



REPUBLIC OF KENYA



KENYA LAW
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**Sumba v Republic (Court Martial Appeal E003 of 2024)
[2025] KEHC 586 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
COURT MARTIAL APPEAL E003 OF 2024**

**DR KAVEDZA, J
JANUARY 30, 2025**

BETWEEN

SPR NICHOLAS WANYONYI SUMBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by the Court Martial sitting at Moi Airbase on 13th September 2024 in
Court Martial No. 6 of 2023 Republic vs SPR Nicholas Wanyonyi Sumba)*

JUDGMENT

1. The appellant was charged and convicted on six counts under the [Kenya Defence Forces Act](#), 2012, and the Penal Code:
 - i. Count I: Committing a civil offence contrary to Section 133(1) of the [Kenya Defence Forces Act](#), specifically attempted murder under Section 220 of the Penal Code. On 11 June 2023, at approximately 7:15 pm, the appellant discharged two rounds of ammunition (7.62x39mm) from his assigned AK-47 rifle (Serial No. 6209XXXX) in an attempt to murder Captain J.N. Obwayo (130XXXX) at Nanyuki Barracks, Laikipia County.
 - ii. Alternative to Count II: Conduct prejudicial to good order and service discipline under Section 121 of the [Kenya Defence Forces Act](#). The appellant assaulted Captain J.N. Obwayo using his assigned rifle during the same incident.
 - iii. Count III: Conduct prejudicial to good order and service discipline under Section 121 of the [Kenya Defence Forces Act](#). On 11 June 2023, at around 5:00 pm, the appellant over-socialized with commissioned officers (Major H.W. Khisa, Major S.W. Lugadiru, and Captain J.N. Obwayo) at an unauthorized private party in Major Lugadiru's accommodation, breaching military protocol.



- iv. Count IV: Leaving his sentry post without being properly relieved, contrary to Section 69(1)(a)(iii) of the *Kenya Defence Forces Act*. On 11 June 2023, at approximately 6:00 pm, the appellant abandoned his sentry duties at Nanyuki Barracks.
 - v. Count V: Being drunk while on sentry duty, contrary to Section 69(1)(a)(ii) of the *Kenya Defence Forces Act*. The appellant consumed alcohol while deployed on sentry duties at the same location and time.
 - vi. Count VI: Deliberate discharge of a firearm, contrary to Section 123 of the *Kenya Defence Forces Act*. The appellant intentionally discharged two rounds of ammunition from his rifle during the incident at 7:15 pm.
2. He was sentenced to 15 years' imprisonment for Count I and 15 years' imprisonment for Count II (Alternative). For Count III, he received 1 year's imprisonment, while for Count IV and Count V, he was sentenced to 4 years' imprisonment each. Additionally, for Count VI, he was sentenced to 1 year's imprisonment. The sentences for Counts I, II, III, and VI are running concurrently, whereas the sentences for Counts IV and V are running consecutively.
 3. Being aggrieved, he filed an appeal challenging his conviction and sentence. The appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that the court failed to prove their case beyond reasonable doubt. In addition, the sentence meted out was harsh and excessive. He urged the court to quash his conviction and set aside the sentence imposed.
 4. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
 5. 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).
 6. The prosecution case was that on 11 June 2023, at approximately 7:30 pm, a shooting occurred at the Kenya Ordnance Corps in Nanyuki. PW2, Jackline Ochieng Rugo, a civilian, testified that she travelled to Nanyuki after being invited by an individual named Wesley, whom she had met on social media. Upon arrival, she discovered Wesley was a military officer. She attended a house party at the Single Officers' Quarters within the Kenya Ordnance Corps. The appellant, stationed at the gate, allowed her entry. After consuming alcohol, she lost consciousness and has no memory of subsequent events.
 7. PW1, Major Erick Makori, Officer Commanding Nanyuki Region, testified that while at his residence in the married quarters, he heard two gunshots from a nearby building. He rushed to the scene and found Captain Obwayo on the ground, with Major Khisa and Corporal Wasike nearby. The victim was evacuated to the Military Medical Reception Station (MRS). PW1 later learned the shots were fired by the appellant, Service Member Sapper Nicholas Wanyonyi Sumba.
 8. PW3, Captain Ombwayo Japhet, currently posted at the 10 Engineers Battalion in Nanyuki, stated that on the day in question, he visited Major Lugadiru's residence, where he found Major Lugadiru, Major Khisa, and several female guests. While socialising, the appellant, dressed in uniform and armed, entered the premises and exited through the kitchen. Moments later, PW3 heard gunshots. He rushed outside and saw Major Khisa struggling with the appellant, attempting to disarm him. PW3 intervened but was shot, losing consciousness. He later regained consciousness at Nanyuki Cottage Hospital. PW3 noted that the appellant may not have intentionally targeted him.



