Hassan & another v Republic (Criminal Appeal 150 & 151 of 2019 (Consolidated)) [2023] KEHC 2432 (KLR) (Crim) (24 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2432 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 150 & 151 OF 2019 (CONSOLIDATED)

CW GITHUA, J

MARCH 24, 2023

BETWEEN

HASSAN EDIN HASSAN ..... 1ST APPELLANT

MOHAMED ABDI ABIKAR ALIAS MOHAMED ALI ABIKAR 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence in Nairobi Chief Magistrate's Court Criminal Case No. 993 of 2015 dated 9th June 2019 (Hon. Mr. Andayi W. Francis (CM))

JUDGMENT

1. The appellants, Hassan Edin Hassan and Mohamed Abdi Abikar alias Mohamed Ali Abikar were charged with three other persons who are not party to this appeal in a total of 152 Counts with terrorism related offences following the terror attack at Garrissa University College on 2nd April 2015.

2. In count 1, the appellants were jointly charged with the offence of conspiracy to commit a terrorist act contrary to Section 23 (2) of the *Prevention of Terrorism Act*, 2012 (POTA). The particulars alleged that on or before 2nd April 2015 at Garissa Township within Garissa County, the appellants and their co-accused jointly with Abdirahim Mohammed Abdulahi (deceased), Khalid Issack Hassan (deceased) and other persons not before court conspired to commit a terrorist act at Garissa University College.

3. In Count 2- to Count 150, the appellants and their co- accused were jointly charged with the offence of committing a terrorist act contrary to Section 4(2) of POTA. The particulars were that on 2nd April 2015 at Garissa University College within Garissa County, the appellants jointly with others not before court committed a terrorist act which resulted into the death of 149 people whose identities were disclosed in the particulars supporting the charges in each count.

4. The appellants were also separately charged in Count 151 and 152 with the offence of being a member of a terrorist group contrary to Section 24 of POTA. The particulars were that on or before 30th May 2015, at Anti-Terrorism Police Unit HQ within Nairobi County, they were found to be members of a terrorist group namely, Al-Shabaab, in contravention of the POTA.

5. After a lengthy trial, the appellants were convicted of the charges preferred in each count. In Count 1, both appellants were sentenced to serve 10 and a ½ years' imprisonment while in Count 2 to 150, they were sentenced to serve 25 and a ½ years' imprisonment in each Count. The sentences in Count 1, Count 2 to 150 were ordered to run concurrently.In Count 151 and 152, each appellant was sentenced to serve 15 and a ½ years imprisonment. The sentence was ordered to run consecutively to the sentences imposed in Count 1, Count 2 to Count 150.

6. Aggrieved by their conviction and sentence, the appellants through their advocates, Mbugua Mureithi & Co. Advocates filed separate appeals vide petitions of appeal dated 11th and 17th July 2019. The appeals were subsequently consolidated and heard together.

7. In their respective petitions of appeal, the appellants advanced a total of sixteen grounds of appeal which were similar in all respects. Most of the grounds were duplicated but in summary, the appellants complained that the learned trial magistrate erred in law and fact by: convicting them on the basis of a fatally defective charge of conspiracy to commit a terrorist act which was not supported by the particulars thereof and the evidence presented during the trial; failing to critically evaluate the evidence and failing to appreciate the legal standard of proof in cases based on circumstantial evidence and common intention; Convicting them on contradictory and unreliable evidence which did not prove their guilt as charged in each count beyond any reasonable doubt; failing to objectively consider their defence; and, meting out harsh and excessive sentences in the circumstances of the case. They prayed that their convictions be quashed and sentences set aside.

8. At the hearing, the appellants and the respondent chose to prosecute the appeal through written submissions. The appellants' submissions were filed on 15th July 2022 while those of the respondent were filed on 18th July 2022.

9. In his submissions, learned counsel for the appellants Mr. Mbugua Mureithi expounded on the appellants' grounds of appeal and started off by asserting that the appellants were wrongly convicted in Count 1 since in his view, the charge in that count was fatally defective as the offence allegedly committed was not disclosed in the particulars supporting the charge. In support of this submission, counsel placed reliance on the authority of Yongo V Republic, [1983] eKLR where the Court of Appeal held, inter alia, that a charge is defective if it did not accord with the evidence or gives a mis-description of the alleged offence in its particulars.

10. Further, Counsel invited me to note that the appellants were convicted on the basis of evidence of telephone communication between them and the deceased terrorists which was unreliable given the contradictions in PW9, PW15 and PW22's evidence (wrongly described as PW21 in the proceedings); that in any event, the evidence regarding the said communication was insufficient to prove to the required legal standard the essential elements of the offence of conspiracy as charged in count 1 and common intention required to sustain the offence of committing a terrorist act charged in Count 2 to 150.

