



**Maina v Republic (Criminal Appeal E242 of 2022)  
[2023] KEHC 18886 (KLR) (Crim) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E242 OF 2022**

**DR KAVEDZA, J**

**JUNE 16, 2023**

**BETWEEN**

**CIII JOB LUKALE MAINA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant, 43890 CIII Job Lukale Maina, was at the material time a member of the Kenya Defence Force. He was charged with three (3) counts of committing a civilian offence contrary to section 133(1) (b) of the *Kenya Defence Forces Act* 2012. The civilian charges brought against the appellant were obtained by false pretences contrary to section 313 of the *Penal Code*.
2. The particulars of the offences were that on February 8, 2021 at unknown place with intent to defraud colluded with 85026 Gunner Anthony Kimeywa Leboo and Maj J K Kenyakisa, the appellant obtained Kshs. 200,000 through his Cooperative Bank account number 01116xxxxxxx from Philip Kadipo in the pretext that he was in a position to recruit Mr. Dominic Kadipo into the Kenya Defence Forces during the February 2021 recruitment exercise. With regards to the charge II, it was alleged that on April 26, 2021 within Nairobi he obtained Kshs. 90,000 in cash from Mr. Colley Njeru in false pretense that he was in a position to recruit Mr. Kevin Gitonga Munene into the Kenya Defence Forces during the February 2021 recruitment exercise. In count III, it was alleged that the appellant on diverse dates between 16<sup>th</sup> March and April 30, 2021 within Nairobi county with intent to defraud obtained Kshs. 211,500 from Mr Colley Njeru in false pretense that he was in a position to recruit Mr. Kevin Gitonga Munene into the Kenya Defence Forces during the February 2021 recruitment exercise. The appellant was further charged with desertion contrary to section 74(1)(a) as read with section 74(2)(e) and 74(3) (b) of the *Kenya Defence Forces Act*. The particulars of the offence were that the appellant on February 16, 2021 at Kahawa Garrison absented himself from his place of work without leave for a continuous



period of more than ninety (90) days until he was apprehended by Military Police on August 22, 2021 having absented himself for a total period of one hundred and eighty eight (188) days.

3. This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach its own independent determination whether or not to uphold the conviction of the appellant. (See. *Njoroge -vs- Republic* [1987] KLR 19)
4. The prosecution called eight (8) witnesses in support of their case. Charles Koome Kiambati (PW1) tendered sworn testimony and told the court that he is the originator of this case as he came into contact with the appellant who was working at Nanyuki Barracks. He stated that the appellant used to approach him every day for him to get a potential recruit into the Kenya Defence Forces (KDF). As he did not have anyone in mind, he approached one Caroline Murugi (PW2) an employee at 42 field workshop who in turn approached her sister and the sister subsequently approached Mr. Colley Njeru (PW4) who expressed interest and offered to pay Kshs. 400,000 that the appellant had demanded. PW1 later accompanied Kelvin Munene (PW5), PW2 and PW4 to Nairobi where they met Major Wasike who confirmed that PW5's documents were in good order and who further demanded a down payment of Kshs. 100,000 for the recruitment exercise. He stated that PW4, Mr Colley Njeru, withdrew the said money from mpesa and handed the same to Mr. Wasike following which they returned to Meru.
5. PW2 confirmed that on February 13, 2021 she travelled to Nairobi with PW1, PW4 and PW5 where they met one Major Wasike at Beams Hotel. Major Wasike then perused PW5's document and asked them to deposit Kshs. 100,000 which PW4 withdrew from an Mpesa shop, handed it over to her and she gave it to Major Wasike. She further stated that on April 26, 2021 she went to Nairobi with PW4 and PW5 and they were picked by a doctor who took them to GPO where they met one Joseph whom she identified as the appellant. The appellant asked them to leave PW5 at GPO for them to go to Department of Defence (DOD) where they met one Major Wasike who then informed them that the doctor had confirmed that PW5 was fit for service. They returned to Town and the appellant asked for Kshs.90,000 which PW4 gave her, and upon recounting, she handed over the same to the appellant. She also stated that the appellant showed them a calling letter which would be used to recruit PW5 upon them making all the required payments.
6. Barnabas Manyalla Omollo (PW3), a Safaricom Liaison Officer testified and produced registration details for 07114xxxxxx which was registered under Joseph Adiedo Mola of National ID 323xxxxx, 07192xxxxx registered under Ibrahim Juma Wasike of National ID 2018xxxxx, 0768xxxxx registered under Mirriam Ogweru Akunda of National ID 249xxxxx and 07250xxxxx registered under Colley Njeru Kamunge of National ID 133xxxxx.
7. Colley Njeru Kamunge (PW4) told the court that on February 13, 2021, while in the company of PW1, PW2 and PW5 he met one Major Wasike who promised to secure a slot in the military for PW5. He further stated that upon meeting Major Wasike at Beams Hotel in Nairobi, the said Wasike perused PW5's academic certificates and confirmed that PW5 was qualified for the job. Major Wasike then demanded Kshs.400,000 from them to secure the job and a deposit of Kshs. 100,000. PW4 then stated that he withdrew the money from an Mpesa agent and gave it to PW2 who upon recounting confirmed the amount and handed it over to Major Wasike who promised to work on the deal in two (2) weeks.
8. PW4 also told the court that Major Wasike later called him on March 16, 2021 and asked him to offset the balance by sending it to 0114xxxxxx under the name Joseph Adiedo Mola which he complied by sending money on diverse dates.



