



REPUBLIC OF KENYA



KENYA LAW
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**Said & another v Republic (Criminal Appeal 45 of 2019)
[2023] KEHC 22273 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 22273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL 45 OF 2019**

**A. ONG'INJO, J
JULY 31, 2023**

BETWEEN

MOHAMED SUDI SAID 1ST APPELLANT

**MOHAMED SUDI SAID ALIAS MOHAMED SUDI MOHAMED
ABU 2ND APPELLANT**

AND

REPUBLIC RESPONDENT

*(Being an appeal from the decision of the Hon. F. Kyambia (SPM)
on 22nd March 2019 in Mombasa Criminal Case No. 1116 of 2014)*

JUDGMENT

Background

1. The Appellant Mohamed Sudi Said was charged with the offence of being in possession of unauthorised explosive contrary to Section 29 of the Explosive Act Cap 115 Laws of Kenya in Count I.
2. The particulars are that the appellant Mohamed Sudi Said alias Mohamed Hussein alias Abu Osama on the 14th June 2014 at about 11.00 am along Likoni/Ukunda highway between Ferry area Kona Police in Likoni District within the republic of Kenya was found in possession of an explosive namely one hand grenade with identification number 822518-89650.
3. In count II the Appellant was charged with being in possession of unauthorized explosives contrary to Section 7(1) of the *Explosives Act*.
4. The particulars are that Mohamed Sudi Said alias Mohamed Hussein alias Abu Osama on the 14th June 2014 at about 11.00 am along Likoni/Ukunda highway between Ferry area Kona Police in Likoni District within the republic of Kenya was found in possession of an explosive to wit 14 detonating wires without approval by an inspector and in disregard of the rules under the act.



5. In count III the Appellant was charged with the offence of being in possession of firearm contrary to Section 89(1) of the Penal Code.
6. Particulars are that Mohamed Sudi Said alias Mohamed Hussein alias Abu Osama on the 14th June 2014 at about 11.00 am along Likoni/Ukunda highway between Ferry area Kona Police in Likoni District within the republic of Kenya was found in possession of a firearm namely a Ceska pistol without a firearm certificate in circumstances which raised a reasonable presumption that the said firearm had recently been used in a manner prejudicial to public order.
7. In count IV the Appellant was charged with the offence of being in possession of ammunition contrary to Section 89(1) of the Penal Code.
8. Particulars are that Mohamed Sudi Said alias Mohamed Hussein alias Abu Osama on the 14th June 2014 at about 11.00 am along Likoni/Ukunda highway between Ferry area Kona Police in Likoni District within the republic of Kenya was found in possession of four ammunitions without a firearm certificate in circumstances which raised a reasonable presumption that the said ammunition had recently been use in a manner prejudicial to public order.
9. In count V the Appellant was charged with the offence of being in possession of an article connected with an offence contrary to Section 30 of the *Prevention of Terrorism Act* No. 30 of 2012.
10. Particulars are that Mohamed Sudi Said alias Mohamed Hussein alias Abu Osama on the 14th June 2014 at about 11.00 am along Likoni/Ukunda highway between Ferry area Kona Police in Likoni District within the republic of Kenya was found in possession of articles to wit one hundred and eight (108) pieces of DVD/CD discs for the purpose of using them to instigate the commission of a terrorism act.
11. In count VI the Appellant was charged with the offence of engaging in organized criminal activity contrary to Section 3(a) as read with Section 4 of the Prevention of Organised Crime Act Cap 59 Laws of Kenya.
12. Particulars are that Mohamed Sudi Said alias Mohamed Hussein alias Abu Osama on the 14th June 2014 at about 11.00 am along Likoni/Ukunda highway between Ferry area Kona Police in Likoni District within the republic of Kenya was found engaging in criminal activity with Mombasa Republican Council (MRC).
13. Upon analysis of the evidence of 9 prosecution witnesses and the sworn statement of the Appellant in his defence, the trial magistrate convicted the Appellant for the offences in Count I, II, III and IV and acquitted of the offences in Count V and VI and sentenced to serve 5, 1,7, and 7 years for each of the counts respectively to run concurrently. The sentences were however kept in abeyance because the Appellant was serving a death sentence in a murder trial in the High Court. The appellant was acquitted in Criminal Appeal No. 33 of 2021 where the Court of Appeal quashed the conviction on the charge of murder and set aside the death sentence on 21.1.2022.
14. The Appellant was aggrieved by the entire judgment and sentence of the trial court and he filed the appeal which had the following grounds: -
 1. The learned magistrate erred in both law and fact by convicting the appellant on inconsistent and uncorroborated evidence which did not dislodge the defence of alibi tendered by the appellant.
 2. The learned magistrate erred in both law and fact by convicting the appellant after the prosecution failed to prove their case beyond reasonable doubt and



more so in proving that the appellant was found to be in possession of the exhibit in question.

