



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.3 OF 2018

(An Appeal arising out of the conviction and sentence of the Court Martial

delivered on 29th May 2018 in Moi Air Base- Eastleigh Nairobi, Court Martial No.7 of 2015)

LABAN AGAK NYAMBOK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Laban Agak Nyambok is a member of the Kenya Defence Forces. He was charged with four (4) counts of the offence of **conduct to the prejudice of good order and service discipline** contrary to **Section 121** of the **Kenya Defence Forces Act**. The particulars of the offences were that on 10th April 2013, 23rd July 2013, 31st October 2013 and 17th April 2014, the Appellant while performing the duties of medical verification officer at the Armed Forces Medical Insurance Scheme Registered Trustees (also known as Defence Forces Medical Insurance Scheme (DEFMIS)), he received the sums of Kshs.100,000/-, Kshs.20,000/-, Kshs.150,000/- and Kshs.100,000/- from Anthony Mbithi, the proprietor of Tahidi Nursing Home Mwingi in consideration for clearing fictitious hospital bills amounting to Kshs.748,646/-. He was further charged with three (3) counts of the offence of **neglect of duty** contrary to **Section 65** of the **Kenya Defence Forces Act**. The particulars of the offence were that on 6th June 2014, 7th November 2014 and 27th January 2015, the Appellant while performing his duties as the medical verification officer at DEFMIS, approved the payment for inpatient hospitalization of Naomi Mwalale and Abdinassir Jama at Tahidi Nursing Home and Waso Medical Services and Nursing Home respectively without admission authorization, an act the Appellant knew or ought to have known constituted an offence. When the Appellant was arraigned before the Court Martial, he pleaded not guilty to the charges. After full trial, the Appellant was found guilty as charged in count 1, 2, 3 and 4 and sentenced to serve one (1) year imprisonment in each count. The sentences were to run concurrently. He was acquitted of the charges in count 5, 6 and 7. 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 of appeal challenging his conviction and sentence. He was aggrieved that the prosecution failed to establish its case to the required standard of proof beyond any reasonable doubt on the charges that were brought against him. He was aggrieved that the trial court relied on exhibits that had not been authenticated to support his conviction. He faulted the trial court for failing to properly evaluate the evidence on record and thereby reached the erroneous conclusion that he was guilty as charged. He took issue with the sentence that was meted on him noting that the same was harsh and excessive in the circumstances. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant filed written submission in support of his appeal. This court also heard oral rival submission made by Mr. Were for the Appellant and Mr. Momanyi for the State. Mr. Were submitted that crucial witnesses were not called to adduce evidence before the Court Martial. He pointed out that the cheques produced in evidence were signed by members of the Kenya Defence Forces who were never called before the Court Martial to testify. None of the said signatories were questioned by the investigating officer. He added that the fictitious bills were alleged to have originated from Tahidi Nursing Home, yet the prosecution failed to avail witnesses from the said nursing home to adduce evidence in support of the prosecution's assertion. He averred that the prosecution failed to lay a proper basis for production into evidence of bank statements from National Bank of Kenya and Standard Chartered Bank respectively before they were produced as exhibits in court. He stated that the said documents were inadmissible in evidence since the authors were not availed before court to adduce evidence in support thereof.

Counsel for Appellant further submitted that the evidence adduced by PW4 and PW18 was to the effect that the Defence Forces Medical Insurance Scheme (DEFMIS) did not lose any money. He stated that the investigating officer in his testimony admitted that he did not have any proof of money that had been transferred from DEFMIS to Tahidi Nursing Home and then later to the Appellant's bank account. He

submitted that the Appellant was not a beneficiary of the funds that were deposited in his bank account. He asserted that no evidence was placed before the court to establish the allegation that the funds deposited in the Appellant's bank account were for the purposes of serving as an inducement to settle fictitious bills.

