



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 27 OF 2020**

**(CONSOLIDATED WITH CRIMINAL APPEAL NO. 26 OF 2020)**

**JOSEPH JUMA ODHIAMBO.....1<sup>ST</sup> APPELLANT**

**IDRIS OPWORA WESONGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

(Being an Appeal from the Judgement of Hon. M. Kimani, Senior Resident Magistrate,

Mandera delivered on the 4<sup>th</sup> of September 2020)

**JUDGEMENT**

1. The appellants herein were charged with three counts in Criminal Case No. 558 of 2019 in the Senior Principal Magistrates Court in Mandera as follows;

**Count I**

**Travelling to a terrorist designated country without passing through designated immigration exit point contrary to Sections 30B(1)(a) & 30B (2) (b) as read with Section 30C (1) of the Prevention of Terrorism Act 2012.**

Particulars of the Offence were that Idris Opwora Wesonga and Joseph Juma Odhiambo alias Yussuf on diverse dates within October and November 2019 at Border Point three in Mandera County of the Republic of Kenya were found to have travelled to Somalia a terrorist designated country.

**Count II**

**Failing to report departure to the Immigration Office contrary to Regulation 17 (1) (a) and Regulation 17 (4) of the Immigration Regulations, 2012 as read with Section 60 of the Kenya Citizenship and Immigration Act No. 12 of 2011**

Particulars of the Offence of the offence were that Idris Opwora Wesonga and Joseph Juma Odhiambo alias Yussuf on diverse dates within October and November 2019 at Border Point three in Mandera County of the Republic of Kenya failed to report departure to the nearest immigration officer as required by law and traveled to Somalia.

**Count III**

**Exiting Kenya through place not designated as a place of entry contrary to Section 15 (2) (a) of the Kenya Citizenship and Immigration Regulations 2012 as read with Section 60 of the Kenya Citizenship and Immigration Act. No. 12 of 2011**

Particulars of the Offence were that Idris Opwora Wesonga and Joseph Juma Odhiambo alias Yussuf on diverse dates in November 2019 at Kenya Somalia Border at Mandera East Sub County within Mandera County of the Republic of Kenya exited Kenya to Bulla Hawa Somalia through a place not designated as a place of entry.

2. The matter proceeded for full trial where the Appellants were found guilty, convicted and sentenced as follows; -

The 1<sup>st</sup> appellant was sentenced to serve **fifteen years for the 1<sup>st</sup> count, one year for the 2<sup>nd</sup> count, and one year for the 3<sup>rd</sup> count.** The sentences were to run concurrently and calculated from 9<sup>th</sup> December 2019 when the appellant took plea.

The 2<sup>nd</sup> appellant was sentenced to **10 years' imprisonment for the 1<sup>st</sup> count, one-year imprisonment on the 2<sup>nd</sup> Count, and one-year imprisonment on the 3<sup>rd</sup> count.** The sentences were to run concurrently and calculated from 9<sup>th</sup> December 2019 when the appellant took plea.

3. Being aggrieved by the judgement the appellants lodged their respective appeals which were consolidated. The grounds of appeal are as follows;

**a. The learned trial magistrate erred in both the law and fact in finding that the prosecution had proved its case beyond reasonable doubt, while to the contrary the prosecution evidence was insufficient, unsubstantiated, contradictory, and uncorroborated hence arriving at a wrong conclusion in law.**

**b. The learned trial magistrate erred in both in law and fact by shifting the burden of proof on the appellants, disregarding their defense, and preferring a harsh sentence.**

**c. The learned trial magistrate erred in both law and fact by proceeding with the trial of the case against the Appellants without carrying out an inquiry and knowing very well that they stood prejudiced for lack of legal representation and which right was never communicated to the Appellants at any time.**