3. The learned magistrate erred in both law and fact by convicting the Appellant despite the existence of screaming contradictions which were major and fatal to the prosecution's case.
 4. The learned magistrate erred in both law and fact by convicting the appellant without considering the strong and corroborated defence put forth by the Appellant hence arriving at a wrong conclusion in law.
 5. The learned magistrate erred in both law and fact by shifting the burden of proof on the Appellant to prove his defence of alibi hence the entire decision amounts to miscarriage of justice.
 6. The learned magistrate erred in both law and fact by failing to make a finding that material witnesses and evidence was not availed at the detriment of the prosecution's case leading to an inference of not guilty.
 7. The learned magistrate erred in both law and fact by failing to appreciate the role of the prosecution in criminal matters which is to present all the available evidence for the court to make a fair and just conclusion but not to tamper with evidence.
 8. The learned magistrate erred in both law and fact by sentencing the appellant excessively and in violation of the relevant laws/policy guidelines and failure to consider the period the appellant has been in custody and that he is a first offender.
15. The Appellant prayed that his appeal be allowed and the decision of the subordinate court be reversed and that he should be acquitted forthwith.
16. This appeal was canvassed by way of written submissions.

Prosecution Case

17. PW1, Evans Osio, an expert in bomb disposal testified that on 16th June 2014, he received a Chinese hand grenade type A25 as well as 4 pieces of detonators and on 16th July 2014, he received a substance in a black paper bag. He examined all the exhibits and found the substance in the black paper bag was ammonium nitrate which can be used as explosive. He prepared a report on 23rd June 2014 for the first two exhibits and on 5th August 2014 for the substance in the black paper bag. He said that the grenade was not a dummy, he said he did not know where the exhibits were recovered from and he was not aware if finger prints were lifted from the exhibits. The witness also said he could not tell if the exhibits were planted on the appellant.
18. PW2, Philip Kiviyusu, manager with Lloyd Masika Agents testified that he was managing housing for his employer in town and in Likoni near Shell Petrol. PW2 testified that the Appellant was a tenant at the houses in Likoni and that he was known in their records as Mohamed Hussein. He produced a file to prove that the appellant was their tenant. He also produced a tenancy agreement signed by the appellant. He said that there were six units and only 4 were occupied. He said that he was not present when the Appellant was arrested but he said that his wife was beaten until she fainted. PW2 said that they never chased the wife of the appellant out of the house after he had been arrested.



19. PW3, SP Lawrence Nthiwa testified that on 19th June 2014, he received a Ceska Pistol and 4 rounds of ammunition from PC Steven from Likoni CID. He was required to examine the exhibits to ascertain the type of pistol or firearm, the country of origin and the type of ammunition used in the firearm. He was also required to ascertain the type of ammunition, their country of origin, if they were alive and the type of firearm that can be used to fire them. He was further required to ascertain if the firearm had been used earlier to commit any crimes in the country.
20. PW3 established that the firearm was Model CZ85B Ceska pistol which is chambered for ammunition in caliber 9 by 19 mm similar to the exhibits B (1) - (4) which had also been submitted for examination. He said that the firearm was still in good condition and could be used to fire and was able to restore the serial number on it. In regard to the ammunitions, he test-fired them and formed the opinion that they were capable of being fired and that he used the firearm to fire two rounds of ammunitions during the test firing. He produced a ballistics report to that effect. In cross examination, he said that he knew nothing about the appellant and that it was the IO who knew how the appellant was connected to the exhibits.
21. PW4, PC Geoffrey Ouma Scenes of Crime Officer based in Mombasa testified that on 14th June 2014 at 11.00 am, PC Osuri called him to attend to a scene in Likoni. That he was led to a house adjacent to the petrol station where the owner of the house had been arrested and the police wanted to start a search. That the Appellant was instructed to enter the house first and PW4 took 27 photographs which he produced as Exh-12 and the Report Exh-16. He said the Appellant was handicapped and carrying a blue paper bag and he did not know the contents of the paper bag. He said he did not see any pistol recovered from the Appellant, he said it is the Appellant who opened the door and he was walking behind the Appellant who was walking with some officers and that he was not sure whether the door was open or locked by the time they were there. PW4 also said he was only called after the recovery and he was not that there was a first search in which nothing was recovered. He said that there is no photograph of any DVD or CD player but there was photograph No. 7 which showed that there was a TV on the table but it was not on. He said that he did not know if the writing captured in photograph No. 7 was in Arabic or any other language and he did not take a photograph of the officers exiting the Appellant's house. Neither did he see the inventory.
22. PW5, Cpl Joseph Mucheru testified that on 11th June 2014, ACP Nyale Munga instructed him to team up with Sgt. Chris Mubunge, PC Rambala and PC Salim and proceed to Mombasa where they were to join DCI investigators who had been tasked to track the killers of Sheikh Idris who was killed on 10th June 2014 within Likoni area. That he joined Chief Inspector Gitari, Chief Inspector Njoka, Chief Inspector Siele DCIO Likoni, PC Munoko, PC Osule, PC Ouma and PC Sachita among others. That CIPs Gitari and Njoka briefed them that there was information from an informer that the firearm that had been used to kill Sheikh Idris would be transported by a suspect from Kona Police to Likoni Ferry Area on 14th June at around 9.00 am. He said that they had been given a description of the suspect and they laid an ambush by the roadside in Likoni. That they were told that the suspect, a short brown man in a goatee wearing a Swahili cap would go riding a bicycle.
23. That at 11.00 am, a cyclist by the features given by CIP Gitari went riding towards the ferry and he was stopped by PC Osule and PC Munoko. PW4 identified the bicycle that the suspect was riding in court. That on conducting a search PC Munoko unwrapped a black paper bag from the frame of the bicycle and retrieved a black Ceska pistol, a magazine and four rounds of ammunition which serial number had been erased. That 50 pieces of CDs and DVDs were recovered together with a bunch of keys and an inventory prepared to that effect. 2 phones were also recovered make G-tide and a Tecno phone with Safaricom, Airtel and YU lines. An inventory for the phone and SIM cards was also made by PC Osule and signed by the Appellant and police officers.