Mr. Were further submitted that the Appellant's role was limited to verifying medical documents that were presented to him when claims were lodged by approved medical services providers. After verification of the same, the claims were forwarded to the audit department and afterwards to the finance manager who authorized the payment of the same. He wondered why the finance manager and the managing director of DEFMIS at the time were not similarly prosecuted yet they were part of the chain of decision makers that enabled the payments to be made to the said medical establishments. He submitted that the Appellant was held in detention for a very long time before he was arraigned before the Court Martial. He asserted that the Commanding Officer did not make any recommendation for the Appellant to be charged before the Court Martial.

Learned counsel pointed out that the prosecution witnesses confirmed in their respective testimonies that admissions to the various approved medical facilities were authorized by other persons at DEFMIS other than solely the Appellant. He explained that the allegation by the prosecution to the effect that the Appellant had participated in the defrauding of DEFMIS was not established to the required standard of proof. He asserted that the prosecution did not present any evidence to establish that the funds deposited in the Appellant's account were deposited by a service provider i.e. Tahidi Nursing Home. Mr. Were stated that the proprietor of Tahidi Nursing Home denied ever depositing such funds in the Appellant's account. He urged the court to find that the prosecution failed to establish its case against the Appellant to the required standard of proof beyond any reasonable doubt. In the premises therefore, he urged this court to allow the Appellant's appeal.

Mr. Momanyi for the State opposed the appeal. He submitted that the Appellant was at the material time assigned the duty of a medical verification officer tasked with making authorization for inpatient and outpatient treatment with the various approved medical establishments. He was also the designated contact person between DEFMIS and the service providers. It was his duty to ascertain and verify medical claims, and where appropriate weed out any fictitious medical claims presented to DEFMIS. Mr. Momanyi submitted that the Appellant authorized payments of claims which were not genuine. The relevant complainants told the court that they did not seek or get any treatment from the medical facilities in question. He further asserted that kickbacks were paid to the Appellant through his bank account held at Kenya Commercial Bank, Flamingo Branch Nakuru by the said service providers. He stated that PW15, who was a legal officer at Kenya Medical Practitioner's and Dentists Board (KPMDB), testified that the proprietor of Tahidi Nursing Home was known as Anthony Mbithi. The deposits made to the Appellant's bank account were effected by a person by the name Anthony Mbithi.

Learned State Counsel further submitted that the document examiner (PW10) told the court that some payments made by DEFMIS to service providers were made on the basis of forged claim documents. It was the duty of the Appellant to verify these claims before a request for payment was made. He stated that the Appellant was negligent in his conduct of his duties either by acts of omission or commission. He asserted that the prosecution established its case to the required standard of proof beyond any reasonable doubt. He therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Cpt. Josephine Nduta Githii, worked as an actuarial officer at the Defence Forces Medical Insurance Scheme (DEFMIS). DEFMIS was a scheme that was established by the Kenya Defence Force to cater for the medical needs of retired military officers and some of their designated dependants. She worked with the Appellant who was in-charge of the department that dealt with verification of medical claims. Her immediate supervisor was the Managing Director of DEFMIS, Brigadier R. A. Onyango (now retired). She testified that if a member of the scheme required medical treatment, they were required to go to an accredited medical facility. After treatment, they would fill and sign a claim form. They said claim form together with accompanying documents would then be sent to DEFMIS by the hospital for settlement. At DEFMIS, the claim form was received by a clerk in the Administration Section who recorded the same in a register. The said clerk was required to ascertain the member's details on the claim form and confirm that the claim was from a hospital accredited by DEFMIS. The claim was thereafter forwarded to the medical verification officer.

