Takow v Republic (Criminal Appeal 7 of 2018)
[2024] KEHC 16214 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16214 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL 7 OF 2018

JN ONYIEGO, J

DECEMBER 18, 2024

BETWEEN

ABDIRAHMAN ABDI TAKOW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal against the conviction and sentence by Hon. P.N. Areri in the Principal Magistrate's Court at Mandera Criminal Case No. 689 of 2017 delivered on 29.11.2017))

JUDGMENT

1. The appellant was charged with the offence of collecting information contrary to section 29 of the *Prevention of Terrorism Act* 2012. The particulars of the offence were that; on 14.09.2017 at around 0830 hrs at Mandera Township within Mandera County in preparing the commission of a terrorist act collected information for the use in the commission of a terrorist act at Mandera G.K. Prison.

2. Having denied the charge, he was tried, convicted and consequently sentenced to 30 years imprisonment. Dissatisfied with the determination of the trial court, he proffered this appeal on grounds that:

    i. The trial court erred in law and fact by convicting him when the prosecution did not prove its case beyond any reasonable doubt.

    ii. The sentence meted out was not only harsh but also excessive in the circumstances herein.

3. The court directed that the appeal be canvassed by way of written submissions but the parties chose to submit orally.

4. The appellant submitted orally that he be taken back to his family noting that he had suffered a lot.

5. The respondent in opposing the appeal submitted that the nature of the offence with which the appellant was charged demands a strict sentence to deter such acts. That the appellant acted as a spy to the terrorists in order to fetch information on security infrastructures in the county. Further, he was illegally in the country when he was caught within the facility. That to that end, the prosecution adduced sufficient evidence to support the charge. This court was thus urged to dismiss the appeal and uphold the conviction and sentence meted out by the trial court.

6. This being a first appeal, I am mandated to analyse and re-evaluate the evidence afresh in line with the holding of the Court of Appeal in Okeno v Republic [1972] E.A. 32 and re-stated in Kiilu and another v R (2005) 1 KLR 174.

7. PW1, No. 41894 PC Hussein Osman Mursal stated that on 04.09.2017 at around 8.00 am., he was manning the watch tower at the rear of the prison camp when he noticed the appellant had entered the camp through a fence used by contractors in erecting a perimeter wall. That previously, they had received intelligence report from their officer in charge as there was security alert and so, they were warned to be extra vigilant. Upon stopping and questioning the appellant, he stated that he was with another person who unfortunately led him to the camp.

8. He went further to state that the appellant told him that he was going to report a case of obtaining money by false pretenses to the police when he found himself in the camp. According to the appellant, someone had obtained Kes. 30,000/- from him in front of a police station promising him that he would aid his transport to Nairobi. It was his evidence that the explanation by the appellant seemed unlikely and that it was only clear that he had been sent by the Al Shabaab to survey the camp.

9. PW2, No. 41889 Ali Mohamed Ibrahim recalled that on the material day, he was with PW1 at the watch tower when the appellant entered the camp using an opening in the perimeter wall which was under construction. On arrest and interrogation, the appellant stated that he had spent the previous night at Bulla Hawa in Somalia and that he had crossed into Kenya in the morning hours. That somebody had taken his money by pretending that he would transport him to Nairobi. It was his evidence that he was not convinced since previously, they had received intelligence report that Al Shabaab intended to send people to collect information from police stations, prison camps and military installations. That after about an hour, another person showed up peeping through the camp and upon being called, he ran away.

10. PW3, No. 78484 Cpl. David Munga of Mandera ATPU testified that on 11.09.2017 at around 5.00 a.m., the Al Shabaab attacked the Somali National Army Camp in Bulla Hawa using explosives laden vehicles. That they ran over the army resulting to 15 officers being killed and 9 injured. It was his evidence that the terrorists burnt a police station, the District officer's office and the residence of the immigration officer in charge of security in the Gedo region. That the terrorists took two land cruiser vehicles, a water bowser, three civilian vehicles, an army truck and weapons. That the attack brought fear in Mandera town which borders Bulla Hawa. Additionally, the SNA and police officers came to Mandera to look for assistance and treatment of the injured. That as a result, the security apparatus in Kenya were put on high alert.

11. He went further to state that on 12.09.2017, they received intelligence report that the terrorists had sent their spies to Mandera town. Their main aim was to collect intelligence on the installations the terrorists intended to attack. According to the intelligence received, the terrorists intended to attack prison camp, police stations, military camps and Mandera Referral Hospital. Thus all the officers were put on high alert. He stated that on the material day, they received information that a person had been arrested inside the prison camp and so, they opened up investigations.

12. That the person had no explanation as to what he was doing inside the camp and or why he was in Kenya. That he accessed the prisons via an unauthorized points and noting that no viable reason was forthcoming from the appellant as to what he was doing in the camp, they concluded that he wanted to collect information for use in terrorism activities. He produced the confidential intelligence report dated 12.09.2017 as Pex. 1.