11. Moreover, according to learned Counsel, the telephone communication between the appellants and the deceased terrorists amounted to circumstantial evidence which was weak and insufficient to establish the guilt of the appellants as charged. For this proposition, Counsel relied on several authorities including the cases of PON V Republic, [2019] eKLR; Feisel Mohamed Ali V Republic,

[2018] eKLR; Dickson Mwangi Munene & Another V Republic, [2014] eKLR and Mohamed Haro Kare V Republic, [2016] eKLR. He urged the court to find merit in the consolidated appeals and allow them as prayed.

12. The appeal is contested by the state. Learned Principal Prosecution counsel Mr. Ondimu who represented the respondent supported the appellants' conviction in each count and the sentences imposed by the trial court. Though admitting that the prosecution case rested entirely on circumstantial evidence in the form of telephone communication between the appellants and the felled terrorists, counsel relied on the authority of Simon Musoke V Republic, [1958] EA 715 and argued that the evidence adduced by the prosecution conclusively proved that the appellants were involved in the planning and execution of the terrorist attack at the Garissa University College (the college).

13. In addition, Counsel submitted that the appellants were part of a group who shared a common intention of executing the terrorist act in question which led to the death of over a hundred victims. He invited me to find that the prosecution had proved beyond any reasonable doubt all the charges preferred against the appellants and dismiss the appeal for lack of merit.

14. Turning now to the evidence adduced during the trial, the record shows that the prosecution called a total of twenty two (22) witnesses in support of its case. The brief facts of the prosecution case are that on the dawn of 2nd April 2015, the Garissa University college was raided by terrorists.

15. According to the evidence of PW1, PW2, PW3, PW5 and PW7, all survivors of the attack, at the material time, they were at different places within the university when they heard the sound of gunshots. PW2, Chepkemoi Everline and PW3, Risper Nyakara, who were in a group of students praying in one of the Lecture Halls recalled that on 2nd April 2015 at around 5.30a.m, they heard an explosion before a man opened the door and started shooting at them in random. They could also hear sounds of gunshots being fired outside the lecture hall.

16. The witnesses recalled how terrified they were by the turn of events and how they lay on the floor pretending to be dead until they were rescued by officers from the Kenya Defence Forces (KDF) and members of the Kenya Red Cross between 11 am and 12 noon. It is only after being rescued that PW2 realized that she had been shot on her right hand and leg while PW3 had been shot on her thigh and right knee. They also noticed that most of their prayer mates had been shot dead. Alongside other survivors, they were airlifted to Kenyatta National Hospital where they were admitted for treatment for over a month.

17. PW1, Walianala Collins, a student leader at the university and PW7 Robert Njera Mathenge told the court that on the fateful morning, they were asleep in their respective hostels when they were awakened by the sound of gunshots. According to the evidence of PW7, he went to hide in the washrooms where the assailants found him together with other students. They were led to the female side of the hostel where one of the attackers declared that they were members of Al Shabaab and they were using the students to communicate to the Kenya Government that the Al Shabaab wanted the Kenya Defence Forces out of Somalia.

18. PW7 further recalled that the assailants separated the male from female students and ordered Muslims to leave the room. They then asked the remaining students to lie down after which they fired gunshots at them. He remained lying on the floor until around 2.00pm when he was rescued by security officers. Upon being rescued, he realized that most of his colleagues had died in the attack.

19. PW5, PC Wycliffe Chepkonga, was one of the police officers who had been deployed at the University. He testified that on 2nd April 2015 at about 5.30 am, he was on patrol near the classrooms together with his colleague PC Khaemba when they heard the sound of gunshots. The gunshots were coming from

the direction of the main gate. They walked towards the main gate while their other two colleagues went towards the hostels. They started firing back at the assailants but they were unfortunately overpowered and had to take cover as they called for reinforcement.

20. PW6 Elias W. Njagi, the then University's Acting Chief Security Officer testified that on realizing that the University was under attack, he contacted the Deputy OCS Garissa Police Station but remained in hiding till around 7.30 am when he went to the university's main gate. He found the police already there. He noted that two of the universities security guards who had been manning the main gate had been shot dead.

21. PW8, Sgt. Eric Mwita, PW9 PC Geoffrey Busolo and PW15 PC Anthony Kuria were part of a team of investigators from the Anti-Terrorism Police Unit (ATPU) who proceeded to the university on the following day, that is, on 3rd April 2015. They joined a Multi-Agency team whose task was to conduct a search and rescue operation which included processing scenes of the attack. They narrated to the trial court how they tagged, labelled and collected evidence from various scenes of the attack which included several student hostels. They also collected the dead bodies and placed them in body bags.