PW1 testified that the medical verification officer was tasked with counterchecking whether the treatment accorded to the member by the hospital, as well as drugs dispensed matched with the patient's medical diagnosis. The officer would then append his/her signature on the invoice and forward the claim to the finance department. Once the claim was approved by the finance department, the same was forwarded to Defence Headquarters where three authorized signatories, i.e. Chief of Defence Forces, his deputy and the Managing Director, authorized the payment of the same. PW1 testified that invoices were prepared by the hospitals (service providers). She stated that the Appellant was a medical verification officer, and was not the final decision maker when it came to payment of claims. She added that other persons other than the Appellant worked at the Medical Verification Department. They included Sgt. Nyawira and Sgt. Wanja.

PW2, Col. Fredrick Kosgei Mutai was a medical verification officer at DEFMIS. He succeeded the Appellant. He identified several medical claims in respect of members who were allegedly treated at Tahidi Nursing Home and Waso Medical Services and Nursing Home. He confirmed that the two medical facilities were service providers accredited by DEFMIS. He however told the court that the claims ought not to have been approved since crucial supporting documents had not been attached to the said claims. He stated that the claims were verified by the Appellant since he was the medical verification officer at the material time. He however stated that he was not familiar with the Appellant's signature. The procedure then was that after the Appellant had verified a claim, the same was forwarded to the internal auditor for approval and thereafter to the finance department for payment. He confirmed that the medical verification officer as well as any officer from the management team such as Managing Director, Finance Department or an Administrator at DEFMIS could give authorization for the treatment of a member. The authorization could be verbal or written. In the absence of the medical authorization officer, any member of the team could authorize treatment of a member. However, authorization of payment was only done after certification by the medical verification officer. After the invoice was verified, it was forwarded to the internal auditor before being sent to the finance officer for payment.

PW3, Senior Sgt. Rodgers Kikech was a clerk at the Finance Department at DEFMIS. Claim documents were forwarded to the Finance Department by the medical verification officer. At the Finance Department, they were tasked with authentication of invoices from the service providers. They also prepared cheques for settlement of the said invoices. PW3 stated they were required to confirm that the invoices originated from accredited hospitals, the required signatures were present and finally the requirement that 25% of the medical bill be settled by the member in case of an outpatient claim. He told the court that there were instances where Finance Manager or the Managing Director

would authorize payments to service providers even though some of the required supporting documents had not been attached.

(stopped there)

PW4, Lt. Col. Mung'ori was the Finance Manager at DEFMIS. He was appointed in May 2015. On 3rd August 2015, the investigation officer (PW18) visited DEFMIS offices. He was investigating a case of fraudulent payment of medical claims involving Ewaso Medical Services and Tahidi Nursing Home. PW4 was able to retrieve data from the system showing payments to the said service providers by DEFMIS which he outlined before the court. PW4 stated that the team that was at DEFMIS at the time the alleged fraudulent claims were paid out were Retired Brigadier Richard Onyango who was the Managing Director, Retired Lieutenant Colonel Nyaga who was the Finance Manager, Retired Lieutenant Kiiru who was the Personnel Manager and the Appellant who was the Medical Verification Officer. The said Managing Director, Finance Manager and Personnel Manager were relieved of their duties. PW4 identified the Appellant's bank account statement in Court. There were several deposits made to the Appellant's account held at Kenya Commercial Bank by one Anthony Mbithi. PW4 stated that the said Anthony Mbithi was the proprietor of Tahidi Nursing Home. There were also two deposits of Ksh.120,000/- and Ksh.200,000/- made by Ewaso Medical Services to the Appellant's bank account. PW4 stated that the said deposits to the Appellant's account were made days after DEFMIS settled claims of the stated service providers.

PW5, retired WOII Jonathan Mulumba was a member of DEFMIS. He stated that his wife, Phoeth Mulumba, was listed as a dependant in his medical cover. He was categorical that neither he nor his wife has ever received medical treatment from Tahidi Nursing Home. He testified that his children were not beneficiaries of his medical cover, and that they have never been treated at Tahidi Nursing Home. He identified in court a claim form from Tahidi Nursing Home which indicated that his son had received treatment from the said medical facility. He told the court that his son has never visited the said facility and that he was not eligible to benefit from the scheme since he was 28 years old, which was way above the permitted age. His testimony was corroborated by his son, Justus Mutunga Mulumba, who testified as PW7.

