

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL COURT MARTIAL APPEAL NO. E003 OF 2024**

**ALFRED ODONGO WANGOKO.....**  
.....**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

*[An appeal from the decision of G. Onsarigo, Judge-Advocate, delivered on 16<sup>th</sup> February 2024 in Court Martial Case 2 of 2023 sitting at Kahawa Garrison]*

**JUDGMENT**

1. The appellant was convicted by the Court Martial sitting at Kahawa Barracks on *six* counts. Counts I and II related to *loss of property* contrary to section 96 (1) (b) as read together with 96 (2) of the **Kenya Defence Forces Act 2012** (hereafter the Act).
2. The particulars of those counts were that on 7<sup>th</sup> October 2022 at Nanyuki Town, he lost service weapon self-loading pistol butt number 117 registration number 24NY04292 and 13 rounds of ammunition all valued at Kshs 769,000 the property of the Kenya Defence Forces entrusted to him for escort duties.
3. Counts III to V were for *stealing* contrary to section 88 (1) (a) as read with 88 (2) of the Act. The particulars of the counts were that on the same date at Nanyuki 27 Mechanized Infantry Battalion (MIB) Range Camp, he stole three mobile phones make Infinix,

Oppo, Redmi as more particularized in the charge sheet.

4. Count VI related to *conduct to the prejudice of good order and service discipline* contrary to section 121 of the Act. The particulars were that on 6<sup>th</sup> October 2022 at about 23:51 hours, he left his hotel room at Ibis Hotel without the authority of his in-charge 105019 WOII *Phillip Munuve* until the time he was arrested at the MIB Service members accommodation.
5. On each of Counts I and II, he was sentenced to 10 months imprisonment while on Counts III to VI, he was imprisoned for 6 months on each count. The sentences were to run *concurrently*.
6. The appellant lodged a *Notice of Appeal* predicated upon section 187 (1) of the Act on 4<sup>th</sup> March 2024 against both the conviction and sentences. There are ten grounds of appeal but which can be compressed into six. Firstly, that the registration number of the pistol in question was not properly identified; secondly, that the prosecution witnesses including their “*star witness*” gave contradictory, unreliable or uncorroborated evidence; thirdly, that the members of the court martial disregarded the summing-up or opinion of the Judge Advocate; fourthly, that the identification procedure of the appellant was not positive and violated the law;

and, fifthly, that in all the circumstances of this case, the sentence meted out was “*excessive and punitive*”.

7. The custodial sentences are attacked for being punitive or draconian and for failing to take into consideration that the appellant was held in *close arrest* from 7<sup>th</sup> October 2022 to the date of sentencing on 16<sup>th</sup> February 2024 save for a period of 4 days. A further ground urged is that the appellant had already been surcharged for the lost pistol and ammunition in the course of the court martial proceedings.

8. The appeal is contested by the Republic through Grounds of Opposition dated 8<sup>th</sup> October 2025. In a synopsis, the case for the state is that that all the elements of the charges were proved beyond reasonable doubt; and that the sentences handed down were well within the law.

9. The Court directed that the appeal be heard by written submissions. The appellant’s learned counsel, *Mr. Orende*, filed detailed and lengthy submissions dated 20<sup>th</sup> September 2025 together with a bundle of authorities. Learned Principal Prosecution Counsel, *Ms. Awino*, replied through submissions dated 8<sup>th</sup> October 2025.

10. On 22<sup>nd</sup> January 2026, I heard further arguments from both

learned counsel.

11. I take the following view of the matter. This is a first appeal to the High Court. I have thus examined the record; re-evaluated the evidence and drawn independent conclusions. There is a caveat because I neither saw nor heard the witnesses. **Njoroge v Republic** [1987] KLR 19, **Okeno v Republic** [1972] E. A. 32.
12. I have also kept in mind that the legal and evidential burden rested squarely on the prosecutor. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.
13. I have examined the records of the Court Martial. It is important to clarify that the High Court does not have any handwritten transcript of the proceedings. This is not surprising because the proceedings at the Court Martial are attended by shorthand typists. In the instant case, *Agnes Kwamboka* and *Kamaru Njiru*, among others, are listed as the stenographers and took an oath to provide an accurate record.
14. Furthermore, at page 326 of the Record of Appeal, there is a *certificate of transcription* by the said stenographers and confirmation by the Judge-Advocate on 27<sup>th</sup> February 2024 (page 327) *“that the transcribed proceedings of the Court Martial as*

*prepared by the shorthand writers are correct and accurate”.*

15. The practice at the High Court is that in the event of an appeal, a certified copy is filed at the Registry by the Defence Court Martial Administrator. In this appeal, a *certified true copy* dated 29<sup>th</sup> August 2024 has been lodged by the administrator.