9. He also told the court that on 30/04/2021 he sent Kshs. 2000 to Miriam Akunda of mobile number 0768xxxxx. PW4 further stated that on March 26, 2021, while in the company of PW2 and PW5, he gave Joseph, the appellant herein, Kshs. 90,000 after he requested for the balance.
10. Kelvin Munene (PW5) testified that in the company of PW1, PW2 and PW4, he met one Major Wasike at Beams Hotel where he verified his academic documents for recruitment to KDF and demanded Kshs.100,000. He stated that he later returned to Nairobi for medical check-up and PW4 gave PW2 Kshs. 90,000 which she then handed to Joseph, whom he identified as the appellant, to facilitate the recruitment exercise.
11. Major Robert Aputo (PW6) testified that on the morning of February 16, 2021 the appellant gave him some documents to sign but when he sent the headquarter master to look for him later in the day, he could not be found. He was later informed of the allegations against the appellant and they raised an AWOL (absent without official leave) which was dispatched to the Kenya Army Headquarters. He further stated that after 21 days, they convened a board with the authority of the commandant to establish the cause of the appellant's absence but he was later declared a deserter after 90 days having not reported to his station.
12. CII Elizabeth Osibe (PW7) corroborated PW6's testimony and told the court that on 16/02/2021, she sent the appellant to take some documents to PW6 but he never returned to the office nor resumed his duties. She tried to call him but his phone was off.
13. 106261 WOII Yegon Kipting (PW8) testified that he was tasked to investigate the allegations of desertion against the appellant. He stated that the AWOL was raised on 24/02/2021 and that the appellant was arrested on 22/08/2021 having deserted service for 118 days. He further unearthed that PW4 had lodged a complaint at the Military Police Headquarters on 26/07/2021 against the appellant for obtaining money by false pretences.
14. The appellant denied the charges. He further denied bribing anyone and claimed that the telephone numbers provided did not belong to him. He pointed out that no evidence was produced to show that a medical examination was done and that the witness did not state where the medical examination was done. With regards to the charges of desertion, he argued that he was not a service member and that after resuming work from leave on 16/02/2021, he went to try his luck for the MCA position at his home area in Kakamega. The appellant further told the court he had addressed a letter to the chief clerk indicating that he would not be in service for the remaining contract period of one and a half (1½) years. He also raised an alibi and urged the court that he was at Kakamega at the alleged time of the offence. He pointed out that the prosecution ought to have adduced CCTV footage from CCTV cameras at GPO placing him at the alleged scene.
15. After full trial, he was acquitted of count I and convicted of counts II, III and IV. In respect to count II and III he was sentenced to serve 2 ½ years imprisonment for each offence and 1 year imprisonment for count IV. The sentences were ordered to run consecutively with the period the appellant had spent in custody being taken into consideration.
16. The appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court. In his petition of appeal, the appellant raised several grounds challenging his conviction and sentence. He contended that the Court Martial convicted him in the absence of any sufficient or cogent evidence. In that regard, he was of the view that the evidence adduced did not support the charges that were brought against him. He further averred that the weight of the evidence did not support the convictions. He thus faulted the Court Martial for meting out an illegal sentence against him.



17. Both the appellant and Counsel for the DPP filed written submissions. I have carefully considered the submissions by the appellants' advocates and submissions by the learned state counsel and the relevant law and authorities.

### **Analysis and determination**

18. The issue for determination by this court is whether the prosecution established to the required standard of proof beyond any reasonable doubt the charges of obtaining by false pretences contrary to section 313 of the *Penal Code* and the charges of desertion contrary to section 74(1)(a) as read with section 74(3)(b) of the *Kenya Defence Forces Act* and if so, whether the sentence meted to the appellant was legal.

19. The prosecution was required to establish the elements that constitute the offence of obtaining by false pretences in respect of the first three (3) counts that the appellant was charged with. As was held by Gikonyo J in *Joseph Wanyonyi Wafukbo -vs- Republic* [2014] eKLR:

“...the following essential elements of the offence of obtaining through false pretences are discernable: that the person; (a) Obtained something capable of being stolen (b) Obtained it through a false pretence (c) With the intent to defraud.”

