withdrew the money, settled the appellant's bill, and handed the balance to him. She was later summoned to provide a statement regarding the transaction.
7. PW4, Musoba Ann, testified that she met the appellant in Nairobi regarding KDF recruitment. She and other potential recruits met with the appellant and Corporal Nzioka, who briefed them and distributed admission letters. The appellant demanded full payment of facilitation fees through a middleman, Godfrey Matun. PW4's father, John Musoba, paid Kshs. 480,000 to the appellant through Godfrey, with an additional Kshs. 20,000 sent directly to the appellant. Despite the payments, neither PW4 nor her father received any admission into KDF, nor was the money refunded.
8. PW5, Stephen Musili, a Kenya Forest Officer, met the appellant, in October 2019 at his brother's shop in Kitui. They exchanged contacts and he later introduced him to Godfrey Matun Chemei (PW6) with whom they discussed KDF recruitment opportunities. The appellant claimed that each cadet slot cost Kshs. 500,000. PW5 testified that he witnessed Matun delivering cash to the appellant multiple times, with parents sending money through Mpesa for recruitment. Despite the payment, the recruits were never admitted to the KDF.
9. PW6, Godfrey Matun, testified that he raised Kshs. 250,000 and travelled to Nairobi to meet the appellant. The appellant introduced him to Corporal Erick Nzioka who was posing as Morris and he offered additional slots. Thirteen candidates, including Brian Musto and Ann Musoba, were identified, with parents contributing Kshs. 4.1 million in total. Despite assurances, the appellant's promises failed. The group travelled to Eldoret to wait for further instructions but they dispersed after the appellant stopped responding.
10. PW8, Brian Musto, testified that he travelled to Nairobi with Matun and handed over Kshs. 500,000 to the appellant. The appellant also introduced them to Nzioka. However, none of the thirteen candidates were recruited, and their money was not refunded.
11. PW12, John Musoba, a retired teacher, testified that he paid Kshs. 480,000 through Matun (PW6) to facilitate his daughter Ann Musoba's (PW4) recruitment into the KDF. When the recruitment failed, PW6 provided him with the appellant's contact information. PW12 later met the appellant in Eldoret,



who claimed to have received only Kshs. 300,000 from PW6. The appellant requested an additional Kshs. 20,000, which PW12 sent through Mpesa to one of the appellant's numbers. In total, PW12 lost Kshs. 500,000

12. PW7, Major Emmanuel Passiany, a military investigator, conducted an identification parade, where both Musoba Ann (PW4) and Brian Musto (PW8) identified the appellant as the individual they gave money to for KDF recruitment.
13. PW9, Daniel Hamisi, a Safaricom security officer, testified that his role was to assist law enforcement by providing subscriber information. Through three court applications, he provided Mpesa statements and registration details for phone numbers linked to the appellant and his accomplices. He confirmed that phone numbers 0721xxxx and 0721xxxx were registered under Isaac Mwangi Maina, the appellant herein. Another number, 0712xxxx, was registered to Morris Makau (identified later as Erick Nzioka). He produced these statements and extracts as exhibits, complying with the *Evidence Act*.
14. PW11, Duncan Wambugu, an employee of Cooperative Bank, testified that the bank was served with a court order to provide information on account 011164693xxxx. This account was registered under Godfrey Matun Chemei, a key intermediary in the alleged recruitment scheme. PW11 produced bank statements and account opening forms as exhibits.
15. PW13, Kenneth Yegon, an employee of KCB Bank, testified that he received a court order to produce account statements for account 11681xxxx belonging to Matun (PW6). PW13 presented the bank records, account forms, and certificates under the *Evidence Act* as exhibits.
16. PW10, Senior Sergeant Isaac Mwangi, who serves as the Motor Transport Officer at the Army Headquarters, confirmed that the appellant worked as a driver at the headquarters and was assigned several vehicles. He testified that the appellant had been on authorized leave from March 8 to March 12, 2021, but failed to report back to work on March 15, 2021, leading to an absence report being raised. He recounted that the appellant remained missing for 79 days until he was arrested on June 2, 2021, by the civil police and brought back to the Army headquarters.
17. PW14, WOII Samuel Mwalizi, the Chief Clerk at Army Headquarters, confirmed that the appellant failed to report back to work after his leave ended. After several failed attempts to contact him, his absence was reported, and his salary was stopped. Upon the appellant's arrest on June 2, 2021, a formal record of his return was entered.
18. PW15, Corporal Collins Alulu, testified that the appellant conspired with accomplices to defraud families of money for fake KDF recruitment slots. He confirmed the accused's 79-day absence from duty and presented financial records and official documents as evidence. An identification parade confirmed the accused's involvement, as two complainants identified him and his accomplice. During the investigation, an identification parade was conducted by Major Passiany, where two complainants Brian Musto and Ann Musoba positively identified the appellant and his accomplice, Erick Nzioka.
19. In his unsworn defence, the appellant testified that he joined the Kenya Defence Forces in 2009 and worked as a driver at Army Headquarters. He admitted receiving money from complainants, claiming some were soft loans from Godfrey Matun (PW6) for business purposes. He denied knowing the money's source, stating it was meant for loans and land deposits. Regarding his absence from duty, the appellant explained that personal and marital issues, along with deteriorating mental health, led him to extend his leave. Though he sought leave extensions through calls to his superiors, he was arrested before receiving medical assistance.