24. That when the Appellant led them to his house, a black polythene paper bag was recovered from under his mattress and it contained a hand grenade with black and green caps which were still active and they found four detonators used as improvised explosive devices. There was also a crystal-like powder in the same bag.
25. That from the shelf in the same room, they recovered assorted CDs and DVDs. That they also recovered Mombasa Republican Council manifesto of 2010 and an album with 3 photographs of the Appellant, a wallet containing an identity card of the appellant and Kshs. 3400 in different denominations was also recovered. That there was also a Kasuku notebook containing names and telephone contacts Exh-29; two hand written papers with names and contacts Exh-30, video camera make Sony Exh-31, sword in a sheath Exh-32, SIM card holders from Airtel, Orange and YU Exh-33, an admission card No. SHO/491/14/R dated 3/2/2004 with a stamp and signature in the name of Said Mohamed Sudi as a member of Al-Shabaab Exh-34. PW5 said that in the second room they did not recover anything of interest and an inventory was prepared in which the Appellant denied possession of the hand grenade, 4 detonators, 1 lead wire and whitish crystalline substance weighing quarter a kilo. That the Appellant was arrested and charged with the offence of murder in the High Court and the offence of possession of firearm, ammunition and explosive materials in the magistrate's court. PW5 said PC Ouma took photographs of the scene of the items that had been recovered and that they also took photographs of the scene at the site of ambush. He said that they had nothing on them when they went to the Appellant's house.
26. In cross examination, PW5 said that the names in the admission card Exh-34 Said Mohamed Sudi was the Appellant's but the stamp on the card was not legible. He said that he was not aware the Appellant had another case, that he did not know Sheikh Idris before his death but he learnt that he was shot on 10th June 2014. He said that on arrest of the Appellant, he was in possession of the firearm, he said that they did not cross with the Appellant to Likoni on 13th June 2014 to look for another suspect. He said he did not stage manage the 14th June 2014 incident and that they did not go directly to the Appellant's house. He said they were informed the Appellant was renting out the firearm but could not tell whether the owner of the gun existed. That other suspects were arrested but he did not know what happened to them.
27. PW6, PC Peter Mwangi testified that on 13th June, CIP Gitari called him at 9.00 am and told him that he had information concerning a suspect who was being linked to the murder of Sheikh Idris from Likoni. PW6 was instructed that they were supposed to go and look for a suspect who was known by description and not by name. That he was accompanied by his colleague PC Munoko, CIP Gitari and CIP Njoka while the team from Nairobi included Sgt. Lumusi Cpl. Christopher, PC Lambala and PC driver Salim. The team from Likoni were PC Osule and PC Sachita.
28. PW6 said that they were given a description of the man as a short brown man with long beards. That they were informed the man was to hand over the firearm to his accomplices. That they met him between Kona Police and the Ferry Area at a signpost written Likoni at around 11.00 am while he was riding a bicycle. That it is PC Munoko and PC Osuri who intercepted the suspect and on conducting a search unwrapped a black polythene paper bag tied on the frame of the bicycle and recovered a pistol and some CDs. PW6 said the Ceska pistol did not have a serial number. He said the magazine and 4 rounds of ammunition were also removed from the gun and that the Appellant introduced himself as Sudi Said and did not give a satisfactory explanation as to the ownership of the Ceska pistol. He said that an inventory of the recovered items was prepared and signed but the Appellant denied knowledge of the Ceska pistol.