22. The dead bodies included those of four suspected terrorists which were identified as such because they had beside them military porches containing live ammunition and AK 47 Rifles. PW9 who testified as the investigating officer recalled that he searched the bodies labelled as B117, B118, B125 and B126. He recovered three mobile phones from three of the bodies, namely, an Itel Mobile phone from B117 (P Exhibit 10); a Nokia Phone from B118 (P Exhibit 12) and a Techno phone from B126 (P exhibit 15). He did not recover any phone from the body marked as B125. All the recovered mobile phones had Safaricom sim cards.

23. PW13 and PW14 were crime scene officers who documented the scene through photographs and a video tape which they tendered in evidence. PW12, Dr. Edwin Walonga, performed autopsies on the victims' bodies and produced the post mortem reports as P Exhibits 73 (1) to 144.

24. The evidence adduced by PW18 Jackson Mukaria shows that two of the slain terrorists were identified as Khalid Hassan Isaack and Abdirahim Abdullahi Mohammed. They were identified by matching their fingerprints to the data held at the National Registration Bureau. The other two assailants were not identified.

25. In the course of investigations, Mr. Antony Sunguti who was one of the investigators wrote three letters to Safaricom Ltd (P Exhibit 94, P Exhibit 95 and P Exhibit 96) requesting for Call Data Records (CDR), IMEI history, Subscriber details and MISDIN history of the recovered phones.

26. PW22, IP Christopher Mmbuanga, (wrongly described in the proceedings as PW21 due to an obvious error in the numbering of witnesses) an analyst based at ATPU gave evidence regarding his analysis of call data records provided by Safaricom Ltd. He testified that cellphone number 07259xxxx registered under the name of Khalid Isaac and recovered from the body marked B-125 communicated with three cellphone numbers registered in Somalia namely +25261636xxxx ; +25261740xxxx and +252617815xxxx as well as five Kenyan cellphone numbers namely, 072593xxxx ; 072593xxxx ; 072289xxxx ; 072150xxxx ; and 071647xxxx 4.

27. According to PW22's analysis, number 072593xxxx on 1st April 2015 made a call to number 072150xxxx belonging to the 1st appellant at 12:00 hours and to cellphone number 071647xxxx belonging to the 2nd appellant at 15:20 hours. On the same day, at 20:53 hours, the same cellphone number called a Somalia number +252 61636xxxx . At the time of making the calls, the person using number 0725933614 was located around Garissa Gulet Area. On 2nd April 2015, the same number made a call to Somalia number +252 617402539 at 7.15 am and at 7.40 am, it received an sms from

Somalia number +252 6174xxxx . At 7.42am, 7.45am and 9.41am, the number received calls from number 072593xxxx recovered from the body marked B117 and number 072289499xxxx recovered from the body marked B126. On the same date, the number (072593xxxx) also communicated with Somalia number +252 61740xxxx 2539 at 9.55am, 9.58am and finally at 10.29am.

28. PW22 further testified that numbers 072593xxxx ; 072593xxxx ; 072289xxxx which were also registered under Khalid Isaack made calls to number 072593xxxx at different times on 2nd April 2015. In addition, number 07228xxxx which was recovered from the body marked B126 received a call at 13:07 hours from number 072150xxxx which was recovered from the 1st appellant. It is important to note that the body marked B118 was found to belong to the said Khalid Isaack. After his analysis, PW22 prepared his report on 20th July 2015 which he produced as P Exhibit 110.

29. PW16, PC Alex Kimathi, then attached to the DCI office, Mandera County was one of the arresting officers. He recalled that on 2nd April 2014, he received instructions from IP Okoth, the Officer In Charge of ATPU Mandera Office, to join an operation aimed at arresting a suspect. He was informed that the suspect was using cellphone number 071641xxxx and was headed towards Mandera. Together with other security officers, they intercepted a Mandera bound bus registration number KBP xxxB. They called the cellphone number provided by IP Okoth which rang in the 2nd appellant's pocket. He was immediately arrested. PW16 searched his pockets and recovered a mobile phone make Techno T340 as well as his ID card number 2450xxxx . Another suspect (3rd accused) was also arrested in the bus.

30. After the arrests, on instructions from IP Okoth, PW16 went to Mandera Military Camp where he re-arrested the 1st appellant who had been arrested by military officers. He searched him and recovered two bus receipts in the name of Hassan Adan: one receipt from Towakal Bus Express from Mandera to Garissa dated 27th March 2015 and another one from Dessert Cruiser Bus from Garissa to Mandera dated 29th March 2015. He also recovered two mobile phones make Techno and Nokia both with dual sim slots and a sim card holder for number 0721503666 and an ID card bearing number 2675xxxx registered under the names of Hassan Edin Hassan and a leather wallet containing Kshs.2,250. PW16 thereafter airlifted the suspects to Nairobi and handed them over to PW20, PC Okisai together with the recovered items.

