

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIBERA**  
**COURT MARTIAL APPEAL NO. E001 OF 2025**

**NO. 87097 CPL ELVIS  
LUMASIRA.....APPELLANT**

**VERSUS**

**REPUBLIC.....  
RESPONDENT**

*(Being an appeal against the conviction of the Court Martial sitting at Moi Airbase in Court Martial No. 4 of 2022 Republic vs CPL Elvis Lumasira)*

**JUDGEMENT**

- 1.** The appellant was charged and, after a full trial, convicted on five counts. Count I concerned retaining public property contrary to section 87(1)(b) as read with section 87(2) of the Kenya Defence Forces Act, 2012. Count II concerned conniving to steal public property contrary to section 87(1)(a) as read with section 87(2) of the Act. Count III related to disobedience to standing orders contrary to section 77(1). Count IV concerned conduct prejudicial to good order and discipline contrary to section 14. Count V concerned conduct prejudicial to good order and discipline contrary to section 121.
- 2.** He was sentenced to seven years' imprisonment on Counts I and II, and to two years' imprisonment on each of Counts III, IV and V. The sentences on Counts I and II were ordered to run concurrently, and the sentences on Counts III, IV and V were likewise ordered to run concurrently. The concurrent sentences on Counts I and II were to run consecutively to the concurrent

sentences on Counts III, IV and V, with credit given for the period spent in remand custody.

3. Being dissatisfied, he filed an appeal challenging his appeal and conviction. In his petition of appeal, he raised 9 grounds which have been summarised as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He contended that he was not afforded a fair hearing. He urged the court to quash his conviction and set aside the sentence.
4. 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**).
5. The prosecution's evidence was as follows: PW1 Lt Lucas Gachieno testified that the appellant was part of the instructor team during a training session and that a report had been made regarding missing ammunition.
6. PW2 WOII David Mbugua stated that following the report, a civilian, Kimeu, was interrogated and implicated the appellant. When questioned, the appellant admitted retaining the remaining ammunition after training sessions in his accommodation. A recovery exercise at his room yielded 174 rounds beneath his bed, and an inventory was prepared and signed by all present, with PW2 confirming that the procedure complied with regulations.

- 7.** PW3 Ssgt Peter Simiyu corroborated the recovery, witnessing the ammunition being handed over in the presence of investigators, though he could not confirm whether it was first- or second-line ammunition.
- 8.** PW4 Col Ewaton Ngatia gave evidence regarding the Skill at Arms course and noted a separate incident in which SPTE Obimbo stole ammunition. It was his evidence that Obimbo purportedly implicated the appellant, though no independent evidence supported this and the link remained circumstantial.
- 9.** PW5 SGT Kimani, a storeman and custodian of ammunition, rifles, and food, testified that after returning from official leave, he was informed of a report of 500 rounds missing. He described the procedures for releasing ammunition and confirmed that remaining ammunition is returned to the store after tallying on the same day, and that the armoury was always open for this purpose. He could not recall the specific ammunition issued to the appellant.
- 10.** PW6 CI Kenneth Chumba, a ballistic expert at DCI headquarters, received 1,274 rounds for testing and confirmed they were ammunition, producing the exhibit memo.
- 11.** PW7 Ambrose Munywoki, a data analyst within law enforcement liaison at Safaricom, obtained call data records and M-Pesa statements relating to numbers registered to Francis Lesiamito, Brian Obimbo, and the appellant.
- 12.** PW8 CI James Onyango of the DCI produced the ballistic report of the recovered ammunition, confirming that the rounds were

capable of being fired under the Firearms Act, the report being dated 15<sup>th</sup> November 2021.

- 13.** PW9 Francis Lesiamito, a civilian, stated that he purchased 500 rounds from SPTE Obimbo, identifying the bullets shown in court as similar to those he had bought for Kshs 50,000 via M-Pesa, and confirmed he had never met the appellant.
- 14.** PW10 Sgt James Wanzala confirmed signing the inventory of the recovered ammunition alongside the appellant, with the recovery witnessed by WOII Mbugua and Ssgt Simiyu.
- 15.** PW11 Alphonse Munywoki Mulwa, a civilian, testified regarding his involvement in an attempt to deliver bhang into the DHQ CAU guardroom, admitted guilt in Kibera Law Courts, and was fined Kshs 5,000.
- 16.** PW12 WOII Kenneth Okuru outlined the background and progress of the Military Police investigations, confirming that the team acted according to procedure and that the appellant's conduct warranted inquiry.
- 17.** PW13 CPL Ambrose Okello testified to the search and inventory of unauthorised items in the appellant's room, including a knife, hacksaw, and mobile phone, noting that the appellant voluntarily surrendered his phone.
- 18.** PW14 Sgt Felix Auki, a Medical Laboratory Technologist at Defence Forces Memorial Hospital, produced a toxicology report confirming marijuana in the appellant's system on 20<sup>th</sup> January 2023.
- 19.** PW15 Ssgt David Macharia provided technical information on KDF service numbers and clarified procedures for escorting

detainees to medical facilities, addressing procedural points raised by the defence.