29. That upon arrest of the Appellant, he led them to his house behind Shell Petrol Station where PC Mucheru opened the door using the key that the Appellant had identified. That the Appellant, PC Mucheru and PW6 entered the house and he saw PC Mucheru recover a paper bag from under the mattress and from the paper bag a grenade, a red cable wire and a crystal-like substance was recovered. That from the house other 58 assorted CDs and other items were recovered and an inventory was prepared. That the Appellant denied item No. 9, 10, 11 and 12 that is the hand grenade, 4 detonators, a red cable and ¼ kg of white crystal-like substance.
30. On cross examination, PW6 said that he came into the case on 13th June 2014. He said he met the officers from Nairobi on 12th June 2014 at the CID Headquarters in Mombasa. That the scene was visited on 13th June 2014 but the same was not booked in the OB. He said that CIP Gitari got the information that the Appellant was linked to the killing of Sheikh Idris in Likoni. He said they were not given the name of the Appellant and that he was not aware he had another case in court. He said that briefing was done on 13th June 2014. PW6 demonstrated where the paper bag with pistol was tied on the frame of the bicycle but said that the same was not captured in the photographs. He also said that the Ceska pistol that was recovered did not have a serial number. He said that the Appellant disowned the pistol and that it belonged to its owners but did not say who the owners were.
31. PW6 said that PC Osuri prepared an inventory from the first recovery in the vehicle immediately after the arrest but CIP Gitari, CIP Njoka and PC Munoko did not sign the inventory. PW6 said that he did not know why they did not sign. He also said that there is no photograph showing PC Munoko opening the Appellant's house and did not know the lady in the photograph. He said that the scenes of crime officer arrived at the scene when already him and PC Munoko together with the Appellant were already in the house. He said that the grenade was recovered from the second bedroom where there was a double decker. He said that he did not sign the second inventory and neither did CIP Gitari. He also said he did not specify in which of the two rooms items were recovered and did not see where the ID was recovered as he was guarding the prisoner. He said that he did not see any money recovered and did not know who arrested the Appellant on 13th June 2014. He also said that he did not take the Appellant's avocado and beetroot and did not see CIP Gitari slap a lady.
32. PW7, PC Stephen Sachita of DCI Likoni testified that he Appellant was arrested on 14th June 2014 and a Ceska pistol, grenade, 4 wires, ammunition were forwarded for analysis by ballistic experts and bomb experts, and 109 CDs forwarded to cybercrime experts for analysis and reports. PW7 said he did not participate in the arrest of the Appellant. He only participated in forwarding the items to Nairobi and that fingerprints were not taken from the items that were recovered. He said that the court ordered for call records from service providers and that he got the call records from Safaricom on 21st November 2016. He said that he was not present when the CDs were recovered from the Appellant.
33. PW8, CIP Joshua Mutua, Forensic Examination Officer, testified that on 19th June 2014, he received DVDs/CDs from PC Stephen Sachita of CID Likoni to ascertain the reference of the CDs and make a report of their content. He analysed CD 1-10 and found they were calling upon Muslims to take arms and kill non-Muslims. He said that only 15 CDs were relevant to establish whether there were communication or acts leading to use of firearm. He said that CDs A1-10 were showing people being killed using guns. A19-50, he did not find any information of interest. He prepared a report dated 18th August 2014 and produced it as PExh 40. He also produced a report (PExh 41) in respect to B1-B58 and said he found nothing in respect to the matter in question. The videos were played in court.
34. In cross examination by the defence council Mr. Chacha, PW8 said he did not establish between A1-50 which among them were DVDs and which were CDs. He said the person who was speaking in the DVDs was speaking to Muslims to take arms and commit acts of terrorism. He said he could not tell