PW6, retired WOII John Musee was also a member of DEFMIS. He identified claim forms (**Prosecution Exhibit No.4(a), 6 & 8**) from Tahidi Nursing Home which indicated that his wife had sought inpatient services from the said medical facility. He told the court that his wife had sought medical treatment from the said hospital but that she was never admitted as was indicated in the claim form. His testimony was corroborated by his wife, Rose Kisio Mutemi, who testified as PW8. She denied ever being admitted at Tahidi Nursing Home. PW9, Abdinassir Jamar was a member of DEFMIS. He identified a medical claim in court (**Prosecution Exhibit No.10**) which indicated that he had been admitted at Ewaso Medical Clinic for six days from 20th September 2014. He told the court that he was indeed admitted at the said medical facility but for only three days and not six days as indicated on the claim form. He further denied being admitted at the said facility for ten days as indicated on medical claim produced as **Prosecution Exhibit No.13**.

PW10, Chief Inspector Daniel Gutu was a forensic document examiner based at the DCI Headquarters. He was called upon to examine signatures of the patients on the medical claims in comparison with specimen signature to determine if the signatures were genuine. After his analysis, he concluded that some of the signatures of the patients on the medical claims had been forged. He also examined the Appellant's signature which was appended on the medical claims in his capacity as the medical verification officer and confirmed that the said signatures were genuine. PW11, Anastacia Mueni was the wife of retired KDF officer Boniface Muia Mutuku (PW12). They told the court that neither they nor their children have ever been admitted at Tahidi Nursing Home. They denied the contents of medical claims produced as **Prosecution Exhibit Nos.6 and 47** which indicated that PW11 and their daughter, Caroline Mwikali, had sought inpatient medical services at Tahidi Nursing Home.

PW13, Kennedy Kasina Aquina was a member of DEFMIS. He identified a medical claim form in court (**Prosecution Exhibit No.3**) which indicated that his son, Peter Nyaa Kasina, was admitted at Tahidi Nursing Home in October 2013. He told the court that his son was never admitted at the said medical facility. He also denied contents of a medical claim forms (**Prosecution Exhibit Nos.5, 6 & 10**) which indicated that his wife and daughters were admitted at the same facility in June 2013, September 2013 and May 2014 respectively. His wife, Beatrice Kavoi (PW14) corroborated his testimony.

PW15, Eunice Mureithi was a legal officer at the Kenya Medical Practitioners' and Dentists Board (KMPDB). On 7th May 2015, she received a letter from the investigating officer (PW18) requesting for particulars of the proprietors of eight medical facilities, including Tahidi Nursing Home and Ewaso Medical Services. She told the court that the proprietors of Tahidi Nursing Home were listed as Anthony Mbithi Kilonzo, Blata Mwendu and Boniface Kitheka. Ewaso Medical Services was registered under Dr. Mohammed Abdi Kuti and Mrs. Hadija Demo Abdula.

PW16, Danson Gichina Kiritu was the Legal Manager at Kenya Commercial Bank. He received instructions from the investigating officer (PW18) to furnish him with bank statements of the Appellant's bank account number 1100186174 held at KCB Flamingo Branch in Nakuru for the period between January 2012 and April 2015. PW17, Judith Tabitha Wemali, who was a Manager at KCB Flamingo Branch in Nakuru produced the said bank statements in Court. According to the said statements, one Anthony Mbithi had deposited Ksh.100,000/- in the Appellant account on 10th April 2013, Ksh.100,000/- on 16th May 2013, Ksh.200,000/- on 24th June 2013, Ksh.20,000/- on 23rd July 2013, Ksh.150,000/- on 31st October 2013, Ksh.100,000/- on 29th November 2013, Ksh.150,000/- on 18th December 2013, Ksh.100,000/- on 17th April 2014 and Ksh.150,000/- on 18th June 2014.