20. In the present case, the witnesses testified as to how the appellant, together with others not charged before court represented to them that he was in a position to facilitate the recruitment of PW5 into the Kenya Defence Forces. The appellant represented to PW4 that in consideration of the sums that he requested from him, he would be able to secure recruitment of PW5 into Kenya Defence Forces. The appellant knew this fact to be false because he lacked capacity both in law and in fact to facilitate the recruitment of PW5 into the Kenya Defence Forces. In fact, as it later emerged, the appellant did this with the sole intention of defrauding PW4 of the various sums that were paid to him. The prosecution was able to establish to the required standard of proof beyond any reasonable doubt that the appellant was paid through cash and through Mpesa account registered in the name of Joseph Adiedo Mola and Miriam Akunda the various sums that PW4 stated that he had paid to the appellant.

21. Despite the appellant's contention that he did not receive the sums alleged to have been sent to him, PW8 testified that he linked the transactions to the appellant because when he was arrested, a search was done on him and some items were recovered. In particular, a business card was recovered which indicated that he was a chief marketing manager of a securities company and among the contacts in the card was 0768xxxxx which was registered to Miriam Akunda. In addition to that, an Identification Parade was conducted and PW4 identified the appellant as one Joseph Adiedo Mola with whom he transacted with. It was therefore immaterial for the prosecution to produce CCTV footages from CCTV cameras at GPO as alleged by the appellant to establish that the offences were committed. Further, the appellant's alibi defence that he was at Kakamega at the time of the offence was discounted by the cogent and credible evidence that was adduced by the prosecution witnesses.

22. As regards to the last count of desertion, contrary to section 74(1)(a) as read with section 74(2)(e) and 74(3)(b) of the *Kenya Defence Forces Act*, 2012. The prosecution was required to establish the following:

(I) That the appellant was a member of the Kenya Defence Forces.

(II) That the appellant deserted duty or was absent from duty for a continuous period of more than ninety days.

(III) That the appellant did not have permission from his superiors to be away from duty.



(IV) That there was no lawful excuse or reason for the appellant to absent himself from duty.

23. According to the ingredients of the charge, there is no dispute that the appellant was a member of the Kenya Defence Force at the time the offence was committed. The appellant was therefore subject to the *Kenya Defence Forces Act*. As regard to whether the appellant deserted from duty, it was the prosecution's case that the appellant deserted from duty on 16/02/2021 and was continuously absent for a period of more than 90 days until his arrest on 22/08/2021.
24. PW6 and PW7, the officers who were directly supervising the appellant at the time, testified that the appellant absconded duty on 16/02/2023 and did not return to work until he was arrested by the Military Police on 22/08/2021. The appellant did not dispute the fact that he was away from duty during this period. His explanation was that he had sought permission vide a letter to the chief clerk indicating that he would not be in service for the remaining contract period of one year and six months. However, the same was not produced in court as evidence. Upon re-evaluating the evidence adduced in that regard, this court forms the firm opinion that the prosecution proved to the required standard of proof beyond any reasonable doubt that indeed the appellant deserted from duty for a continuous period of more than 90 days without the permission of his superiors. I therefore affirm the conviction.
25. On sentence, the prosecution conceded that the cumulative sentence of five (5) years imprisonment that was imposed in respect of count II and count III was excessive and illegal. Section 313 of the *Penal Code* provides the maximum punishment on conviction for the offence of obtaining by false pretence to be three years imprisonment. This court also noted that the Court Martial when rendering the sentence did not specifically take into account the period that the appellant was under arrest prior to his conviction. During sentencing the court noted that the pre-trial custody period had been taken into consideration.
26. From the record, the offences in counts II and III occurred in a single transaction and I am therefore guided by the case of *Peter Mbugua Kabui vs Republic* [2016] eKLR where the Court of Appeal stated as follows:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.
27. Having that in mind, I find that the consecutive sentence on counts II and III meted upon the appellant was excessive. In addition, although the Court Martial stated that it had taken that period into account, the fact that the appellant was sentenced to two and half (2 ½) years imprisonment for counts II and III, yet he had already spent one year in pre-trial detention, is a clear indication that the court martial did not take this time into consideration. This was contrary to section 333(2) of the *Criminal Procedure Code* that requires the period of pre-trial detention to be taken into account when sentencing a convict.
28. In the premises therefore, taking into account the period that the appellant was in pre-trial detention, and further taking into consideration the period that the appellant has been in prison, this court forms the view that the period the appellant has been in lawful detention is sufficient punishment. The custodial sentence of the appellant is therefore commuted to the period served.
29. For the above reasons, the appeal against conviction is dismissed. The appeal against sentence is partially allowed. The appellant's custodial sentence is commuted to the period already served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held.



30. It is so ordered.

Judgment dated and delivered virtually on **16<sup>th</sup> June, 2023.**

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**D. KAVEDZA**

**JUDGE**

**In the presence of:**

Ms Ntabo for the State

Mr Kang'ahi for the Appellant.

Habiba C/A

Appellant Present (VTC)