20. 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.
21. This court has re-evaluated the evidence adduced before the trial court. It has also considered the submission made by the parties to this appeal. 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.”
22. 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 a fraudulent KDF recruitment scheme.
23. PW1 testified that the appellant, a KDF officer, promised to facilitate military recruitment for his daughter, leading PW2, his wife, to transfer Kshs. 100,300 to the appellant. PW2 further confirmed that she convinced other individuals to send facilitation fees, forwarding a total of Kshs. 298,876 and additional instalments of Kshs. 300,800 to the appellant. Despite the payments, no recruitments occurred. PW4, Ann Musoba, and PW12, her father, testified that they paid Kshs. 500,000 through an intermediary, PW6, believing it would secure military admission. PW6 confirmed collecting over Kshs. 4.1 million from various parents, which he delivered to the appellant and his accomplice, Corporal Erick Nzioka, but none of the complainants were recruited to the KDF.
24. PW9, a Safaricom officer, linked phone numbers used in the scheme to the appellant and produced Mpesa statements confirming the transactions. Bank officers (PW11 and PW13) provided bank records showing deposits to accounts linked to intermediaries working with the appellant. Additionally, PW7 conducted an identification parade where both PW4 and PW8 identified the appellant as the individual who collected money for recruitment.
25. The question for determination is whether the prosecution provided a nexus between the transactions, the complainant, and the appellant. Moreso because 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 decide.
26. Thus, in my view, to prove such misconduct just like any other criminal offence, the state ought to establish both actus reus and mens rea on the part of the appellant. In this case, the actus reus was shown since the appellant received the money from the appellant. Secondly, the appellant was in a position to induce the recruitment of army officers. In addition, the prosecution established a link between the appellant and the monies paid.
27. In *Ali v R* (1990) KLR 154. The court stated that,
- “ 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 reasonable hypothesis 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”



28. The key question is, does the defence offered by the appellant in the lower court raise doubts as to his guilt? Does it rebut the above ingredients? Is it reasonable in the circumstances?
29. In his defence, the appellant acknowledged receiving money from complainants, asserting that some were soft loans from Godfrey Matun (PW6) for business. He denied knowing the money's source, claiming it was intended for loans and land deposits.
30. After weighing the explanation offered by the appellant and the prosecution evidence, I find that the prosecution evidence is truthful, credible, and probable as opposed to the highly improbable defence offered by the appellant. The appellant's defence did not raise any reasonable doubts on the prosecution case. Overall, the evidence suggests the appellant played a central role in the fraudulent recruitment operation, leading to charges against him.
31. 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.
32. The appellant's conviction on counts I, II, III, IV, V, and VI is affirmed.
33. In counts vii and viii, the appellant was charged with being Absent Without Leave (AWOL) contrary to Section 75(1) a) as read together with section 75 (2) of the KDF Act. It was the prosecution's evidence through PW10, that the appellant was on authorized leave from March 8 to March 12, 2021. Notably, he failed to report back for duty on March 15, 2021, prompting an absence report to be filed. Furthermore, PW14 corroborated the evidence detailing multiple unsuccessful attempts to contact the appellant during his absence. This lack of communication led to the suspension of the appellant's salary and the formal documentation of his absence. Finally, PW15, reinforced the timeline of the appellant's absence, affirming that he remained missing for 79 days before being apprehended on June 2, 2021. Collectively, this evidence establishes evidence of unauthorized absence from duty as charged in count viii. The conviction in count viii is therefore affirmed.
34. From the record, however, there was no evidence by the prosecution that the appellant absented himself from his place of work without leave from 9th November 2020 until he reported back to work on 13th November 2020 at about 1400 hrs. The conviction of Count VIII is consequently quashed.
35. On sentence, the appellant was sentenced to serve two and a half years imprisonment each in counts i to viii and one and a half years imprisonment in counts vii and viii. The sentences are running consecutively.
36. Section 121 of the KDF Act on which the appellant was convicted provides for a sentence of imprisonment for a term not exceeding two years or any lesser punishment provided for by the Act. The sentence imposed was therefore above the 2 years provided under the law and therefore illegal.
37. 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”.



38. 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 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.”

39. In the instant case, the charges in counts i, ii, iii, iv, v, and vi 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, iii, iv, v, and vi to run consecutively. The trial court indeed acted on wrong principles in that regard.

40. The upshot of the above analysis is that the appeal partially succeeds. I hereby make the following orders:

- i. The sentence of two (2) years and six (6) months each imposed in Counts i, ii, iii, iv, v, and vi is substituted with a sentence of two (2) years imprisonment on each of the said counts.
- ii. The sentences in counts i, ii, iii, iv, v, and vi shall run concurrently.
- iii. The sentence of one (1) year and six (6) months imposed in Count viii is maintained.
- iv. The sentence of one (1) year and six (6) months imposed in count viii is set aside.
- v. The sentences in counts i to vi running concurrently shall run consecutively with the sentence imposed in count VII from 7th June 2021 the date of the appellant’s arrest having spent the entirety of this trial in remand custody.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Ms. Maina h/b for Ms. Omurokha for the Respondent

Achode Court Assistant