**d. The sentences though legal were harsh and not informed by the prevailing circumstances.**

4. The appeal proceeded by way of written submissions as follows; -**Appellants Submissions.**

The appellants' counsel submitted that the charge sheet as drafted was defective for duplicity and lack of clarity. The same failed Section 134 and 137 of the Criminal Procedure Code. Further, the offences covered by Sections 30 (B) and (c) have nothing to do with border crossing without passing through a designated exit point. The same was also defective as it failed to cite the provisions of the Gazette Notice designating Somalia as a terrorist country. Counsel made reference the case of **Baraza Wakachula versus Republic (2016) eKLR.**

Further counsel submitted that the particulars of the offence stated that the appellants were found in Somalia in the month of October 2019 which contradicts the evidence of PW4 who averred that in the months of October to December 2019 the two were travelling to Mombasa.

5. The appellants counsel also took issue with contradiction and inconsistencies in the prosecution evidence. Firstly, as regards the alleged date of arrest 22<sup>nd</sup> November 2019 to the date the Appellants were handed over; 6<sup>th</sup> of December 2019. He also took issue with the confinement in the intervening period. He urged that if there was any handing over, which they deny, the same was not recorded and/or reflected in the Occurrence Book at the Border Point Control Police Post as is mandatory in accordance with **National Police Service Act Section 50 (1) and 59.**

Further there was contradiction as to who made the arrest between the Somali National Army and Somali Intelligence forces.

The prosecution failed to present the Occurrence Book extract of the handover and arrest and equally failed to call Major Kalla who was a crucial witness to the case or present the cell data records.

6. The appellants further submitted that PW2 was an imposter since he did not identify himself. By alleging that he only understood Somali language they posed how then did he interrogate the appellants.

7. It was also submitted that the court failed to consider the intimidation of appellants by the Police prior to arraignment and post arraignment. In this regard Counsel also cited the case of **Joseph Ndungu Kagiri v Republic (2016) eKLR.**

8. Lastly, the appellants' counsel urged the court to revise the sentence and consider that the appellants were unrepresented in the trial court and were equally not informed of their right to representation despite the severity of the offense.

#### **Respondents Submissions.**

9. The Respondent urged the Court to take judicial notice of the **Gazette Notice Number 172.**

Further it submitted that the evidence of PW1 & PW2 was corroborated by PW3 & PW4. The prosecution evidence was clear that none of the appellants passed through the immigration department thus proving **Counts II and III.**

Further the appellants were informed of the arrest, continued detention, and prosecution hence all their rights were accorded to them during their arrest, their detention, and subsequent transfer to Kenyan authorities. In this regard, it cited the case of the **United States versus Baktash Akasha et al (2018), Omar Awadh & 9 Others versus Attorney General Petition No. 55 and 56 of 2011.**

The Respondent further urged the court to take due regard to the provisions of the International Convention for the Suppression of the

Financing of **Terrorism of United Nations Security Resolution 1373 (2001) by Resolution 2178 (2014)** which called for the state parties to legislate on preparatory offenses. It was the states submission also that even without the analysis of the cell data and the Occurrence Book extracts there was considerable evidence to implicate the appellants of the offenses.

Further despite the severity of the sentence the appellants have not persuaded the court that substantial injustice occurred due to them having not been represented at trial.

### **Analysis and Determination**

10. It is the duty of this court as the first Appellate Court to examine, evaluate and consider the evidence afresh in order to arrive at an independent opinion. Bearing in mind the trial court heard the witnesses and interacted with them first hand.

In **Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal** stated on the duty of the Court on a first appeal thus

**“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.”**

11. It is the prosecution's case that the Appellants belong to a terrorist cell in Mumias, Kakamega having been radicalized at a local Mosque and were on the Anti-Terrorist Police Unit radar. The two initially travelled to Mombasa in July, 2019 with an intent of crossing to Somalia through Boni Forest but were unable to due to the anti-terror operations in that area. They later in November travelled to Nairobi and were to seek an alternative route. Garissa was not suitable to the 1<sup>st</sup> Appellant as he had in 2016 been convicted of another terror related charge. The two kept changing their telephone lines hindering monitoring of their movement. However, information about the two was shared leading to their arrest in Bulla Hawa within Somalia and their handing over to Kenya Police on the 6<sup>th</sup> of December 2019. **PW1 PC Wilson Nyaga** testified that on the said day they received a call from a KDF Liason officer that two male adults were arrested at Bulla Hawa. The two were Kenyans with national identity cards and they were to be handed over to Kenyan authorities to establish why they traveled to Somalia. The two had been arrested by Somalia National Army in Somalia.