PW18, Major Andrew Onyamu, investigated the present case. He was assigned the case on 9th April 2015. It involved suspected fraudulent payment of medical claims at DEFMIS. PW18 stated that the medical claims were authored by the various service providers and sent to DEFMIS. At DEFMIS, the medical claims plus the supporting documents were received by the Administration Section and then forwarded to the Medical Section and thereafter to the Finance Section where a cheque was prepared. The cheques were signed by authorized signatories at the Defence Headquarters. PW18 testified that the Appellant was a Medical Verification Officer at DEFMIS. He was tasked with verifying claims to ensure that the same were legitimate. He also served as a contact person between DEFMIS and the service providers.

PW18 further testified that he obtained the Appellant's bank account statements from KCB. He discovered that Anthony Mbithi who on several occasions deposited funds in the Appellant's account, was the proprietor of Tahidi Nursing Home. Staff of Ewaso Medical Services had also made some deposits in the Appellant's account. He interrogated the Appellant with regard to the said funds. The Appellant informed

him that he received the funds on behalf of the Managing Director. He also told him that he withdrew the funds and gave the money to the Managing Director. PW18 stated that in the course of his investigation, he noted that after payments were made to Tahidi Nursing Home, money was deposited in the Appellant's account a few days later by the said Anthony Mbithi. He produced bank statements belonging to DEFMIS (**Prosecution Exhibit No.17(a)**) which showed that Ksh.237,553/- was paid out in favour of Tahidi Nursing Home on 5th April 2013 vide a cheque No.903331. A few days later, Ksh.100,000/- was deposited to the Appellant's bank account by Anthony Mbithi on 10th April 2013. Similarly, DEFMIS paid out Ksh.237,535/- in favour of Tahidi Nursing Home on 22nd July 2013 (**Prosecution Exhibit No.16(a)**). The following day on 23rd July 2013, Ksh.20,000/- was deposited in the Appellant's account by Anthony Mbithi. The same pattern was replicated in several other payments made by DEFMIS to Tahidi Nursing Home as shown by **Prosecution Exhibits No. 16 and 17**.

Upon cross-examination, PW18 admitted that the Appellant was not involved in preparation of the claim documents as the same was done by the service providers. He also stated that verbal authorization for patients to be admitted in the various hospitals was granted by either the Managing Director or the Medical Verification Officer (Appellant). PW18 failed to offer explanation as to why he failed to avail witnesses from Tahidi Nursing Home and Ewaso Medical Services to shed light on the discrepancies contained in the medical claims. He also admitted that he did not have any documentary evidence to prove that the said Anthony Mbithi who deposited funds in the Appellant's account was the same Anthony Mbithi who was a proprietor of Tahidi Nursing Home. He further testified that if the medical services providers made false representations on the medical claims then they were to blame for the said actions. He stated that he was not aware who between the Managing Director and the Appellant gave authority for admission with regard to the alleged fictitious medical claims that were flagged. He admitted that in the course of his investigations he confirmed that the Appellant did send money to the Managing Director. He stated that he did not take statements from employees of the involved medical facilities. He further asserted that he did not investigate other officers who worked with the Appellant in the chain of command at DEFMIS such as the Managing Director and Finance Officer. He explained that their cases had been forwarded to The Director of Criminal Investigations as they were outside his jurisdiction.

The Appellant was put on his defence. He stated that he was posted to DEFMIS in January 2013. He worked as a medical verification officer until April 2015 when he was arrested by military police. He stayed under close arrest for seventy-three (73) days before he was finally arraigned before the Court Martial. He averred that he was not presented before the Commanding Officer after 48 hours as was required. He stated that his duties at DEFMIS were to conduct a cost effective analysis on the medical services offered to their clients by the various service providers, verify claim documents together with supporting documents as well as pay *ad hoc* visits to the service providers. He averred that his duty was to verify the medical details of a claim, and not financial details. He asserted that only the Managing Director had the authority to review and renew contracts with service providers. It was his testimony that the flagged service providers (Tahidi Nursing Home and Ewaso Medical Services) were contracted by DEFMIS way before he was posted there. He therefore did not know the proprietors of the said medical facilities since he did not participate in contracting their services.