- who was giving instruction, when the DVDs were created and he did not create a transcript out the information he got from the DVDs or CDs. He said the B category CDs were recovered from the accused person's house. He said he was not told whether the accused was found watching the CD. He said some of the CDs were faulty and he was not able to read them.
35. PW9, No. 80936 P.C. Osuri Otieno, the Investigating Officer said that on 10.6.2014 at 7.10 am, he received a call from the DCIO Coast Province informing him that Sheikh Mohamed Idris had been shot dead at around 5.00 am in Likoni Manyatta village while heading to the mosque and was rushed to Pandya Memorial Hospital. PW9 testified that he went and met his seniors at Pandya Memorial Hospital where he was instructed to investigate the case. That when a postmortem was conducted, a bullet was found lodged in the Sheikh's body. That on 14.6.2014, he received information from the in charge Flying Squad, CIP Gitari together with the Criminal Intelligence Unit officer that there was a suspect who had been involved in the death of Sheikh Idris. That PW9 was given the description of the suspect as a short brown man with a beard and that the man had been charged in Mombasa Criminal Case No. 148 of 2011. PW3 stated that he went with officers from flying squad to Likoni and they were informed that the suspect was handing a pistol to his accomplices and that the pistol was suspected to have been used in the murder.
36. PW9 stated that they divided themselves into groups and that PC Munoko saw the suspect, stopped him and approached him while PW9 gave him cover. That the bicycle he was riding was in court (Exh-2) and that PC Munoko searched his pockets and recovered keys. That a pistol was recovered from a paper bag which was tied on the bicycle. That they prepared an inventory of the recovered items which was signed by the suspect and other officers present. That the items recovered include a Ceska pistol Exh-8, 4 rounds of ammunition Exh-9, 50 CDs Exh-15, two mobile phones (make G-tide (Exh-17) and Tecno (Exh-18)), bicycle and umbrella, and a bunch of keys (Exh-16). That the first photo showed where the suspect was arrested.
37. PW9 testified that they then asked the suspect to lead them to his house and that they entered the house with the accused. That PC Mucheru did the search, PC Mwangi guarded the suspect while PW9 took possession of the Exhibits. That PW9 called PC Ouma, the Scenes of Crime officer who took photographs of the items recovered. That they recovered some items and prepared an inventory (Exh-35) and that the items recovered included a padlock (Exh-36), MRC manifesto booklet (Exh-28), sword with sketch (Exh-32), 58 CDs and DVDs (Exh-26), Camera make Sony (Exh-31), a photo album, copy of ID in the name of Mohamed Sudi Said (Exh34), spring file with receipts for rent payment (Exh-5), one hand grenade (Exh-21), 4 detonators (Exh-22), one red wire (Exh-23), whitish crystalline substance (Exh-24), one Orange SIM card holder (Exh-33), two YU SIM card holders, modem pocket (box), two hand-written papers, one kasuku loose leaf, box card bearing admission reference No. SHO/494/14R (Exh-34), and cash Kshs. 3200 (Exh-27). That the officers and the suspect signed the inventory but the suspect remarked that "Nakubali vitu vyote ila namba 9, 10, 11, na 12" That they had the scene of crime officer who took photos of the items recovered.
38. PW9 informed court that he prepared an exhibit memo and forwarded the pistol to the ballistic expert for analysis and the expert concluded that the pistol was serviceable firearm. That the expert fired two rounds and found that the pistol was capable of firing. That the CDs/DVDs recovered were forwarded to the cyber-crime officers and that the CDs/DVDs had different messages. That PW9 prepared an exhibit memo and forwarded the hand grenade, 4 detonators and red cables for analysis by bomb experts who concluded that the hand grenade was capable of exploding and causing harm, the detonators were highly explosive and dangerous, and the red wire cable was a low explosive which could cause death. That he also forwarded the white crystalline substance to the Government Chemist Mombasa for analysis where it was concluded that the crystalline substance was ammonium used in



making explosives as it is easily acquired. The bomb expert report was produced as Exh-42 while the ballistic expert report was produced as Exh-43. That PW9 contacted the Deputy Registrar of Societies, Joseph Onyango, concerning the MRC and that PW9 was informed that the MRC was not registered society per the letter dated 16.5.2014.

39. That they concluded investigations and established that the pistol had been used in Killing Sheikh Idris and that according to the ballistic expert report, the ammunition found at the scene of murder of Sheikh Idris had been fired from the pistol. That PW6 interrogated the accused and recorded his statement.
40. On cross examination, PW9 said that Sheikh Idris was alone and that he was not certain whether there were any eye witnesses who saw the person who killed the deceased. That at 5.00 am, PW9 was in his house in Mbaraki and that when he went to Pandya Memorial Hospital, he was given a bullet head and spent cartridge by the deceased's son who had also received the items from someone he could not recall at Likoni (PW9 was shown the witness statement and he confirmed that it stated that the witness was given the bullet head and cartridge at the hospital). That the informer was not an NIS officer, that the informer was not present when Idris was shot and that the informer only said he knew the deceased. That PW9 is not aware that on 10.6.2014 some officers had visited the scene and that the other spent cartridges were recovered on 11.6.2014. That the pistol recovered was not subjected to fingerprints lifting and that they did not forward the mobile phones/SIM cards for forensic analysis. That they did not have a photo of the door closed to show that it was door No. 6 and that they did not recover anything used in making explosives.

Defence Case

41. The Accused, Mohamed Sudi Said, gave sworn statement that he was a resident of Likoni Kona Police where his first wife and six children lived, and also a resident of Majengo Mapya where his second wife and one child lived for about 3 months. The appellant said that he was arrested on 13th June 2014 and not on 14th June 2014. He said he had left his home in Kona Polisi and left his workshop then he proceeded to Majengo Mapya where his wife was sick and his 2nd wife told him he was taking the child to Pandya Hospital. That while he was at the workshop, his 2nd wife told him to take to her an umbrella. That he tied the umbrella to the bicycle and crossed to the island but since the rains had subsided, he called and told his wife that they would meet at home.
42. The appellant said that it was during Ramadhan and that the wife was supposed to prepare food for breaking the fast. That before he went home, he met one Ali who was his debtor at Musa Mosque in Majengo and that Ali told him that he was going to pay him the following Monday. That Ali gave him CDs to hold as security for his money. That the wife called him and told him to buy for her Bistro fruits which he did and which he put them in a paper bag and put them on the bicycle carrier. That he also put CDs on the bicycle. The appellant said that as he was riding his bicycle approaching Boss Freighter, a vehicle came from behind and the occupants of the vehicle told him to stop. That he stopped and some people alighted from the vehicle and arrested him. That he raised an alarm saying "Thieves! Thieves!" and members of the public came and asked what they were doing to him and the people introduced themselves as police officers and removed their gun. That as people were running away, they took his bicycle and put it in the vehicle and also bundled him in the vehicle.
43. That the police officers drove and packed at Boss Freighters where they started making calls. He said those who arrested him included PW6, PC Peter Mwangi. He said there were two inspectors who did not testify. That they drove towards Nakumatt to Ferry using the wrong side of the road and he was driven to Likoni Police Station. That at the police station, he gave a police officer Kshs. 200 to buy him milk and bread which he did and afterwards he was put in another vehicle. He said his mobile phones