They took the suspects and booked them at Mandera Police Station. On interrogation, they established that the suspects traveled to Somalia claiming they were looking for work at Bulla Hawa. They were arrested when about to board a motorcycle to Baidoa and could not explain where they were going.

They received the following items that had been recovered from the two; 2 Kenyan National identity cards; – ID Serial number 216574267 issued in mumias on 21/8/2003 for Idris Opolla Wesonga, 3<sup>rd</sup> generational ID Bearing the name Joseph Ouma Odipo ID Number 30578111 issued in Matungu, E.A. Passport bearing the name of Idris Opolla Wesonga Passport Number AK0193539. The passports did not bear any entry/exit stamp of any country and 2<sup>nd</sup> passport for Joseph Juma Odhiambo passport Number AK0057681 did not also bear any exit or entry stamp of any country.

12. **PW2 Ali Hassan Der** in charge of Intelligence in Gedo Area in Somalia testified that he got information from Kenyan forces that some people had crossed from Kenya to Somalia and on 22<sup>nd</sup> November 2019 they arrested the appellants along the Bulla Hawa - Baidoa road at a place called Luq 10-15 km from the Kenyan border.

On arrest, the appellants claimed they were going to search for work in Baidoa as *fundis* but they did not have any papers.

The route in question that the Appellants used is normally used by Alshabaab. Between Baidoa and Bulla Hawa there are many Al-Shabaab training camps. Further he stated, their investigations revealed that the appellants were going to join Alshabaab and claimed to have been recruited through one Abdi Rashid.

He confirmed further that upon arresting the appellants they had East African passports, Identity cards, and a driving license. He recorded their statements and handed them to Kenyan officials on 6<sup>th</sup> December 2019.

13. **PW3 C.I. Samson Mwaniki** attached to Madera East DCI testified that together with Mr. Kalla attached to KDF and the OCPD Mandera East they received the appellants from Somali Security officers stationed at Bulla Hawa. They interrogated the appellants on what they had gone to do in Somalia, and one of them replied that, they were going to Baidoa. On receiving the two, they took them to the police station and called the Anti-Terror Police Unit.

14. **PW4 Cpl Elias Korir** attached to Mandera Anti-Terror Police Unit testified that in early 2019 they received reports about emerging terror cells in Mumias Sub County and that a number of mosques were engaged in extreme ideologies and youth radicalization. The two suspects were alleged to have been recruited in a mosque. The Unit was able to monitor the movements of the two. In early July 2019, the two traveled from Mumias to Mombasa with the intent to cross to Somalia to join Alshabaab. However, the operation undergoing in Boni forest could not allow them to cross to Somalia from that end. They planned an alternative route and in November 2019, the 2 suspects were traced to Nairobi after coming from Mombasa.

The two had planned to cross to Somalia using Mandera route. They could not use the Garissa route as 2<sup>nd</sup> accused had a previous conviction

in Garissa and feared he would be recognized by security forces in Garissa. The two kept changing their mobile phone lines making it hard to be traced and arrested, that in checking their movements they had to liaise with security forces in Somalia through KDF liaison officer.

The two were arrested inside Somalia heading to Baidoa and were handed over to Kenyan authorities on 6<sup>th</sup> December 2019. He produced as exhibits, Passports, Identity cards and Driving license of the Appellants.

He further informed the court that the 1<sup>st</sup> appellant was arrested and charged in Garissa for the offence of attempted departure to Somalia and imprisoned for 6 months in PCR/249/15.