9. PW4, Sergeant Lorna Muthoni, duty supervisor at the 10 Engineers Battalion, was informed of the incident by Corporal Oloo at 7:45 pm. Upon arriving at the scene, she observed bloodstains outside Major Lugadiru's house. A search of the premises, assisted by Lieutenant Colonel Wasike, revealed eight women locked in a room, including PW2. Two women had fled before her arrival. The appellant underwent a toxicology test, which showed an alcohol level of 0.15%. The appellant, who was required to be at the Officers' Barracks, was found at the scene.
10. PW5, Captain V. Kipkoech, a medical officer, treated PW3 for a gunshot wound to the right chest, which had both entry and exit wounds. The victim was stabilised and referred to Nanyuki Cottage Hospital. PW6, Chief Inspector Gilbert Kipngeno Tonui, a forensic document examiner, confirmed that the appellant had signed for a firearm in the Daily Arms Issue Register.
11. PW7, Chief Inspector Alfred Mbalani Kahi, a forensic ballistic expert at the DCI Headquarters, testified that on 16 June 2023, he received the following exhibits from Sergeant Samuel Mathenge: one AK-47 rifle (Serial No. 6209XXXX), an AK-47 rifle magazine, 28 rounds of ammunition, and two spent cartridge cases (7.62 x 39mm). Upon examination, he confirmed the rifle was a Chinese-manufactured AK-47 (2018 model) in full working condition. His findings were documented in a report produced as an exhibit.
12. PW8, Major Harry Wafula Khisa, testified that he attended a social gathering at Major Lugadiru's residence on 11 June 2023, alongside other officers and civilians. Alcoholic and non-alcoholic beverages were consumed. The appellant became agitated after his advances toward civilian women were rejected. Following intervention by the host and Captain Ombwayo, he left but warned, "Wait, you will know who I am."
13. The appellant later returned, dressed in military attire and armed with an AK-47 rifle. He appeared enraged and interrogated a woman, asking, "Who called me a prostitute?" PW8 attempted to disarm him, leading to a struggle during which the appellant discharged a round. Captain Ombwayo, who intervened, was shot during the altercation. PW8 stated the appellant was under the influence of alcohol.
14. PW9, Lt. Col (Dr) Nicholas Kiboi Gachara, a cardiothoracic surgeon at DFMH, testified that he treated Captain Ombwayo for a gunshot wound to the right chest. The patient presented with pain, difficulty breathing, and internal bleeding. A surgical procedure was performed to remove clotted blood, and the patient remained under medical care for two to three weeks before being discharged. Treatment notes were produced as exhibits.
15. PW10, Corporal Mark Oloo, and PW13, Sergeant Mustafa Alulu, military investigators at Nanyuki Detachment, testified that on 11 June 2023, PW10 received reports of a shooting at the 10 Engineers Officers' Quarters. Upon arrival, they observed a white civilian Nissan Note leaving the scene at speed. They later found the appellant with other military personnel and civilians.
16. Investigations revealed the appellant had been deployed for guard duties at the 10 Engineers Officers' Quarters barrier but had absconded to attend the party. A confrontation occurred at approximately 7:00 pm, during which he was instructed to leave. He later returned in uniform, retrieved his issued AK-47 rifle (Serial No. 6209XXXX), and proceeded to Major Lugadiru's residence.
17. Major Khisa attempted to disarm him, resulting in a struggle during which two rounds were discharged, one striking Captain Ombwayo. Two spent cartridges and bloodstains were recovered from the scene. A toxicology test confirmed the appellant was intoxicated. A forensic examination confirmed the firearm was in full working condition. The appellant was subsequently charged.