31. When placed on their defence, the 1st appellant elected to exercise his constitutional right to remain silent and did not call any witness. The 2nd appellant chose to give a sworn statement and did not also call any witness.

32. In his sworn statement, the 2nd appellant denied having committed any of the offences as alleged and claimed that he did not know any of his co-accused prior to meeting them at the ATPU Offices. And although he admitted having been arrested aboard a bus on 2nd April 2015 and that at the time he was using telephone number 07164xxxx , he denied having made any call to number 0725933614 as alleged by the prosecution. He also denied being a member of the Al Shabaab.

33. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am well aware of my duty as the first appellate court which was succinctly articulated by the Court of Appeal in Kiilu & Another V Republic, [2005] eKLR, as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.

> It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusion. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

34. Guided by the above principle, I have carefully considered the grounds of appeal, the evidence on record, the rival written submissions made on behalf of the parties and all the authorities cited. Having done so, I find that three key issues arise for my determination which are;

    i. Whether the charge in count 1 was fatally defective;

    ii. Whether the prosecution proved the guilt of the appellants as charged beyond any reasonable doubt;

    iii. Whether the sentence imposed on the appellants was harsh and manifestly excessive in the circumstances of the case.

35. Before addressing the issues isolated above, I wish to briefly deal with the appellants' complaint that the learned trial magistrate failed to objectively consider their defences and dismissed them unfairly. To start with, as stated earlier, the 1st appellant did not offer any defence as he chose to remain silent. There was therefore no defence for the trial court to consider in respect of the 1st appellant.

36. Regarding the 2nd appellant, a reading of the learned trial magistrate's judgment shows clearly that he thoroughly interrogated all the evidence placed before him including the 2nd appellant's sworn statement but after comparing it with the evidence adduced by the prosecution, he found it to be implausible and dismissed it. Nothing therefore turns on that ground of appeal.

37. I now wish to address my mind to the 1st issue. Learned counsel for the appellants submitted that the offence charged in count 1 did not accord with the particulars stated in the charge sheet; that the particulars failed to specify who among the alleged conspirators was in Kenya or outside Kenya at the time of the alleged offence.

38. It is noteworthy that in Count 1, the appellants were charged jointly with three others before the court and others not before the court with the offence of conspiracy to commit a terrorist act contrary to Section 23 (2) of the POTA.

    Section 23 of the POTA stipulates the different circumstances under which the offence can be committed and provides as follows:

> "(1) A person who, being outside Kenya, conspires with a person who is in Kenya to carry out a terrorist act in any place outside Kenya being an act which if committed in Kenya, would constitute an offence under this Act shall be deemed to have conspired to commit that act in Kenya.
>
> (2) A person who, being in Kenya, conspires with a person who is outside Kenya to carry out a terrorist act in Kenya shall be deemed to have conspired in Kenya to carry out that act.
>
> (3) A person who, being outside Kenya, conspires with a person who is outside Kenya to carry out a terrorist act in Kenya shall be deemed to have conspired in Kenya to do that act.

(4) A person who conspires to carry out a terrorist act under this section commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years."

39. The particulars of the charge in count 1 alleged that:

> " On or before the 2nd April 2015 at Garissa Township within Garissa County, jointly with Abdirahim Mohammed Abdulahi (Deceased), Khalid Issack Hassan (Deceased) and other persons not before court, conspired to commit a terrorist act at Garissa University College."

40. Section 134 of the Criminal Procedure Code which deals with the framing of charges states that:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

41. The Court of Appeal in the case of Benard Ombuna V Republic, [2019] eKLR held that:

> " ... In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

42. In the instant case, I agree with Mr. Mureithi's submission that the particulars of the offence charged in count 1 failed to specify that the appellants alleged co-conspirators were located outside Kenya which was an error given that the charge was framed under Section 23 (2) of the POTA which envisages a scenario where a person who is within Kenya conspires with another who is outside the country to commit a terrorist act in Kenya. The question that then arises is whether this error rendered the charge incurably defective.

43. In my considered view, the answer to the above question is in the negative. I say so because the particulars disclosed the nature of the offence the appellants were facing and the names of some of their alleged co-conspirators. The particulars also specified the terrorist act they were accused of having conspired to commit. The appellants were therefore well informed of the charges against them, the persons they were alleged to have conspired with as well as the place of the alleged terrorist act. They were able to plead to the charge and through their counsels, cross –examined the prosecution witnesses on the same.