- 20.** PW16 Sgt Simon Muchiri and PW17 WOII Samuel Kiogora, the investigating officers, summarised the investigation, stating that the evidence collected linked the appellant to unauthorised possession of ammunition, drug use, involvement in an attempted contraband delivery, and possession of unauthorised items, basing their conclusions on witness accounts, documentary records, and the toxicology report.
- 21.** The appellant gave a sworn defence. Concerning the first two charges, he stated that he signed out ammunition for his team on 12<sup>th</sup> October 2021 as instructed by his Team Commander, who was then a Captain. After the exercise, he was unable to return the remaining rounds because the team returned late and the armoury was closed. He maintained that ammunition can only be returned once it is counted and entered in the store records and that this was the reason he retained it. He asserted that no operation was mounted to recover the ammunition; instead, he voluntarily disclosed that he had it. He denied stealing any ammunition or colluding with SPTE Obimbo.
- 22.** On the charges relating to marijuana, he denied being found with any drugs and denied ever being taken to Defence Forces Memorial Hospital for toxicology testing. He stated that he was under close arrest at the time and that there was no evidence that he was formally booked out for medical examination.
- 23.** He further denied conspiring with or knowing PW9 Mulwa and noted that PW9 did not mention him in his evidence. He stated

that no communication records were produced linking him to PW9.

**24.** On the charge relating to possession of unauthorised items, he stated that he was not present during the search of his room. He testified that Military Police officers entered at about 6.30 am, handcuffed him and took him to their office until about 12.30 pm. He said that he was later given an inventory of items said to have been recovered, which he denied owning or knowing about.

**25.** The appeal was canvassed by way of written submissions and there is no need to rehash them.

**26.** In Count I, the appellant was charged with retaining public property contrary to section 87(1)(b) as read with section 87(2) of the Kenya Defence Forces Act, 2012. The prosecution contended that the appellant, while at Kamanga Military Training Camp on 8<sup>th</sup> October 2021, retained 173 rounds of 5.56×45 mm ammunition and one round of 7.62×54 mm ammunition following a range exercise, contrary to established range procedures. It was alleged that he knew, or ought to have known, that such retention constituted an offence.

**27.** 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.**

**28.** In Count I, the appellant was charged with retaining public property contrary to section 87(1)(b) as read with section 87(2) of the Kenya Defence Forces Act, 2012. It was the prosecution's evidence that the appellant retained 173 rounds of 5.56×45 mm ammunition and one round of 7.62×54 mm ammunition following a range exercise at Kamanga Military Training Camp on 8<sup>th</sup> October 2021. PW2 WOII David Mbugua testified that upon questioning, the appellant admitted to keeping the remaining ammunition in his accommodation.

**29.** A recovery exercise was subsequently conducted in his room, and the ammunition was found beneath his bed. An inventory of

the recovered rounds was prepared and signed by all present, with PW2 confirming that the recovery was carried out in strict accordance with established military procedures. PW3 Ssgt Peter Simiyu corroborated the recovery, observing the handover of the ammunition in the presence of investigators. PW5 SGT Kimani, the custodian of ammunition and storeman, confirmed that standard procedure required that remaining ammunition be returned to the armoury immediately after training exercises, and that the armoury was always open for tallying and return. The unbroken chain of custody and proper documentation confirmed the appellant's unauthorised retention.

**30.** In his defence, the appellant explained that that retention resulted from late return from the exercise and closure of the armoury, and that he voluntarily disclosed the ammunition. However, having reanalysed the defence, I find it to be without merit and was properly rejected. Operational inconvenience does not excuse non-compliance with statutory duties.

**31.** Section 87(1)(b) clearly criminalises the retention of public property without lawful authority. Voluntary disclosure of the retained ammunition does not negate the unlawful nature of the act. Any reasonable officer in his position would be aware that retaining ammunition outside the authorised process contravenes the law. The evidence, including multiple eyewitness testimonies and concurrent documentation, overwhelmingly demonstrates that the appellant retained the ammunition in contravention of the KDF Act. The appellant's conviction in count I was therefore proper and is affirmed.

**32.** In count II, the appellant was charged with conniving to steal public property contrary to section 87(1)(a) as read with section 87(2) of the KDF Act, 2012. The prosecution alleged that the appellant colluded with SPTE Obimbo to steal 300 rounds of 7.62×39 mm ammunition on 23<sup>rd</sup> September 2021. The evidence relied upon was largely circumstantial. PW4 Col Ewaton Ngatia stated that Obimbo implicated the appellant, but no independent evidence corroborated this claim. PW9 Francis Lesiamito, who purchased ammunition from Obimbo, confirmed he had never met the appellant and could provide no link between him and the alleged theft. No call data records, messages, witness sightings, or documentary evidence established that the appellant participated in planning or executing the theft. The appellant denied any collusion with Obimbo.

