REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 3 OF 2020

SALEH OMAR NYAMACHE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant herein was charged, convicted and sentences to ten (10) years imprisonment for the offence of **Receiving training for purposes of Terrorism contrary to section 30 (b) (1) (a) of the Prevention of Terrorism Act.**

2. The particulars of the offence were that on or before 6th March 2016, in Dadajabula within Wajir County jointly with others not before court, the appellant knowingly attended training in Somalia in preparation for the commission of a terrorist act within the Republic of Kenya.

3. The Appellant after a full trial was convicted and sentenced to 10 years imprisonment.

4. Being aggrieved by the sentence the appellant filed his memorandum of appeal on 9th January 2020. The grounds of appeal that may be summarized as follows;

> **a. That the prosecution's case was not proved beyond reasonable doubt since the elements of the offence were not proved to the required standard of proof.**
>
> **b. That the sentence was harsh and misappropriate considering the facts of the case and the overall circumstance of the offence.**
>
> **c. That the learned trial magistrate erred in law and fact when he failed to consider the sentencing guidelines and evaluate the entire prosecution case in light of the defence in order to arrive at an appropriate sentence.**
>
> **d. That the trial magistrate erred in law in failing to consider the provisions of Section 333 (2) of the Criminal Procedure Code when he sentenced the appellant to ten years' imprisonment.**

5. Parties canvassed the appeal through written submission as follows;-

APPELLANT'S SUBMISSIONS

6. Dadajabula in Wajir County is 75 km away from Somalia. The prosecution did not provide evidence of how the appellant received instructions and how his travel was facilitated by the alleged persons not before court. The appellant also took issue with the manner in which the prosecution's exhibits were retrieved from him and their relevance to the case.

7. With regard to the appellants alleged admission in he submitted that the admission was not with regard to the offence he was charged with.

8. The appellant equally urged this court to consider the time he had served in custody prior to his conviction. He prayed that the court reviews the sentence and issue him an appropriate sentence that would give him an opportunity to rehabilitate and re-integrate back to society. He cited the case of **Yawa Nyale v Republic (2018) eKLR, Mulamba Ali Mabanda vs Republic (2018) eKLR amongst others.**

RESPONDENT'S SUBMISSIONS

9. The Respondent submitted that the appellant cannot contend that the plea was unequivocal at this stage since he was heard and the court

passed judgement after he had given a sworn testimony. The Respondent further submitted that the sentence was proper since the same was the minimum provided in law. The respondent however conceded that the trial court may have failed to factor in the time the appellant spent in custody.

ANALYSIS AND DETERMINATION

10. This being a first appeal, it is this court's duty to examine analyze and re-evaluate the evidence afresh in order arrive at its own conclusion. See the case of **Okeno v Republic [1972] EA 32**.

In the trial court the prosecution called two witnesses while the appellant testified as a sole witness in his defence.

11. **PW1 APC Ibrahim Khadir** testified that on 5th of March 2016 at Dagaballa patrol base he received instruction together with other officers to arrest the appellant at Sultan Guest House. They proceeded and arrested the appellant at the lodge, took him to the station and searched him, when they recovered from him a telephone Nokia 1280, an I.D. card, election card and bus tickets and a female passport. They scrolled his phone which showed Mpesa transactions done within Nairobi, Mombasa, Garissa, Eastliegh, Hagadera, Bungoma and Isiolo. It was also his testimony that the appellant informed them that he was visiting his colleagues, however did not explain well the Mpesa transactions.

12. **PW2 Philemon Kibet** attached to ATPU Garissa testified that after interviewing the Appellant they searched him and found in his possession a Nokia Phone, a refugee I/D card, five passport size photographs, an unidentified passport photo, two bus tickets for Zafina bus and one for unidentified bus, and Election card and an I.D card. That further after the interview they were certain that the appellant was intending to cross to Somalia. The also established that the appellant was arrested severally in Dadaab, Mbalambala and Hulugo. Where he was charged for failing to register and acquitted in 2015. The Kenyan I.D belonged to the Appellant, and the refugee card belonged to one Daud Aden Abdurahman. He was of the view that the Appellant was to use the refugee card to cross to Somalia.

13. The court found the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement informing the court that he is a Madrasa teacher and stays in Kisumu. That he had travelled to Somalia. He was told that there was a military training in Kismayu and he agreed to go to there. He did not stay for long; he returned to Kenya and was arrested. He stated further that he was confessing to the mistake and asking for forgiveness since his family was suffering. In cross-examination he admitted that he had gone to Somalia for training.

14. The trial court considered the evidence of the Prosecution and that of the defence and formed the opinion that the appellant had in his testimony admitted to the charge levelled against him, found him guilty and convicted him.

15. After going through the evidence on record and the parties' submissions, the court finds the issues for determination are;

i. **whether the prosecution proved its case beyond reasonable doubt and**

ii. **whether the sentence was harsh and excessive.**

16. The appellant was charged with offence of receiving instructions for training in terrorism contrary to Section 30(B)(1)(a) of the Prevention of Terrorism Act, which provides 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

(b) 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."

17. The prosecution led evidence that the appellant intended to proceed to Somalia to receive training for the purposes of terrorism. From the exhibits presented and the evidence of PW1 and PW2 the same were not clear whether the Appellant had crossed the border or not or whether he had intended to cross the border to Somalia using a refugee card. There was no evidence either of the alleged training and/or receipt of instructions.

18. However, the appellant in his sworn evidence admitted to having been to Somalia with the intend of receiving military training and having received such training and the intend of joining a military camp in Kismayu.

19. The court is of the view that the Appellant was well aware of the charges as the proceedings were conducted in Kiswahili a language he understands well and his own testimony was very clear both while giving evidence in chief and at cross examination, to the extend that he sought for forgiveness for the mistake.

The Appellant conceded to receiving military training in Somalia. His evidence incriminated him and the same also sustained the charge. In the circumstances it mattered not that the prosecution had failed which indeed they did, neither can the court turn a blind eye or have deaf ears when one says he committed the offence.

The court affirms the conviction.

20. The next ground of appeal relates to the sentence imposed. The offence which the appellant was charged with provides for a term of imprisonment of not less than ten years. Sentencing is discretionary and an appellate court can only interfere where the same is inordinately excessive as to cause an injustice. The appellant was convicted to ten years imprisonment a term which is the minimum as provided by the law. The term was therefore not excessive in the circumstances.

21. Lastly the appellant sought to have the court take into account the time he spent in custody i.e., from 6th March 2016 to 26th March 2018. A period of two years.

22. **Section 333(2) of the Criminal Procedure Code** provides that: -

> **"Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**
>
> **Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis added)."**

23. This obligation has also been emphasized in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that: -

> **"The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."**

See also **Antony Ndegwa Ngari v Republic [2020] eKLR**

24. The state conceded to this ground. And therefore, taking into account the time the appellant spent in custody the sentence will be reviewed so that it starts from the time the Appellant was placed in custody; the 8th of March 2016 which means that he will serve for the Eight years' imprisonment commencing 26th March 2018.

25. The Appeal succeeds only to the extend of the review of sentence.

DATED SIGNED AND DELIVERED AT GARISSA THIS 17TH DAY OF FEBRUARY 2022

ALI-ARONI

JUDGE