13. Upon closing its case, the court found that the prosecution had established a prima facie case against the appellant thus placing him on his defence.

14. In his sworn evidence, the appellant denied the charges but conceded that he came from Mogadishu in Somalia. He denied any association with those people referring to Alshabab. That he worked in a garage and later stayed in a refugee camp.

15. I have considered the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions. I find the following broad issues for determination.

    i. Whether the prosecution proved their case beyond reasonable doubt; and

    ii. Whether the sentence was manifestly harsh and excessive.

16. The appellant was charged with the offence of collecting information contrary to section 29 of the *Prevention of Terrorism Act* 2012 which provides that a person who is a member of a terrorist group or who, in committing or in instigating, preparing or facilitating the commission of a terrorist act, holds, collects, generates or transmits information for the use in the commission of a terrorist act commits an offence, and is liable, on conviction, to imprisonment for a term not exceeding thirty years.

17. My understanding of the prosecution's case is that the appellant acted as a spy to the terrorists in order to fetch information on security infrastructures in the county that could be used to instigate the commission of terrorist acts. Further, he was illegally in the country when he was caught within the prison camp and that he did not give any viable reason as to why he accessed the said facility. In the case of Galle vs Republic (Criminal Appeal E127 of 2022) [2023] KEHC 516 (KLR), the court held that:

> " In as much as the appellant denies signing the inventory, he does not deny possession of an Infinix mobile phone IMEI 3598830xxxxxx that evidence demonstrates contained material related to terrorism. The trial magistrate having listened to the audios and videos came to a conclusion that Appellant had interest in terrorism as most of the videos and audios related to terrorism. I therefore find that the charges of possession and collection of information for the use in instigating the commission of a terrorist act were proved."

18. In the same breadth, in the case of Mohamed Haro Kare vs Republic, [2016] eKLR] Ngenye J. (as she then was) rendered herself on the evidence that would be sufficient to prove membership to terrorist organizations. The learned judge expressed herself as follows:

> " Determining membership to an outlawed criminal group would involve a consideration of several sets of circumstances. In ordinary circumstances, membership in an organization is easily determinable due to existence of well-known formal structures or by the person's direct actions of professing to be a member. However, membership to a terrorist group may not be so easily determinable, thus, use of circumstantial evidence that points to a person's association with such a group. Several considerations would come into play and supported by relevant evidence that would point to such a conclusion. Terrorist organisations, expectedly, operate underground, and use covert means to recruit persons as members and to advance their operations. Thus, it is upon the prosecution to set out

clearly acts that point clearly of a person's membership to, in this case, the Al Shabaab. This may vary from one case to another. It must be shown that the actions alleged against the accused show a nexus with operations associated with the outlawed group as to enable the court reach a conclusion to his membership. Due to the nature of the group's operations, there is not yet standard test that would apply as a checklist to a person's membership to Al Shabaab. However, certain actions may provide a useful guide, such as a person being trained by the group on the use of weapons, possession of weapons and articles associated with the group, travelling to the known operations of the group, and being associated with members of the group, or being together with members of the group or taking part in activities of the group..."

19. In this case, the appellant was not found with anything that suggested that he had fetched or was in the process of fetching the said information. He had no information found on him, phone or any equipment whatsoever that could be used to instigate the commission of terrorist acts either by him or would be recipients of the collected information. In the same breadth, and as already noted that membership of Al-Shabaab if not confessed and or conceded, the court may infer such membership based on the conduct of the accused.

20. In the instant case, apart from the appellant being found in the prison camp to which he explained to the arresting officers that he had strayed as he was going to the police station and the fact that allegedly, there existed concerns of security at that time, nothing much was produced before the court to demonstrate that indeed the appellant was a terrorist or was related to terrorism activities or was collecting information. It was incumbent upon the prosecution to discharge their burden of proof which does not shift. [See Woolmington vs DPP 1935 AC 462 and Bakare vs State 1985 2NWLR].

21. It is my considered view that the fact that the appellant was from Somalia and was found in the prison camp, the prosecution simply assumed that he was a member of a terrorism group and further, was out to collect information that could be used to instigate the commission of terrorist acts either by him or would be recipients of the collected information.

22. Clearly, there were many unanswered questions in the case, and it seems that the investigating officer decided to charge the appellant with the offence herein noting that he was simply a Somali and further, he was found in the said prison camp in spite of the explanation given which was reasonable. In my view, the arrest of the appellant was largely based on suspicion and speculation. See the case of Joan Chebii Sawe v Republic [2003] eKLR where the court held that:

> " We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt".

23. In the same breadth, the Court of Appeal in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No 17 of 1998) (unreported), stated that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."

24. To that end, it is my humble view that the conviction of the appellant was not safe in those circumstances and as such, I find that there is merit in this appeal. I hereby quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held. However, being a Somalia national, he shall be repatriated back to his country by the immigration department in conjunction with the OCS Mandera police station.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2024

J. N. ONYIEGO

JUDGE