**33.** The evidence for Count II is unsubstantiated and relies solely on uncorroborated assertions. The prosecution failed to prove that the appellant entered into an agreement to commit the alleged theft. There is no proof that he knew, or ought to have known of the alleged plot to steal the ammunition. Consequently, the evidence on Count II is insufficient to sustain a conviction. The appellant is acquitted on the charge in count II.

**34.** In Count III, the appellant was charged with disobedience to standing orders contrary to section 77(1) of the Kenya Defence Forces Act, 2012. The prosecution presented evidence that on 20<sup>th</sup> January 2023, while at Defence Forces Memorial Hospital, the appellant tested positive for marijuana, in contravention of Annex E paragraph 15 of the standing orders. PW14 Sgt Felix Auki, a

Medical Laboratory Technologist, produced the toxicology report confirming the presence of marijuana in the appellant's system on the stated date. PW15 Ssgt David Macharia provided procedural context on detainee escort and documentation, while PW16 Sgt Simon Muchiri and PW17 WOII Samuel Kiogora summarised the investigation, confirming the appellant's positive drug test was properly recorded and in accordance with procedure.

**35.** In his defence, the appellant denied ever being taken to the hospital for testing and claimed he was under close arrest without being formally booked out, asserting the evidence was therefore flawed. However, the toxicology report is official, contemporaneous, and verified, and no credible evidence was presented to contradict its authenticity. The appellant's denial, absent any documentary or procedural flaw, is unsubstantiated.

**36.** Accordingly, the evidence overwhelmingly establishes that he disobeyed standing orders by being under the influence of a prohibited substance, which he knew or ought to have known constituted an offence. The appellant's conviction is count III was proper and is upheld.

**37.** In Count IV, the appellant was charged with conduct prejudicial to good order and discipline contrary to section 14 of the Kenya Defence Forces Act. The prosecution's case relied primarily on the testimony of PW11, Alphonse Munyoki Mulwa, who stated that he attempted to deliver cannabis into the DHQ CAU guardroom on 19<sup>th</sup> January 2023. However, Mulwa's evidence shows that the intended recipient of the contraband was one Walid, and there is no credible evidence linking the appellant to this act. Mulwa

explicitly confirmed that he had no prior relationship with the appellant, and there were no communications, witness accounts, or documentary records establishing any participation, agreement, or knowledge by the appellant regarding the delivery. The prosecution's evidence by PW16 and PW17 merely summarised the investigation findings. It did not provide independent evidence connecting the appellant to Mulwa's actions.

- 38.** The prosecution thus failed to prove a nexus between the appellant and the alleged attempt to smuggle narcotics. Mere proximity in time or location cannot substitute for proof of involvement, and the appellant's denial of any knowledge or participation remained unchallenged by credible evidence. On the facts, the record does not support a finding that the appellant engaged in conduct prejudicial to good order and discipline under section 14. The evidence relied upon is circumstantial at best, lacking direct connection, and falls well short of the standard required for conviction.
- 39.** Accordingly, the prosecution did not prove beyond reasonable doubt the charge in Count IV due to absence of proof linking him to the attempted smuggling of narcotic drugs.
- 40.** In Count V, the appellant was charged with possession of unauthorised items contrary to section 121 of the Act. PW13 CPL Ambrose Okello testified to conducting a search of the appellant's room and identifying a mobile phone, jack knife, and hacksaw blade. The appellant voluntarily surrendered his mobile phone, while denying knowledge of the other items. PW16 and PW17

confirmed the inventory and procedural integrity of the recovery. The unauthorised possession of items while in custody constitutes a clear breach of discipline. The appellant's defence, that he was absent during the search and unaware of the items, is unconvincing given the contemporaneous documentation and procedural verification of the search. The conviction in counts V was therefore proper and is upheld.

**41.** The appellant was sentenced to seven years' imprisonment on Counts I and II, and to two years' imprisonment on each of Counts III, IV, and V. Under section 87 of the Kenya Defence Forces Act, a person convicted of retaining or stealing public property may receive a maximum sentence of seven years. The sentences on Counts I and II therefore reflect the statutory maximum, while the sentences on Counts III, IV, and V reflect the court's assessment of the seriousness of the breaches of military discipline and good order. These sentences were intended to uphold the integrity of military procedures and ensure adherence to lawful conduct within the service. However, the sentence imposed was excessive.

**42.** In the premises, I hereby make the following orders:

- I. The appellant's conviction in Count I, III, and V was proper and is upheld.
- II. The appellant's conviction in counts II and IV is hereby quashed and the sentence imposed set aside.
- III. The appellant's sentence of seven (7) years imprisonment imposed in count I is hereby substituted with a sentence of five (5) years imprisonment.

- IV. The sentence of two (2) years each imposed in counts III and V was proper and is upheld.
- V. The sentences imposed shall run concurrently from the date of arrest 16<sup>th</sup> October 2021, pursuant to section 333(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya.

Orders accordingly.

**Judgement dated and delivered virtually this 18<sup>th</sup> day of November 2025**

**D. KAVEDZA**  
**JUDGE**

**In the presence of:**

Mr. Were for the Appellant  
Mr. Mutuma for the Respondent  
Karimi Court Assistant.