The Appellant further testified that the contracted hospitals retained the right to offer medical services to any member of DEFMIS. It was also their duty to positively identify DEFMIS members prior to offering any medical service, by checking their identity cards and membership cards. He stated that according to DEFMIS contract of agreement, the trust only required the claim form and invoice to clear payments. His duty was to check the medical history of a member to verify that the treatment received matched the figures in the invoice. He testified that in the course of his duty, he flagged several invoices that had erroneously overcharged their services and the said claims were returned back to the medical facilities. He further stated that DEFMIS was a trust registered under the **Trustee Act** and not under any **Military Statute**. He asserted none of the members of DEFMIS Board of Trustees or Board of Management lodged any complaint with regard to the present case. It was his opinion that the complainant in the present case was not identified before court. He was of the view that the investigating officer had no standing to produce in evidence documents belonging to DEFMIS since he was neither a member nor an employee of the said trust. He argued that the claim forms were raised by the medical facilities, yet no one from the said facilities was called upon as a witness to adduce evidence on their authenticity and respond to the claims by the prosecution witnesses that they never visited the said hospitals.

It was the Appellant's testimony that the Managing Director requested to use his bank account and that was the reason why funds were deposited in his account. He stated that he withdrew and forwarded the said funds to the Managing Director. He asserted that he gave this information to the investigating officer, and even showed him Mpesa transactions where he sent money to the Managing Director. He denied having any dealings with Anthony Mbithi. The Appellant denied the charges against him.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the Court Martial to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (**See Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charges of conduct to the **prejudice of good order and service discipline** contrary to **Section 121** of the **Kenya Defence Forces Act** preferred against him to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival 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.”

The prosecution's case was that the Appellant, while employed as a medical verification officer at DEFMIS, illegally received kickback payments from Tahidi Nursing Home to facilitate payment of fictitious claims. Evidence was led by PW4 as well as the investigating officer (PW18) asserting that fictitious medical claims from Tahidi Nursing Home and Ewaso Medical Services were authorized for payment by the Appellant in his capacity as a medical verification officer. The said prosecution witnesses further averred that soon after the claims were settled, the said medical facilities deposited funds in the Appellant's bank account as a kickback. In particular, the witnesses testified that one Anthony Mbithi, who was alleged to be the proprietor of Tahidi Nursing Home, made several deposits to the Appellant's bank account days after DEFMIS settled medical claims from the said medical facility. It was the prosecution's case that the Appellant's conduct was in **prejudice of good order and service discipline** contrary to **Section 121** of the **Kenya Defence Forces Act**.

According to the evidence on record, the medical claims were authored by the medical facilities. The claim forms were afterwards sent to DEFMIS for settlement. At DEFMIS, the claim form was received by a clerk in the Administration Section who recorded the same in a register. The said clerk was required to ascertain the client details on the claim form and confirm that the claim was from a hospital accredited by DEFMIS. The claim was afterwards forwarded to a medical verification officer. The medical verification officer, who is in the present case was the Appellant, was tasked with counterchecking whether the treatment accorded to the member by the hospital, as well as drugs given matched the patient's diagnosis. The Appellant would then append his signature on the invoice and forward the claim to the finance department.