44. In view of the foregoing, I agree with the learned trial magistrate that the omission to indicate which of the alleged conspirators were outside the country and which ones were in Kenya at the time of the alleged conspiracy did not prejudice the appellants and did not make the charge fatally defective. In addition, it is my considered view, that the omission amounted to an irregularity which was curable under Section 382 of the Criminal Procedure Code and cannot form the basis of vitiating the conviction in count 1.

45. The second issue I have identified for my determination is whether the prosecution proved its case in each count against the appellants beyond any reasonable doubt. It is important to state at the outset that in criminal cases, the prosecution has a duty to prove beyond a reasonable doubt the guilt of an

accused person as charged. This duty remains with the prosecution throughout the trial and does not shift to an accused person.

46. As stated earlier, the appellants were charged in Count I with the offence of conspiracy to commit a terrorist act contrary to Section 23(2) of the POTA. Learned counsel for the appellants submitted that the prosecution failed to establish the offence as no evidence was led to prove common intention or an agreement between the appellants and their alleged co-conspirators to commit a terrorist act.

47. The Blacks Law Dictionary 9th Edition defines conspiracy as:

> " An agreement by two or more persons to commit an unlawful act coupled with intent to achieve the agreement's motive, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose."

48. The Court of Appeal in Evans Waweru Maina V Republic, [2020] eKLR which was relied on by the appellants discussed the essential elements of the offence of conspiracy and stated thus:

> " The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons... so long as a design rests in intention only, it is not indictable; there must be agreement....proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."

49. Drawing from the foregoing, it is clear that in order to prove the offence charged in Count I, the prosecution was required to prove beyond any reasonable doubt that the appellants had an agreement with other persons not before the court to execute their common intention of committing a terrorist act at the Garissa University College.

50. A terrorist act is defined under Section 2 of POTA as follows:

> " terrorist act" means an act or threat of action
>
> —
>
> a) which—
>
> (i) involves the use of violence against a person;
>
> (ii) endangers the life of a person, other than the person committing the action;
>
> (iii) creates a serious risk to the health or safety of the public or a Section of the public;
>
> (iv) results in serious damage to property;
>
> (v) involves the use of firearms or explosives;
>
> (vi) involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;
>
> (vii) interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;

(viii) interferes or disrupts the provision of essential or emergency services;

(ix) prejudices national security or public safety; and

(b) which is carried out with the aim of— intimidating or causing fear amongst members of the public or a Section of the public; or

(ii) intimidating or compelling the Government or international organization to do, or refrain from any act; or

(iii) destabilizing the religious, political, Constitutional, economic or social institutions of a country, or an international organization:

Provided that an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm referred to in paragraph (a)(i) to (iv)"

51. From the evidence on record and from the parties written submissions, it is not disputed that a terrorist act was committed at the College in the early morning of 2nd April, 2015. PW1, PW2, PW3 and PW7 witnessed the terror attack firsthand and testified about how terrified they were when they heard the sounds of explosions and gunshots that fateful morning. They also saw armed men firing at them and other students randomly.

52. PW13 and PW14 who were scene of crime officers documented the horrific aftermath of the terror attack and produced in evidence photographs as P.Exhibit 74 (a) – (h) and a video tape as P.Exhibit 78 showing the various scenes of the attack, bodies of students whose lives were snapped out by the terrorists and bodies of four terrorists who were neutralized by the security officers.

PW10 and PW11, ballistic and bomb disposal experts respectively, confirmed that the attackers had explosives and firearms with live ammunition during the attack.

53. From the evidence considered as a whole, there is no doubt that the attack prejudiced national security and public safety and was meant to cause fear among members of the public. It is clear from the evidence of PW7 that the attack was also aimed at arm twisting the Government of Kenya to withdraw its military presence in Somalia. The attack had all the hallmarks of a terrorist act. It is thus my finding that a terrorist act was indeed committed at the college on the date and time alleged.

54. Having found as a fact that a terrorist act was committed at the college as alleged, the question I must now answer is whether the learned trial magistrate erred in finding that the prosecution had proved to the required standard, that the appellants had conspired to commit the aforesaid terrorist act with the named deceased terrorists and others not before the court.

55. As indicated earlier, proof of existence of an agreement between two or more persons to commit an unlawful act followed by acts aimed at furthering or actualizing the intended unlawful purpose is crucial to the establishment of the offence of conspiracy. As correctly stated by the learned trial magistrate, the agreement between the co-conspirators need not be in writing and as held in Evans Waweru Maina V Republic, (Supra) the existence of such an agreement need not be proved by direct evidence. It can be inferred from overt acts undertaken by the co-conspirators and or their conduct in relation to the circumstances surrounding execution of the illegal scheme. Contrary to the submission made by Mr. Mureithi, in order to prove the offence, it was not necessary for the prosecution to prove that the appellants and their co- conspirators actually met or had some physical interactions.

