



**Ngowah v Republic (Criminal Appeal E037 of 2023)
[2024] KEHC 14495 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E037 OF 2023
DR KAVEDZA, J
NOVEMBER 21, 2024**

BETWEEN

CAPTAIN (DR) ROBERT TSIMBA NGOWAH APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by the Court Martial sitting at Langata Garrison in Court Martial Case No. 24 of 2021 on 27th January 2023)

JUDGMENT

1. The appellant was charged and after a full trial convicted for three counts for the offence of conduct to the prejudice of conduct to the prejudice of good order and service discipline contrary to section 121 of the *Kenya Defence Forces Act*. He was sentenced to serve one (1) year and ten (10) months on each count to run concurrently.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He argued that the prosecution failed to prove the offence charged beyond reasonable doubt.
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 v Republic* [1973] EA 32).
4. The prosecution's case was as follows: PW1, Private Abdul-Aziz Barisa Shambaro, a recruit from Tana River County, testified that he did not know the appellant but was enlisted into the Kenya Defence Forces (KDF) on 9th February 2021 after passing all recruitment stages, including a medical and running test. He received his calling letter at around 3:00 pm. PW3, Mohamed Barisa Shambaro,



- PW1's brother, revealed that he paid CID officer Kipkorir Tonui Kshs. 300,000 to help secure the calling letter for PW1, though PW1 denied any bribery.
5. PW2, Private Moses Chonga Chilumo, testified about registering a Safaricom line using his friend PW4's ID at the request of his uncle, the appellant. Later, PW2 admitted to using the ID after being questioned by Military Police. He denied any financial dealings with PW4, claiming he did it to follow his uncle's instructions. PW4, Kazungu Mumba Kashuru, confirmed lending his ID to PW2 for registration but denied any involvement in the recruitment process.
 6. PW5, Daniel Hamisi, a Safaricom law enforcement officer, examined the phone numbers involved in the recruitment process. He identified transactions involving KES 100,000 and KES 40,000 between several numbers, including those registered to PW4, Marion Nafuna Waswa, and Amanda Jeruto Kigen. PW5 tracked these transactions and provided MPESA transaction details and call data as evidence, noting discrepancies in name registrations during the investigation period.
 7. PW6, Marion Nafuna Waswa, confirmed handing her SIM card (07079xxxxx) to her aunt's children during the school holidays but denied knowing Robert Kiprotich Mutai. PW7, Captain Steven Kamule Wanjama, recalled receiving a call from 07079xxxxx which he recognized as Captain Kiprotich Mutai's number. PW8, the investigating officer, outlined how the appellant was found to have facilitated the illegal recruitment, collecting payments via MPESA and instructing his nephew to register a phone line using someone else's ID. The appellant, along with others, was charged after the investigation was completed.
 8. In his defence, the appellant gave an unsworn testimony, stating that he was recruited into the KDF as a medical officer and highlighted his achievements. He admitted being part of the 2021 recruitment team, which included Captain Mutai and Major Chemjor but clarified that he had no authority over who was recruited. His role was limited to conducting medical tests. He denied helping Mohamed Shambaro or Francis Mwandege during recruitment, claiming they were recruited on different days and locations.
 9. The appellant also denied involvement in the SIM card registration or any illegal activities. He further denied meeting or communicating with PW2, Moses Chilumo, and denied receiving money or engaging in any illicit discussions with Major Chemjor and Captain Mutai. The appellant rejected the prosecution's claims of his involvement in fraudulent activities.
 10. 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.
 11. 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.”
 12. On the merits, it was the prosecution's case that the appellant had obtained money from the complainants by fraudulently manipulating the KDF recruitment system by inducing potential recruits to pay money to secure their recruitment. The prosecution's evidence against the appellant includes testimonies from multiple witnesses detailing fraudulent KDF recruitment schemes.



13. PW2, the appellant's nephew, testified that the appellant instructed him to use another person's ID (PW4's ID) to register a Safaricom line, which was later used in the fraudulent recruitment process. PW3 (Mohamed Barisa Shambaro) revealed that he paid Kshs. 300,000 to CID officer Kipkorir Tonui to help secure a KDF calling letter for his brother (PW1). While PW1 denied any bribery, PW3's testimony shows that the recruitment process was not solely merit-based, and money was exchanged to influence the outcome. PW5 (Daniel Hamisi), a Safaricom liaison officer, provided evidence of MPESA transactions that involved large sums of money (KES 100,000 and KES 40,000) linked to phone numbers connected to individuals involved in the recruitment process, including the appellant's associates. These financial transactions point to the collection of funds for recruitment purposes. PW8 (the investigating officer) outlined the appellant's role in the illegal recruitment process, including collecting payments via MPESA and instructing his nephew to register a phone number under false pretences.
14. 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.
15. 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 complainant. 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. 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”
16. 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?
17. In his defence, the appellant denied any involvement in the fraudulent scheme. However, the evidence of PW2, PW3, PW5, and PW8 points to his facilitation of illegal activities. His role in the recruitment process, along with the evidence of financial transactions linked to his associates, contradicts his claims of innocence. His involvement, even indirectly, in the fraudulent recruitment process, including the manipulation of the registration process for the SIM card and the receipt of payments, establishes that the appellant acted with intent to defraud and unlawfully obtained money through false pretences.
18. In my assessment, the appellant's explanation lacked reasonableness and failed to counter the compelling evidence presented by the prosecution. 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 doubt about the prosecution case. 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. 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. This court



therefore holds that the prosecution did prove, to the required standard of proof beyond any reasonable doubt the charges against the appellant.

20. The upshot of the above is that the appellant's conviction by the court martial was therefore safe on all counts.
21. Upon conviction, the appellant was sentenced to serve one year and ten months imprisonment each count to run concurrently. Section 121 of the [KDF Act](#) provides for a term not exceeding two years or any lesser punishment provided upon conviction.
22. The sentence meted was therefore proper and lawful. In the premises, the appeal is found to be lacking in merit and is dismissed.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF NOVEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Musa for the Appellant

Mburugu for the Respondent

Achode Court Assistant