15. In their defence the Appellants gave unsworn testimonies as follows; **DW1 the 2<sup>nd</sup> Appellant herein** testified that on 1<sup>st</sup> December 2019 he was at Mwalimu Lodge when 5 people came for him, asked him for his Identity card, and interrogated him. They then put him in a car and tortured him. They Stopped somewhere where they put him in isolation where he was further interrogated and tortured.

On 2<sup>nd</sup> December 2019 the police came with a pipe and bit him in the genitals, 3<sup>rd</sup> December 2019 he was also tortured, & interrogated. He was blindfolded to the police station where he was further interrogated by the DCI Office. Thereafter relocated to ATPU where they demanded money from him, took his fingerprints on 8<sup>th</sup> July, 2020 and arraigned him in court on 9<sup>th</sup> December 2019. He had been framed as there is no evidence in form of video or documents placed before the court to show that he was found in Somalia. Indeed, the Somali Police did not identify himself in court.

16. **DW2 the 1<sup>st</sup> Appellant** herein testified that on 27<sup>th</sup> November 2019 he was in Mandera traveling to Kakamega when he was accosted by 3 people at the bus park. They blindfolded him and took him away, confiscating his documents i.e., passport and Identity card. He was tortured and coerced to admit to the charges. They were held at the Border post though not recorded. His passport does not bear any stamp to suggest that he was in Somalia.

17. Section 30B(1)(a) &(b), 30B(2)(a) & (b) and 30C of the Prevention of Terrorism Act, No. 15 of 2012 provide as follows; -

### **30B. Training or instruction for purposes of terrorism**

#### **(1) A person who knowingly—**

**(a) attends training or receives instructions at any place, whether in Kenya or outside Kenya; or**

**(1) receives instruction or training on the use or handling of weapons, that is wholly or partly intended for purposes connected with the commission or preparation for the commission of terrorist acts, commits an offence and is liable on conviction to imprisonment for a term not less than ten years.**

**(2) For purposes of subsection (1), it is irrelevant whether—**

**(a) the person in fact receives the training; or**

**(b) the instruction is provided for particular acts of terrorism.**

#### **30C. Presumption of travelling to a country for purposes of being trained as a terrorist**

**A person who travels to a country designated by the Cabinet Secretary to be a terrorist training country without passing through designated immigration entry or exit points shall be presumed to have travelled to that country to receive training in terrorism.**

**(2) Despite subsection (1), a person who ordinarily resides in Kenya within an area bordering a designated country is exempt from the provisions of subsection (1).**

**(3) For the purposes of this section, the Cabinet Secretary may, through regulations, designate any country to be a terrorist training country.**

18. The evidence before court by PW1-PW4 is that the Appellants crossed the Kenyan border in a place not designated as an exit point into a country designated by the Minister as a terrorist country within October and November 2019. PW4 informed the court that the two planned to travel to Somalia through Mandera in November 2019 and PW2 Confirms their arrest on the 22<sup>nd</sup> November 2022 in Bulla Hawa as the two were heading to Baidoa. The two of passports in possession of each of the accused did not have an exit or entry stamp. It is common practice and a requirement when exiting a border point of one country to another that one gets an exit stamp and similarly when entering another country one gets an entry stamp. This would not happen if one uses an illegal route.

19. Secondly attention has been drawn to the court that vide **Gazette Notice Number 172** of 9<sup>th</sup> October 2015 Somalia was Gazetted as a terrorist designated Country which the court duly takes Judicial Notice of. Indeed, by dint of Section 60 of the Evidence Act, the court is required to take Judicial notice of facts of all matters of General or Local Notoriety.