56. In this case, from the evidence on record and as conceded by Learned Prosecuting Counsel Mr. Ondimu, the prosecution case rested entirely on circumstantial evidence in the form of telephone communication largely between the appellants and the slain terrorists. It is trite that for circumstantial evidence to form the basis of a conviction, it must be watertight and incapable of any other explanation other than the guilt of an accused person as charged. The inculpatory facts must be inconsistent with the innocence of the accused.

57. The Supreme Court in Republic V Ahmad Abolfathi Mohammed & Another, [2019] eKLR after considering a number of authorities laid down the test for determination of the sufficiency or otherwise of circumstantial evidence in founding a safe conviction in a criminal charge. The court expressed itself as follows:

> "As was further stated in the case of Musili v. Republic CRA No. 30 of 2013 (UR) "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt." The chain must never be broken at any stage. In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused....."

58. In this case, evidence from the Call Data Analyst (PW22) revealed that cell phone number 07259xxxx which was apparently central in the planning and coordination of the attack made a call to number 072150xxxx which was recovered from the 1st appellant and which was also registered in his name. The call was made at 12:00 hours a day before the attack. At the time the 1st appellant received this call, he was geo-located at Shantabaaq enroute to Mandera from Garrissa. When he was re-arrested by PW16, a search on his person led to the recovery of not only a mobile phone but also two bus ticket receipts. One of the bus tickets, as stated earlier, showed that the 1st appellant had travelled from Mandera to Garissa on 27th March 2015, three days prior to the terrorist act. The call data records also show that the phone recovered from the 1st appellant called number 072289xxxx which was recovered from the body marked B126 at 13.07 hours when the terrorist act was being executed.

59. There is also evidence to prove that four mobile phone numbers which were registered in the names of Khalid Isaac namely 07259xxxx , 0725933xxxx , 072593xxxx and 07228xxxx were all activated on 24th March and 31st March 2015 a period of between 1 – 7 days prior to the attack. This is a clear indication that the mobile phones were acquired and activated for the sole purpose of planning and coordinating the attack.

60. Save for the identity of the person who was using cell phone number 072593xxxx which remained unclear throughout the trial given the contradiction between the evidence of PW9 and PW22 regarding how the phone was recovered which contradiction I will address shortly, there is evidence that this number communicated with the mobile phones recovered from both appellants on 1st April 2015, hours before the attack.

61. Number 07259xxxx also actively communicated with mobile phones which were recovered from bodies of three felled terrorists and other numbers registered in Somalia. As noted earlier, there was a common denominator in the four mobile phones, namely, 07259xxxx ; 07259xxxx ; 07228xxxx recovered from the dead terrorists; and number 07259xxxx since they were all registered under the same name.

62. It is noteworthy that all the communication between the above numbers happened a day before the attack and on 2nd April 2015 when the attack was actually in progress. From the call data records, it is evident that for those two days, the appellants did not call or receive calls from other people other than the user of mobile number 0725933614 and a slain terrorist. The dead terrorists also communicated mainly between themselves and the person using number 072593xxxx .

63. The question that arises from the above evidence is why the appellants were for those two critical days only communicating with a person who was apparently the master mind behind the attack and who played a key role in coordinating its execution if they were not involved in the planning of the attack. Secondly, why did the 1st appellant call one of the felled terrorists when the attack was in progress? It is worth noting that the 1st appellant did not deny having made this call nor did he explain the purpose of the call since he did not say anything in his defence. In the same vein, he did not deny having received a call from number 072593xxxx on the day preceding the attack.

64. With regard to the 2nd appellant, although he denied having received a call on 1st April 2015 from number 07259xxxx , he admitted that phone number 07164xxxx belonged to him and that he is the one who had been using it. This admission lends credence to the evidence of PW16 and PW22.

65. Whereas I agree with the submission by Learned Counsel Mr. Mureithi that mobile number 07215xxxx was registered in the name of Mohammed Derow Abdulahi which is not the name of the 1st appellant, there is evidence from PW16 that the physical handset containing the said number and a sim card holder for the number were recovered from the 1st appellant together with other items which included his ID Card No. 2675xxxx .

66. The learned trial magistrate accepted this evidence and found that although the 1st appellant was not registered as owner of the phone, he is the one who had been using it at the material time. I find no reason to fault this finding by the trial court considering that PW16 was an independent witness, a police officer who from the evidence on record did not know any of the appellants previously and did not therefore have any reason to give false or fabricated evidence against them.