No evidence was led to prove that the Appellant knew that some of the patients' signatures on the claim forms were forged. His duty was to ensure that the treatment and drugs offered to clients matched their diagnosis. The claim forms were usually signed by the patients while at the medical facilities. The Appellant was therefore not the author of the claim forms. The prosecution failed to establish that the Appellant was aware that the said signatures on the claim forms were not genuine. With regard to inpatient services, PW2 told the court that any member of the management team, including the Managing Director, Administrator, Finance Officer or the Medical Verification Officer (Appellant), could give authorization for admission of patients. This testimony was corroborated by PW2 and PW18. PW2 also stated that in the absence of the medical verification officer, any member of his team could authorize treatment. The prosecution failed to prove that the Appellant was the one who authorized the inpatient services in the alleged fictitious claims. The prosecution witnesses were not able to pin point which inpatient pre-authorizations were made by the Appellant with regard to the flagged claims. The court noted that there were many other officers in the management chain who could give authorization and not necessarily members of the medical verification team.

It was the prosecution's case that the Appellant ought to have flagged the fictitious claims before the same were authorized for payment. However, PW3 testified that there were instances where Finance Manager or the Managing Director would authorize payments to service providers even though some supporting documents had not been attached. He went on to state that at times the Finance Manager, with instructions from the Managing Director, would approve payment of claims that had been rejected by the medical verification officer. The prosecution can therefore not solely blame the Appellant for approving medical claims that did not have requisite supporting documents. Various prosecution witnesses who were alleged to have received treatment with regard to the fictitious claims produced in evidence denied having received the said treatment from the medical facilities, or stated that the details of their treatment were exaggerated. However, they failed to avail any documentary evidence to prove that the nature of the treatment they received from the medical facilities was exaggerated in the medical claims. This court notes that the prosecution also failed to avail witnesses from the mentioned service providers to adduce evidence as to the alleged anomalies in the claim forms since they were the authors of the said claim forms.

The prosecution pegged its case on the fact that the Appellant was alleged to have received funds from one **Anthony Mbithi, who the prosecution claimed was the proprietor of Tahidi Nursing Home**. PW16 and PW17 who were employees of Kenya Commercial Bank produced in evidence the Appellant's bank statements. The said statements showed various deposits made to the Appellant's account by 'Anthony Mbithi'. It was the prosecution's case that the said deposits were made soon after medical claims from Tahidi Nursing Home were cleared by DEFMIS. PW15, who was a legal manager at the Kenya Medical Practitioner's and Dentist Board, produced in evidence a letter from the said board which listed '**Anthony Mbithi Kilonzo**' as one of the registered proprietors of Tahidi Nursing Home. The prosecution was of the view that the said payments were made to the Appellant as a kickback for facilitating payment of fictitious claims to the medical facility. This court notes the unusual coincidence with regard to deposits made to the Appellant's bank account few days after Tahidi Nursing Home's medical claims were settled by DEFMIS. However, the prosecution failed to establish a nexus between the Appellant and the proprietor of Tahidi Nursing Home. The investigating officer (PW18) told the court that he interrogated the proprietor of the said medical facility, Anthony Mbithi Kilonzo, who denied depositing any funds in the Appellant's account. The prosecution also failed to procure summons for the said Anthony to appear before court and give evidence as to whether he deposited the said funds in the Appellant's account. As it is, the prosecution has not provided any evidence before the court to conclusively prove that the proprietor of Tahidi Nursing Home, Anthony Mbithi Kilonzo, was the same Anthony Mbithi who made deposits in the Appellant's account. There is no legal reason why the prosecution did not summon the said Anthony Mbithi Kilonzo to come and testify on its behalf before the Court Martial. A conviction in a criminal case cannot be founded on mere suspicion. The Court of Appeal in **Sawe vs Republic [2003] eKLR** held thus;

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”.

This Court is of the view that the circumstantial evidence in the present appeal was not sufficient to sustain the Appellant's conviction. There were other co-existing circumstances which weakened the inference of the Appellant's guilt. As stated earlier in this judgment, the prosecution failed to establish that the Appellant was aware that the signatures on some of the claim forms were not genuine; they also failed to establish that the Appellant was the one who gave authorization for the accorded inpatient services in the said claim forms; they further failed to establish nexus between the Appellant and the proprietor of Tahidi Nursing Home. The accused person always benefits from any doubt raised. The Court in the case of **Philip Muiruri Ndaruga v. Republic [2016] eKLR** held as follows:

“The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt... To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him...”