16. I will first deal with the question of *identification* of the appellant. All the witnesses who testified for the prosecution pointed at the appellant as the person sitting in the dock. I agree with the appellant’s submissions that dock identification is largely worthless. See ***Ajode v Republic*** [2004] 2 KLR 81.

17. However, I find that in this case, some of the key witnesses were armed forces personell who knew the appellant. For instance, on 6<sup>th</sup> October 2022, *Sgt Paul Mwai* (PW1) was informed by *Captain Litari* that the appellant would be part of the advance party for the upcoming KDF celebrations. PW1 knew the appellant and personally conveyed the nomination to the appellant. *Sgt Wafula* (PW2) was the guard commander at Kikisini. He knew the appellant and issued him with a weapon SLP registration number 245NY04292.

18. I am thus satisfied that the appellant was positively identified. In fact, this was evidence of recognition that did not call for an

identification parade as the appellant now argues. See generally, **Wamunga v Republic** [1989] KLR 424. That ground of appeal accordingly fails.

19. I will next deal with the *identification* of the subject pistol. According to the charge sheet, the appellant lost a “*Service Weapon Self Loading Pistol Butt Number 117, Registration Number 24NY04292*”. But according to PW2, he issued the appellant with SLP registration number 245NY04292 butt number 117. Learned counsel for the appellant thus contends that “*this is not one and the same gun*”.

20. Obviously, one digit, 5, is missing from the description in the charge sheet. But the butt number referred to by both PW2 and *Sgt Josephat Rieko* (PW11) and from the Arms Issue Register Book (exhibit 6), the correct serial number was 245NY04292 and which corresponds with butt number 117.

21. I thus find that there was a typing error on the registration number of the firearm in the charge sheet. But the same is *not* fatal. There was never doubt about the firearm that was issued to the appellant and which he signed for at the armoury. True, the prosecution failed to take advantage on 6<sup>th</sup> April 2023 when they

amended the charge. But I am unable to find that the error occasioned any substantial prejudice to the appellant. In any case, the discrepancy is also curable under section 382 of the **Criminal Procedure Code**. That ground of appeal fails.

22. According to PW2, the appellant first drew out the firearm on 5<sup>th</sup> October 2022 and returned it. It was re-issued to him on 6<sup>th</sup> October 2022 and has never been returned. From the Arms Issue Register above, the weapon was released with 13 rounds of nine millimeters (9mm ball) ammunition. The ammunition has never been returned or accounted for.

23. Section 96 (1) (b) of the Act provides as follows-

*A person who is subject to this Act commits an offence if that person (b) loses, or by negligence damages any clothing, arms, ammunition or other equipment issued to the person for use for the purposes of the service; unless, in the case of a person charged with losing any property or any service decoration, the person took all reasonable steps for its care and preservation. [Underlining added].*

24. The prosecution required to prove that the appellant was issued with the firearm and ammunition in question and that he lost it. The appellant on the other hand may controvert it by showing that he was neither issued with the stores nor lost them. Regarding loss, he

could for instance lead evidence that he took all reasonable steps to secure it or use it for the purposes assigned. When the appellant was put on his defence, he opted to keep mum.

25. I readily find from the evidence I highlighted earlier that the appellant was issued with the firearm and 13 rounds of ammunition. They have not been returned to date or accounted for. The appellant did *not* rebut that evidence or demonstrate that he took all reasonable steps for the care and preservation of those stores. The logical corollary is that the appellant lost both the firearm and the stores.

26. I will next turn to count six. According to *WOll Phillip Munuve* (PW3), the appellant was booked to stay at Ibis Hotel, Nanyuki for the night of 6<sup>th</sup> October 2022. It was in preparation for rehearsals of KDF Day at Laikipia Air Base. They both left Nairobi and booked into the hotel. PW3 was later called by the Administration Officer 27 MIB at about 4:00 hours in the night who said the appellant was at the camp. When PW3 checked the appellant's room, he discovered that he had deserted.

27. From the cross-examination and re-examination, I am satisfied that for the purposes of the assignment, PW3 was the senior most

officer. The appellant was thus obligated to report to him before he left the hotel. The appellant was arrested at 27 MIB Service Members Accommodation.

28. Doubt is completely removed by the evidence of *Cpl Mohamed Zena* (PW9). At around midnight on 6<sup>th</sup> October 2022, he was leaving Nanyuki Town towards MIB. A *bodaboda* followed him to the stage and told him there was another person (appellant) also headed there. The appellant showed PW9 his ID. So the two rode on the bike to MIB for a negotiated fee of Kshs 300. Upon reaching the camp, they identified themselves at the gate and entered the camp. Neither of them had a weapon.

29. I find that the conduct of the appellant of deserting the Ibis Hotel without notifying his superior was against service regulations and in contravention of section 121 of the Act which provides that-

*Any person 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.*

30. Learned counsel for the appellant submitted that the above provision contravenes Articles 2 and 49 of the **Constitution**. I

agree that the draftsmanship of the statute is poor, but I disagree that the offence is vague or violates the supreme law.