67. In my view, the reason behind the communication between the appellants and the person who was using number 0725933614 and between the 1st[st] appellant and one of the dead terrorists was a matter which was within their special knowledge and under Section 111(1) of the *Evidence Act*, the burden of proof regarding the purpose for the said communication shifted from the prosecution to the appellants which burden they failed to discharge. The appellants did not claim that the communication was made in error or that it was purely innocent.

68. From my own independent appraisal of the evidence on record in its entirety, I have come to the conclusion that the telephone communication between the appellants; the user of mobile phone No. 072593xxxx which communicated with all the slain terrorists and other mobile numbers registered in Somalia and the communication between the 1st appellant and one of the dead terrorists constituted evidence from which it could be reasonably inferred that the appellants had prior knowledge of the impending attack and were communicating with inter alia, the dead terrorists to ensure that their common intention of executing the attack was actualized. I am thus satisfied that the said telephone communication amounted to credible circumstantial evidence which unerringly linked the appellants to the commission of the offence charged in Count I.

69. I have made the above finding well aware that, as submitted by Mr. Mureithi, there was a contradiction between the evidence adduced by PW9 and PW22 regarding recovery of the cellphone containing number 072593xxxx which was apparently instrumental in the planning and coordination of the attack. Whereas PW9 testified that no mobile phone was recovered from the body marked B125, PW22

maintained that mobile number 072593xxxx was recovered from the said body. It was submitted that this contradiction demonstrated that the evidence concerning the telephone communication which formed the backbone of the prosecution case was speculative; fabricated and incredible.

70. On my part, I take the view that the contradiction though relevant was not material and did not adversely affect the prosecution case. What was material and fundamental to the prosecution case was not whether or not the phone was recovered from the body marked B125 but the fact that one of the dead bodies (B118) was identified to belong to one Khalid Isaac in whose name all the numbers used by the terrorists had been registered including the focal number 072593xxxx which was used to call both appellants a day before the attack.

71. Regarding Count 2 to Count 150, I have already made a finding that a terrorist act was committed at the college on the morning of 2nd April, 2015 which led to the death of a total of 149 persons particularized in each of the 149 counts and left scores of other people injured. PW12 produced in court post mortem reports which proved the death of the victims who did not survive the attack.

72. Although there was no direct evidence to prove that the appellants physically participated in the commission of the offence, I have already found that the telephone communication between them and the slain terrorists left no room for doubt that the appellants were involved in the planning and execution of the terrorist act. This means that in one way or the other, the appellants aided and abetted commission of the offence.

73. Under Section 20 of the Penal Code, persons who aid and abet the commission of offences are supposed to be treated as principal offenders. Having found that the appellants aided and abetted the planning and execution of the attack, I am unable to fault the trial magistrate's finding that the prosecution proved its case against the appellants in Count 2 to Count 150 beyond any reasonable doubt. It is consequently my finding that the appellants were properly convicted in those counts.

74. With respect to Count 151 and 152, the appellants were separately charged with the offence of being a member of a terrorist group contrary to Section 24 of POTA which provides that:

> " A person who is a member of, or professes to be a member of a terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years."

Section 2 of the POTA defines a terrorist group as:

i. "An entity that has one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act; or

ii. a specified entity."

75. Before proceeding any further, I wish to state at this juncture that in this case, it was not disputed that a group known as the Al Shabaab existed and that it was a terrorist organization. This is in fact a matter of common notoriety which would be deserving of recognition by way of judicial notice had the group not been listed in the organizations which were declared to be organized criminal groups for purposes of POTA.

See: Gazette Notices No.12585 of 2010 and No.2326 of 4th April 2015.

76. A look at the charge sheet shows that the particulars supporting the offence preferred against the appellants in Count 151 and Count 152 allege that on or before 30th May 2015 at ATPU Headquarters within Nairobi County, each of the appellants was found to be a member of a terrorist group, namely Al Shabaab in contravention of POTA.

77. From the record, the only evidence adduced by the prosecution in support of the charges was the claim by PW7 that during the attack, one of the terrorists proclaimed that they were members of the Al Shabaab and that the attack's objective was to compel the Government of Kenya to remove its defence forces from Somalia.

PW7 did not however say that he had identified the terrorist who made this declaration to be either the 1st or 2nd appellant. In any event, there is evidence that the two appellants were not physically present at the scene of the attack.

78. I fully adopt the sentiments expressed by Ngenye J (as she then was) in Mohamed Haro Kare V Republic, [2016] eKLR when she delivered 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....."