- Techno and G-tide were taken and he was not allowed to receive incoming calls. He said the police officers who had gone to Mtongwe came back at mid-night and said they had missed him. That in 3 vehicles, they crossed the ferry again to the Island and they drove towards Florida and to the police station near State House where he was booked in the cells.
44. The following morning, the officers who had arrested him came for him, placed a head scarf over his head and took him to a vehicle where he was guarded by one officer while the others went to take tea. That he was driven around town with his head covered and that they drove towards Makupa and to the Airport. That at the airport, he heard the officers saying they will be there in 45 minutes. That he was driven to Provincial Police Headquarters where he was bundled again into the vehicle that was used to arrest him the previous day and they crossed the ferry and went to Likoni Police Station. He said that up to then, he had not been told what his offence was.
45. The appellant testified that the officers went to the office and returned with a bag and told him to take them to his house. He said that they passed his house and later took him to his house. He said that there are six rooms in his house which they have rented and that they found his wife in the house who was washing clothes. He was able to identify his house in PExh- 12 photograph of his house, two police officers, his wife and the clothes that his wife was washing. The appellant said his wife was at home and his door was open. It is therefore not true that he is the one who opened the door to police officers. He said his house was searched, the children's room was also searched and only an identity card was recovered. That his wife saw an officer carrying two small black bags and going back to the house and when she questioned, the officer by the name Gitari stopped her. That he was again taken back to the room and when the mattress was lifted, a black bag was found and they started taking photographs. That he was shown a grenade and the police officers asked if he wanted to kill them. He said the items were placed on the ground and photographed.
46. The appellant said there was no pistol or rounds of ammunition found with him and that PW4 said he did not see a pistol and a bicycle. The appellant said that when the children came back home at around noon and saw that his face was covered, they started crying. He said he was driven back to Likoni Police Station and officers started questioning him and they recorded what he was telling them. He said the Investigating Officer came and removed a pistol and removed the magazine and gave it to Osuri. That Osuri removed the rounds of ammunition. That Osuri then removed another magazine from the drawer and gave it to the investigating officer. That when they wanted him to sign the inventory, he told them to read what they had written and that he could not sign because they had added some things that were not found in his house. That he was forced to sign but before he could sign, he recorded that some of the items were not found in his house. He was then booked in the cells. He said that his wife went to the police station to ask for the money that had been recovered from his house but they could not give him the money saying the appellant was a terrorist.
47. The appellant also testified that after the search in his house, he was taken to the house of Sheikh Idris in Mombasa where he was asked to show them where he had killed Sheikh Idris and said he had not killed him. Photographs were taken at the scene and Sachita produced spent cartridges which were also photographed. The appellant also said that when Sheikh Idris was killed on 10th June 2014, he was at his second wife's home in Majengo Mapya, a few kilometres away from where Sheikh Idris was killed. The appellant emphasized he was arrested on 13th June 2014 and not on 14th June 2014. He said he requested for analysis of his phone, CCTV footage and justice Muya issued an order to that effect on 8th December 2015 and the same was not complied with. The appellant said that no witness was called to testify that he was found with a pistol or rounds of ammunition and the 50 CDs found with him belonged to Ali and said he was not a member of MRC. The appellant said 50 CDs found in his house belonging to Ali were on the bicycle. He said the firearm was planted on him by Osuri who removed it



from the drawer. He said there was also another officer with a firearm but he could not remember his name and that Sachita produced cartridges from his pocket. The appellant said that he did not know where Ali, Muthar, Hanza, and Juma were and therefore he could not call them as witnesses. He said nobody was called to witness when the police were searching his room.