18. PW11, Corporal Leon Wasike, the section commander's guard, testified that at approximately 7:15 pm, he heard two gunshots. Upon responding, he found the victim on the ground and disarmed the appellant before handing the weapon to the military police.
19. PW12, Private Brian Bunde, testified that he was on sentry duty when he was sent to deliver groceries to Major Makori. Upon arrival at the Officers' Quarters, he observed the appellant enter and leave the residence. Shortly thereafter, he heard gunshots and witnessed a struggle between Major Khisa and the appellant as they attempted to disarm him. He saw Captain Ombwayo intervene and collapse after being shot.
20. In his defence, the appellant testified that he was enlisted in 2019 and deployed at 10 Engineers. On June 11, 2023, he was assigned duty at the Officers' Quarters from 0930 hrs to 1230 hrs (Detail One). After his shift, he went for lunch, and at about 1530 hrs, Major Lugadiru called him to his house to assist in brushing his shoes and washing his clothes, to which he complied. He then returned to his house to prepare for his next shift.
21. As he was heading back to duty, he heard a noise coming from Major Lugadiru's house. He reported this to the Guard 2 I/C, who instructed him to check the situation. Upon doing so, Major Khisa came out of the house and attempted to seize his rifle. Unsure of Major Khisa's intentions, he refused to surrender the firearm. A struggle ensued, during which the safety disengaged, and a shot was fired without knowing who pulled the trigger.
22. Immediately afterward, Captain Ombwayo exited the house and, without inquiring, began hitting him. Captain Ombwayo also tried to take the rifle, but since his intentions were unclear, he resisted. During the struggle, another round discharged, striking Captain Ombwayo. Despite this, Major Khisa did not release the weapon. Major Lugadiru later emerged, and for safety reasons, he handed over the rifle. Military Police arrived shortly thereafter. He denies any argument, misconduct, or consumption of alcohol or food at the party, stating that the incident occurred while he was on patrol duty.
23. The appellant was then convicted and sentenced accordingly.
24. Section 220 (a) of the Penal Code provides for the offence of attempted murder as well as the sentence upon conviction:
 - “(a) attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life”
25. To sustain a charge of attempted murder, the evidence must show that there was a specific intent to unlawfully cause the death of another. In *Cheruiyot Vs Republic (1976 - 1985) EA 47* it was emphasized that;
 - “an essential ingredient of an attempt to commit an offence is a specific intention to commit that offence. If the charge is one of attempted murder, the principal ingredient and the essence of the crime is the deliberate intent to murder. It must be shown that the accused person had a positive intention to unlawfully cause death and that intention must be manifested by an overt act”.
26. In this case, multiple pieces of evidence link the appellant to the offence, supporting his conviction. PW3, Captain Ombwayo, testified that the appellant entered Major Lugadiru's residence armed with an AK-47 rifle, appeared agitated, and fired shots during a struggle, injuring him. PW8, Major Khisa,



- corroborated this, stating the appellant had made threats before leaving, then returned armed and deliberately discharged his weapon during a confrontation.
27. PW7, a forensic expert, confirmed that the spent cartridges recovered at the scene were fired from the appellant's rifle (Serial No. 6209XXXX). PW6, Chief Inspector Tonui, verified that the appellant had signed for the firearm in the Daily Arms Issue Register. Additionally, PW16, the toxicology expert, confirmed the appellant had consumed alcohol, suggesting potential recklessness. The appellant's presence at the party, his return armed, and the direct physical struggle over the firearm that resulted in two discharged rounds, including one that injured PW3, support the prosecution's case. The intent element can be inferred from his prior threats and the deliberate discharge of a firearm in a confined setting.
 28. While the appellant claims the shooting was accidental, the chain of events, eyewitness testimonies, and forensic evidence collectively establish a prima facie case linking him to the offence of attempted murder. The evidence establishes that the appellant physically carried out the shooting with clear intent to kill, fulfilling both actus reus and mens rea, supporting the charge of attempted murder. Therefore, the conviction on two counts of attempted murder is affirmed.
 29. In the alternative to Count II, the appellant was convicted of assault under Sections 250 and 251 of the Penal Code. PW3, Captain Ombwayo, testified that after the appellant returned armed, he engaged in a struggle with Major Khisa. When PW3 intervened, the appellant fired a shot, injuring him. PW5, Captain Kipkoech, and PW9, Lt. Col (Dr) Gachara, confirmed the gunshot wound and medical treatment. PW8, Major Khisa, stated that the appellant became aggressive, and was asked to leave, but returned armed, leading to a physical altercation. PW11 and PW12 witnessed the struggle. PW16, a forensic expert, confirmed the spent cartridges matched the appellant's AK-47 rifle. The eyewitness testimonies, medical reports, and forensic evidence establish a prima facie case of assault causing actual bodily harm under Section 251. The conviction in the alternative to Count II is therefore affirmed.
 30. In Counts III, IV, and V, the appellant was convicted for the offence of Conduct prejudicial to good order and service discipline under Section 121 of the *Kenya Defence Forces Act*. These offences involved over-socializing with commissioned officers at an unauthorized private party in Major Lugadiru's accommodation, breaching military protocol, leaving his sentry post without being properly relieved, and being drunk while on sentry duty. PW8, Major Khisa, testified that the appellant attended the party and violated military protocol by interacting with civilians and officers inappropriately. PW2, Jackline Ochieng, confirmed the appellant's presence and his later aggressive behaviour. Military investigators corroborated the unauthorised nature of the party. Furthermore, PW10, Corporal Oloo, confirmed the appellant left his sentry post without official relief. PW16, military investigators, and PW12, Private Bunde, corroborated the claim of abandonment of post. The toxicology report showed the appellant's alcohol level was 0.15%, confirming his drunken state during sentry duty. These collective pieces of evidence confirm the appellant's violations of the *Kenya Defence Forces Act*.
 31. Finally, in Count VI, the appellant was convicted for the deliberate discharge of a firearm under Section 123 of the *Kenya Defence Forces Act*. The evidence includes PW8, Major Khisa's testimony that the appellant intentionally fired his AK-47 rifle during a struggle. PW3, Captain Ombwayo, confirmed he was shot during the altercation. Forensic evidence from PW7, a ballistic expert, linked the spent cartridges to the appellant's rifle. PW12, Private Bunde, and military investigators corroborated the account, confirming the deliberate discharge of the weapon during the confrontation. This evidence conclusively proves the appellant's violation of the KDF Act.
 32. Thus, the appellant's conviction on all counts is affirmed and upheld.