79. In the instant case, the prosecution did not adduce any evidence to show or prove how the appellants were "found" to be members of Al Shaabab while at the ATPU offices in Nairobi. There was no evidence to prove that they made a confession professing to be members of the outlawed group or that they were found with weapons or articles associated with the group. In fact, the prosecution did not make any effort to establish a nexus between the appellants and the Al Shabaab group.

80. The appellants denied that they were members of the proscribed group. The duty of proving the charges as preferred against them lay squarely on the shoulders of the prosecution. The appellants did not have any obligation to prove their innocence. My evaluation of the evidence on record reveals that although there was strong suspicion that the appellants could have been members of the Al Shabaab group given their involvement in the terror attack, suspicion however strong cannot take the place of evidence. In the premises, it is my finding that the learned trial magistrate erred in finding that the prosecution had proved the charges in Count 151 and Count 152 against the appellants beyond reasonable doubt. That finding was not based on any evidence.

81. For the above reasons, I am convinced that the appellants were wrongly convicted in Counts 151 and 152. Their conviction in each of the two counts is consequently quashed and resultant sentences set aside.

82. With respect to the appeal against sentence, the appellants have complained that the sentences imposed by the trial court were harsh and manifestly excessive. It is settled law that sentencing is a matter that rests with the discretion of the trial court depending on the facts and circumstances of each case. However, an appellate court can and should interfere with a sentence meted out by the trial court if it was satisfied that in passing sentence, the court applied wrong legal principles or considered irrelevant factors or failed to consider relevant ones. An appellate court is also mandated to interfere with a sentence if in its opinion, the sentence was manifestly harsh or excessive.

See: Robert Mutungi Muumbi V Republic, [2015] eKLR; Bernard Kimani Gacheru V Republic, [2002] eKLR.

83. For the offence of conspiracy to commit a terrorist act, the law at Section 23 of the POTA prescribes a maximum sentence of 20 years imprisonment. In respect of the offence of committing a terrorist's act, Section 4 of POTA provides for two different sentences whose application depends on the consequences of commission of the offence.

Under Section 4 (1), a person who carries out a terrorist's act which does not lead to loss of human life is liable on conviction to imprisonment for a term not exceeding 30 years. But where commission of the offence causes loss of human life, Section 4 (2) prescribes a maximum sentence of life imprisonment.

84. In this case, the record shows that in Count 1, the appellants were sentenced to serve 10½ years imprisonment. In Count 2 to Count 150, the appellants were sentenced to serve 25 ½ years imprisonment in each count. The sentences in Count 1; Count 2 to 150 were ordered to run concurrently. The record shows that these sentences were passed after the learned trial magistrate took into account the period of 4 ½ years the appellants had spent in lawful custody.

85. In sentencing the appellants, the learned trial magistrate considered the nature of the offences for which they stood convicted; the circumstances in which the offences were committed and the fact that the offences led to the loss of life of many innocent Kenyan citizens. The learned trial magistrate also considered the presentence reports availed to the court and the pleas in mitigation made by Counsel on behalf of the appellants including the fact that they were youthful first offenders.

86. My perusal of the trial courts sentencing notes does not show that the learned trial magistrate applied any wrong legal principle or took into account irrelevant factors in sentencing the appellants or failed to consider any relevant material.

87. On my part, I find that the appellants were convicted of monstrous terrorism related offences which led to the loss of lives of many innocent Kenyans which included those of vulnerable and defenceless students who had nothing to do with the Government's decision to have military presence in Somalia. Their actions and those of their accomplices were cowardly premeditated acts which no doubt caused much suffering to families of the deceased victims and will continue to traumatize the victims who were lucky to survive the attack for the rest of their lives.

88. It must be remembered that terrorism is a grave and heinous transnational crime which not only has devastating effects on its victims but also poses a serious threat to both national and global peace and security.

89. In view of the foregoing and taking into account the punishment prescribed by the law for the offences subject of the appellants' convictions, contrary to the appellants' submissions that the sentences

imposed on them were harsh and excessive, it is my opinion that the sentences were in fact lenient. But since the sentences were within the law and there is no evidence that the learned trial magistrate erred in any way when passing the impugned sentences, I find no basis upon which I can disturb the same. The sentences imposed on each appellant in Count 1; Count 2 to Count 150 are accordingly upheld.

90. In the end, the consolidated appeals partially succeed to the extent that the conviction of each appellant in Count 151 and Count 152 is quashed and sentences imposed in each count set aside. The appeal against the appellants' convictions and sentence in Count 1; Count 2 to Count 150 is hereby dismissed for lack of merit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH 2023.

C. W. GITHUA

JUDGE

In the presence of:

Both appellants

Ms Gikonyo holding brief for Mr. Mbugua Mureithi for the appellants

Mr. Ondimu for the respondent

Ms Karwitha: Court Assistant