31. I will now return to the three counts of theft of mobile phones. The key evidence was from *SPT E Kemei Tanui* (PW4). He was sleeping in a tent at the 27 MIB on the night of 6<sup>th</sup> October 2022. He had left his phone charging. Apparently, he had set up an anti-theft alarm that would go off if the person unhooked it from the charger. On this night, the alarm went off.

32. Then he saw someone in a blue coat, green trousers and gumboots entering or trying to exit the tent. Upon enquiry, a commotion ensued. PW4 blocked the exit from the tent with two beds. His colleagues woke up. Upon interrogating the intruder (the appellant) it turned out that he was a soldier posted to 27 MIB. He recovered three smartphones and one small phone from the appellant which he handed over to the battalion headquarters. The appellant was arrested and beaten in the process by the soldiers.

33. PW4 did not know the appellant. It was at night. But the appellant in this case was caught red handed and he is the person who was marched by PW4 and his colleagues to the battalion headquarters. I thus find again that his identification was not in doubt.

34. PW5 was *PTE Musyimi*. He was woken up at 02:00 hours by the altercation inside the tent. One of the mobile phones recovered by PW4 from the appellant was his Infinix handset (exhibit 2). By the time he reached where the appellant had been made to sit down, the phone was in the hands of PW4. PW5 said he bought it for Kshs 10,700 but did not have the purchase receipt. However, in re-examination, he showed the Judge Advocate some personal information and pictures that demonstrated it was his phone.
35. One of the other phones belonged to *PTE Kurui* (PW6). On the night of 6<sup>th</sup> October 2022, he was also woken up by the noises in the next tent. He discovered that his phone had been removed from the charging cable. He never saw the appellant. He identified it from the phones surrendered by PW4 to the Company Sergeant Major (*WOII Alfred Oguttu*, PW10). PW6 used his password in court to access the phone. It also had his photos. He said he bought the Redmi Note 11S for Kshs 27,999 (exhibit 3).
36. When *PTE Muchiri* (PW7) was woken up by the commotion in the neighbouring tent, he found his phone was missing. It was an Oppo A16 which he had purchased for Kshs 15,300 (exhibit 4). He was told his phone was with PW4. He never saw the appellant.

37. I agree with the appellant that neither PW6 nor PW7 saw the appellant steal their phones. PW5, PW6 and PW7 had no purchase receipts or documents to verify ownership of their phones. But they all demonstrated to the court martial personal data or pictures unique to them. What is material is that there was the uncontroverted evidence of PW4 who recovered all the phones from the appellant's hands or clothing.

38. Furthermore, it was never the appellant's case that he owned them either. The appellant was undeniably the thief and was in possession of the loot at the time he was apprehended. I am also fortified in that finding because he was not meant to be at the camp but had deserted his post at Ibis Hotel, Nanyuki.

39. When the appellant was placed on his defence, he opted to remain silent. His learned counsel however made extensive final submissions praying for an acquittal. The Judge Advocate summed-up the case to the President and members (Page 301 of the record). He guided them very well on the law and evidence. By the very nature of court martial decision making, the summing-up remains a guide. I thus disagree with the appellant's counsel that the members disregarded it.

40. From my analysis of the prosecution's evidence and the law, I readily find that *all* the elements of the offence in *each* of the *six* counts were proved beyond reasonable doubt. It follows that the appeal against *conviction* is *dismissed*.

41. I will now turn to the sentence. Section 354 (3) of **Criminal Procedure Code** empowers this court to *review* the sentence. The offences attracted punishment of up to two years imprisonment. The court took into account the mitigation tendered by the appellant, and that he had behaved well throughout his trial. Like I stated earlier, on Counts I and II, he was sentenced to 10 months imprisonment while on Counts III to VI, he was imprisoned for 6 months on each count. The sentences were to run *concurrently*.

42. Considering the serious nature of the offences, I would be hard pressed to say that the sentences were harsh or oppressive. But I have also taken into account that he remained on *close arrest* for over 400 days during his trial and that some deductions have been made on his salary to cover the lost firearm. He served part of the prison from 13<sup>th</sup> February 2024 until 2<sup>nd</sup> August 2024 when the High Court granted him bail pending this appeal.

43. Granted all those circumstances, and doing the best that I can

and in the interests of justice, I hereby *reduce* the sentence to the period already served.

44. Save for that relief on the sentence, the remainder of the appeal is hereby *dismissed*.

It is so ordered.

**DATED, SIGNED** and **DELIVERED** at **NAIROBI** this 19<sup>th</sup> day of March 2026.

**KANYI KIMONDO**  
**JUDGE**

**Judgment read virtually on *Microsoft Teams* in the presence of: -**

Mr. Orende for the appellant instructed by Orende & Associates Advocates.

Ms. Awino for the respondent instructed by the office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.