48. DW2, Aisha Khalifa Wasanga, gave sworn statement that in 2014, she was staying at Likoni Kona ya Police and that on 14.6.2014, the Appellant was at her house but left in the morning after breakfast to run his errands. That the Appellant was to go back to DW2's house but failed to do so and when she called him, the calls went unanswered. DW2 stated that the Appellant used a bicycle to run his errands and that on 16.6.2014 which was a Saturday, the Appellant went to DW2's house with people unknown to her and who on entering the house went straight to the bedroom. That they did not state the reason for being in her house and when she asked and also why they had arrested her husband, she was slapped. DW2 informed court that her house has three bedrooms and that she used to clean the house and that no grenades or wires were found in the house. That the police officer had a black bag, that she did not witness the search in the house and that she did not see any inventory being recovered.
49. DW3, Asma Mohamed Ali, gave sworn testimony that in 2014, she was married to the Appellant as the second wife and that on 9.6.2014, the appellant went to her house and that in the morning of 10.6.2014, he received a call that Sheikh Idris had been killed. DW3 said she knew the sheikh because she was in the university with his daughter Mariam. That she got her number and sent her a message of condolences. That the Appellant did not go for morning prayers as he used to pray with them in the house. DW3 said she was with the Appellant on 13.6.2014 and that she was taking the child to hospital and needed an umbrella as there were signs of raining when she was crossing the ferry. That the Appellant was to take the umbrella to her but the rains subsided. That DW3 last communicated with the Appellant at 7.00 pm and the calls went unanswered afterwards and so she stopped calling and that the Appellant did not go to her house on that day. That DW3 started looking for the Appellant on 15.6.2014 and that a relative went and told her that her husband had been arrested and that she spoke to her mother-in-law on phone and later went to her co-wife's house where she was told what happened when the Appellant was arrested.

Appellant's Submissions

50. The appellant submitted that the nature of the alibi defence was that the appellant was not arrested in the morning of 14th June 2014 but in the evening of 13th June 2014. That upon his arrest on 13th June 2014, he was not in possession of any firearm/ammunitions and when he was taken to his residence in the morning of 14th June 2014, the police did not recover any explosives after the first thorough search. However, when he was taken back to the house for the second search, he found exhibits had been planted. That PW2 strongly hinted that the wife of the appellant was present during the search on 14.6.2014 which was confirmed by the Investigating Officer, PW9. That it defeats logic for the ODPP to have agreed to charge the appellant exclusively with Count I and II for possessing explosives/explosives materials while it was the wife who was in the house and in control of the house exclusively by the time the police brought the appellant to the homestead.
51. The appellant argued that the investigating officer was at pains to explain his failure to give logical reasons why the pistol and ammunition in question were never subjected to fingerprint lifting to link it to the appellant. That no efforts were made to forward the mobile phones or SIM cards confiscated from the appellant to the cybercrime unit to provide the geo location of the appellant on 13.6.2014 and 14.6.2014 and further proof that there was communication between the appellant and DW3 on 13.6.2014 and that the appellant's phone was switched off on 13.6.2014 after communicating with DW3.



52. The appellant contended that it was clear he was a marked man having been previously charged with terrorism related offences in MCCR No. 148 of 2011 – Republic v Mohamed Sudi Said where he was acquitted. That PW5, 6 and 9 confirm in their respective testimonies that they knew about the terrorism case. That it was observed by the trial court in MCCR No. 1116 of 2014 that it was aware the appellant had been convicted by the High Court for the offence of murder which was related to the exhibits in the case herein. That the trial magistrate went ahead to make a finding similar to the High Court in the offence of murder by disqualifying the alibi defence of the appellant. That the Court of Appeal came up with a contrary finding to the effect that the alibi defence of the appellant was never displaced by the prosecution. That it was made very clear by the appellant to the arresting officers that the firearm, ammunition and explosive materials were not recovered from him and the same was clearly noted on the inventories. That having been absolved by the definition of possession as provided for at Section 4 of the Penal Code and Section 2 of the *Explosives Act*, the appellant wasn't found in possession and neither did he have knowledge of their existence.

Respondent's Submissions

53. The respondent submitted that the prosecution proved its case beyond reasonable doubt in regard to all the four counts of possession as was defined under Section 4 of the Penal Code and as was held in the case of Hussein v Republic (1980) KLR 139. That the prosecution called PW5 and PW6 who were able to testify that the appellant was found with a firearm, black in colour, a ceska magazine and four rounds of ammunition which were contained in a black polythene bag and hanged on the bicycle that the appellant was riding and that the same were produced in court. That a search was conducted in the bedroom of the appellant where a black polythene bag was containing a hand grenade was found. That this evidence was corroborated by DW2 who also stated that a search was conducted in the appellant's bedroom. That the items recovered were properly documented by the inventories dated 14.6.2014 which were produced as Exh 19 and 35 and signed by the appellant. The respondent also cited the case of Maurice Okello Kaburu & Another v Republic (2022) eKLR where the honourable judge quoted with approval the case of Miller v Ministry of Pensions (1947) 2 ALL ER 372 on proof beyond reasonable doubt.
54. On the defence of alibi as presented by the appellant, the respondent argues that the same has long been established in law in the case of Erick Otieno Meda v Republic (2019) eKLR. The respondent also relied on the decisions in Victor Mwendwa Mulinge v R. (2014) eKLR, S v Malefo en andere 1998 (1) SACR 127 (W) at 158 a-e, R v Biya 1952 (4) SA 514 (A) at 521 C-D, S v Sithole 1999 (1) SACR 585 (W) at 590 g, Mhlungu v S (AR 300/13) (2014) ZAKZPHC 27, Republic v John Kimita Mwaniki (2011) eKLR. The respondent submitted that in keeping with the principles of the defence of alibi, the appellant raised his defence at an early stage and indeed it was the duty of the prosecution to displace his defence by showing that the appellant was indeed arrested on 14.6.2014.