20. The Appellants' case is that they were in Mandera when they were unlawfully arrested, and charged. However, the evidence mounted by the prosecution is that they had crossed the border and there was an admission made by them that they were on their way to Baidoa for

training in an Alshabaab camp having been recruited to the said group by one Abdi Rashid. The above evidence by the prosecution was not discredited by the defence in any way. Firstly, the court did not find any reason why the enforcement agencies from Kenya & Somalia would pick on the two and frame them. Secondly, the two had travel documents which they do admit that they did not require when travelling from and to Kakamega and Mandera. Thirdly, the evidence before court was overwhelming, there were no major inconsistencies in the evidence of the prosecution so as to discredit the same. The witnesses in particular PW2 & PW4 were detailed in their information, they appeared to have been well informed, credible and trustworthy witnesses. Of course, the evidence of the prosecution witnesses was not meant to be uniform otherwise it would cast aspersions on the credibility of the same and would have appeared to have been rehearsed and cooked.

21. Having considered the particulars of the offence and the evidence the court is of the view that the three Sections of the law referred to in the charge sheet were proper, and for the offences committed by the Appellants to stand the three Sections had to be read and applied together. The two crossed into a foreign country that is designated as a terrorist Country, through a none designated immigration point, and they did not report their departure.

Evidence is that the two were on their way to Baidoa in Somalia, to an Alshabaab training camp. The law states that it matters not that they did not yet receive the training and further that if one travels to such a country without passing through a designated area then such person is presumed to have travelled to that country to receive training in terrorism. As observed earlier, the Appellants were found in Somalia having used an illegal departure point and the presumption referred to in Section 30C therefore sets in. The two had a duty therefore, to negate that presumption but they failed to do so at interrogation or before the court. The court therefore does not find any fault with the charge sheet and the ground faulting the charge sheet which was not pleaded which appeared first at submission must fail.

22. As for legal representation Article 50(h) of the Constitution sets the parameters. **“to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;”**

The above requirement of the Constitution has been discussed by courts in various authorities

In David Njoroge Versus Republic (2011) eKLR the Court of Appeal stated:-

**“Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.**

We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”

In Republic V Karisa Chengo & 2 Others (2017) eKLR the Supreme Court on its part in considering this issue and having looked at the Legal aid Act stated; -

**“[93] In recognizing the discretion exercisable by any Court in making the determination as to whether the accused person is entitled to legal aid, the Supreme Court of India held as follows:**

**“The Court may Judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the Court.”**

[94] In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:

- (i) the seriousness of the offence;
- (ii) the severity of the sentence;
- (iii) the ability of the accused person to pay for his own legal representation;
- (iv) whether the accused is a minor;
- (v) the literacy of the accused;

**(vi) the complexity of the charge against the accused;”**

23. Considering the matter before court, though the charges that the Appellants faced are serious in the context of the Terrorism menace facing the country, and the world at large, the charges are not serious or complex per se neither can the sentence be said to be severe. Further the Court’s attention was not drawn to any illiteracy that the accused suffered so as not to be able to conduct the trial or their inability to acquire counsel as they have done on appeal.

Right to legal representation is not automatic and would be given

*where “The Court may Judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case”.*

24. As for the alleged torture at the remand, when the allegation was made, the trial court made an inquiry, summoned the officer in charge who in turn met the prison authorities and the claim was found to have no basis. The trial court took a step to consider and interrogate the claim and cannot be faulted.

25. As for the sentences; Section 30B of the Prevention of Terrorism Act No 30 of 2012 provides punishment for the offence as a term of not less than 10 years. The sentences meted out to the respective Appellants in count I were therefore within the law. As for counts II & III the sentences were equally within the law.

As it where sentencing is a judicial discretion and can only be interfered with if the same is too harsh as to cause an injustice or is illegal. This court sees no justification to interfere with the judicial exercise in this instance.

26. Based on the above this court resonates with the findings of the trial court, affirms the convictions and sentences, finds the Appeal lacking in merit and the same is therefore dismissed.

**DATED SIGNED AND DELIVERED IN GARISSA THIS 24<sup>th</sup> DAY OF FEBRUARY 2022**

**ALI-ARONI**

**JUDGE**

**In the presence of**

Mr. Chacha Mwita Advocates for Appellants

Mr. Mulati for the state

Amina/Martin Court Assistants