The Appellant in his defence denied having knowledge that the medical claims were not genuine. This court also notes that the Appellant was not the one who made the final decision on whether a medical claim was to be paid. After the medical claims were verified by the Appellant, the prosecution witnesses testified that the same were forwarded to the internal auditor for approval and thereafter to the finance department. The said departments approved the flagged claims for payment.

The above outlined loopholes in the prosecution's case created doubt in this Court's mind as to whether the Appellant approved the medical claims with full knowledge that the same were not genuine, and whether the deposits made to the Appellant's bank account were kickbacks

to facilitate approval of fictitious claims.

In this court's re-evaluation of the evidence adduced before the Court Martial, it was clear that the Appellant was made a scapegoat for others in the management chain at DEFMIS. PW18, the Investigating Officer admitted that he did not investigate other personnel in the management chain to ascertain their involvement in the alleged offence or otherwise. These officers included the Finance Officer, the Head of Administration and the then Managing Director of DEFMIS. The reason PW18 gave for failure to investigate these officers was that they had retired by the time he commenced investigations against the Appellant. If that was the case, there was no reason why the Director of Criminal Investigations was not roped in to widen the investigations and find the true culprits for the alleged misappropriation of funds from DEFMIS. It was instructive that in his defence, the Appellant told the investigator that the monies deposited in his account were on instruction of the then managing director of DEFMIS. This was a critical line of investigation which was not considered by the investigator. This led to the Appellant being singled out in a chain that had other critical players who apparently appeared to have been left off the hook.

Further, it was this court's evaluation of the evidence that critical witnesses who should have been called by the prosecution were not called. It was clear from the assessment of the evidence that this was to a large extent due to deference to the military chain of command. The investigator in this case being a junior officer could not investigate officers who are senior to him. This led to the curious and peculiar decision made by the investigator to pursue the Appellant who was of a similar rank to him. There was a gap in the investigations which could only have been filled if the entire management chain of DEFMIS recorded statements to confirm or deny the assertion made by the Appellant that he was working under instructions of his seniors when he performed his duties. It was also clear that other critical witnesses including one Sgt. Zainab were not interviewed to verify some of the allegations despite being mentioned severally by prosecution witnesses as having been involved in the verification of the disputed claim documents. This court could discern no reason why this line of investigation was not pursued. The only conclusion that court can reach is that it appeared that the Appellant was first identified as a suspect and then investigations were commenced with a view to confirming his culpability without investigations being conducted with an open mind with the aim of identifying any other likely culprits.

It was further clear from this court's re-evaluation of the evidence adduced before the Court Martial that part of the blame for the loopholes in the claim system at DEFMIS could be attributed to a systemic failure. It was evident from the evidence adduced that many persons within the chain of management could give authorization for the treatment of a member. The senior management of DEFMIS could even overrule objection by junior members of management and direct that payments be made for treatment of members. Payments could be authorized without documents to support the claim that the particular member was treated. These systemic failures may have been exploited by service providers to make fictitious claims. The Appellant just happened to be one of the members of an imperfect and easily manipulable system. He cannot be solely held accountable for systemic failures at DEFMIS.

For the above reasons, this court holds that the prosecution failed to establish its case in the present appeal to the required standard of proof beyond any reasonable doubt. This court therefore finds merit in the appeal lodged by the Appellant. The Appellant's appeal is hereby allowed. His conviction by the Court Martial in count 1, 2, 3 and 4 is hereby quashed. He is acquitted of the charges. The custodial sentence imposed upon him is set aside. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held.

It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF JUNE 2020

L. KIMARU

JUDGE