Analysis and Determination

55. This being a first appeal, the mandate of the court is as was aptly set out in the case of Okeno v Republic [1972] EA 32 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 (Pandya v R. [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own



findings and draw its own conclusions. 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, see *Peters v Sunday Post*, [1958] E.A. 424.”

56. After considering the evidence on record in the trial court, the judgement of the trial magistrate, grounds of appeal, and submissions by the appellant and the respondent, issues for determination are as follows: -
1. Whether the appellant was convicted on inconsistent and uncorroborated evidence which did not dislodge the defence of alibi tendered by him
 2. Whether the prosecution proved their case beyond reasonable doubt
 3. Whether there were major contradictions which were fatal to the prosecution's case
 4. Whether the appellant's defence was considered
 5. Whether the prosecution failed to call material witnesses
 6. Whether the appellant's sentence was harsh and excessive and whether the pre-conviction period in remand custody was considered.
57. The issues above will be discussed concurrently as they are closely related and intertwined.
58. The appellant was allegedly arrested on 14th June 2014 on account of information from an informer that a firearm which had been used to kill Sheikh Idris on 10th June 2014 would be transported by a suspect from Kona Police to Ferry area at 9.00 am. It was the prosecution's evidence that they had the description of the suspect as a short brown man with a goatee wearing a Swahili cap who would be riding a bicycle. According to PW5, PW6, they laid an ambush and indeed arrested the said suspect. PW5, PW6, PW7 and PW9 said that they laid an ambush, intercepted a suspect and a paper bag tied on the frame of the bicycle was removed, unwrapped and a black Ceska pistol without a serial number was recovered. That PC Munoko removed the magazine plus four rounds of ammunition from the pistol and the appellant could not account for the ownership of the CDs and the pistol. Than an inventory (PEXh 19) of the items recovered by the appellant was prepared by PC Osuri. PW5 said that the appellant signed the inventory but said “Nakubali ila namba moja sitambui”. He said that the Pistol and the ammunition are the items which the appellant said he did not recognize. Another PEXh 35 is also an inventory of the items that were allegedly recovered from the appellant's house and he denied knowledge of one hand grenade, 4 detonators, one red wire and a quarter kg of whitish substance.
59. The appellant took issues with circumstances surrounding his arrest and alleged possession of a Ceska pistol and 4 rounds of ammunition. He said he was arrested on 14th June 2014 and that had his phone been analysed and CCTV footage from Boss Freight terminal and Kencont CFS on 13th June 2014 been availed as ordered by the court in High Court Criminal Case No. 24 of 2014, it would have been established that he was not found in possession of the items in exhibit 19 and 35 which were allegedly recovered on 14th June 2014.
60. DW3, the appellant's 2nd wife testified that on 13.6.2014, the appellant went to he her co-wife's house at Kona ya Police on 10.6.2014 and she was expecting him on 13.6.2014 but when she called at round 7.00 pm, there was no response from his phone and it was on 15.6.2014 that she learnt from the co-wife DW2 that the appellant had been arrested.



61. The appellant's 1st wife Aisha Khalifa testified that the appellant had slept in her house and that on Saturday, he went with some people to the home and those people went straight to the bedroom as the door was open. She said that 4 neighbour including Mama Shariff and Mama Binti were present when the police went with the appellant to her home. She said that when she asked why the police had gone to her home, she was assaulted and she fell down and she was unconscious. She said that it is not true wires and a grenade were found in her house and that it is the police who had a black bag.
62. The appellant was convicted in High Court Criminal Case No. 24 of 2014 for the offence of murder and sentenced to suffer death. In his appeal to the Court of Appeal in Criminal Appeal No. 33 of 2021, Kairu, Mbogholi-Msagha and Nyamweya, JJA. found that the prosecution had failed to challenge the alibi evidence of the appellant and his wives that he was arrested on 13.6.2014 and not on 14.6.2014. In the circumstances of the doubt that is raised as to when exactly the appellant was arrested, this court cannot find that he was properly convicted for the offences in Count I, II, III and IV in the absence of the prosecution availing evidence that he was arrested on 14.6.2014 and not on 13.6.2014 i.e. Occurrence Book, call data for the appellant's two phones and CCTV footage from Boss Freight terminal and Kencont CFS. The prosecution failed and therefore the defence of alibi remained unchallenged.
63. In conclusion, this court finds that the appeal herein has merit and the same is allowed. The conviction is quashed and sentence set aside.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 31ST DAY OF JULY 2023.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Mr. Chacha for Appellant

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