33. On sentence, the appellant was sentenced to 15 years' imprisonment for Count I and 15 years' imprisonment for Count II (Alternative). For Count III, he received 1 year's imprisonment, while for Count IV and Count V, he was sentenced to 4 years' imprisonment each. Additionally, for Count VI, he was sentenced to 1 year's imprisonment. The sentences for Counts I, II, III, and VI are running concurrently, whereas the sentences for Counts IV and V are running consecutively.
34. During sentencing, the court martial considered the seriousness of the offence, the appellant's mitigation, and the time spent in remand custody.
35. The Sentencing Policy Guidelines provide as follows: -
- “SUBPARA 7.13 – Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively”.
36. The Court of Appeal has defined the phrase 'same transaction rule' in the case of Republic –vs- Saidi Nsabuga S/O Juma & Another [1941] EACA and revisited it in Nathan –vs- Republic [1965] EA 777 where the court stated as follows: -
- “If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”
37. The question is whether the appellant's actions are connected in time, place, and purpose. In this case, the offences committed by the appellant: attempted murder, assault, conduct prejudicial to good order, and the deliberate discharge of a firearm — were closely linked. The appellant's actions occurred in a single continuous incident, starting with his involvement in the unauthorised party, which led to a confrontation and the subsequent discharge of the firearm, causing injury. These offences were interrelated, as the initial misconduct (socialising at the party) triggered the physical altercation, which in turn resulted in the assault and firearm discharge.
38. Since all the offences occurred during the same incident, within the same location (Major Lugadiru's residence), and had the same intent (the appellant's aggression and refusal to surrender the weapon), they would be considered to have been committed in the same transaction under the law. Consequently, the trial court ought to have ordered the sentences in counts I, II (alternative), III, IV, V, and VI to run concurrently.
39. The upshot of the above analysis is that the appeal on the sentence partially succeeds. I hereby make the following orders:
- I. The sentence in Count I, alternative to Count II, Count III, Count IV, Count V, and Count VI are maintained.
 - II. The sentences imposed by the trial court shall run concurrently from the 11th June 2023 the date of the appellant's arrest having spent the entirety of the trial in remand custody pursuant to section 333(2) of the Criminal Procedure Code, Cap 75 of the Laws of Kenya.

In addition, the appellant also applied for bail pending appeal which was to be determined together with the appeal. However, having dismissed the appeal, the application for bail pending appeal is an academic exercise and has been overtaken by events. It is therefore equally dismissed.



Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JANUARY 2025

D. KAVEDZA

JUDGE

In the presence of:

Ms. Maina holding brief for Mr. Mutuma

Mr. Bosire - present

Appellant – absent

Achode – court assistant

