



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 53 OF 2019

JERMAIN JHON GRANT.....APPELLANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of the Hon. E.K. Makori (CM) on 24th April 2019

in Mombasa Criminal Case No. 3914 of 2011).

JUDGMENT

Background

1. The Appellant JERMAIN JHON GRANT was an accused in Mombasa Chief Magistrate's Court Criminal Case No. 3914 of 2011 where he was charged jointly with FAUD ABUBAKAR MANSWAB and WARDA BREAK ISLAM with the offence of being in possession of explosive materials contrary to section 29 of the Explosive Act Cap 115 Laws of Kenya, in Count I.

2. The particulars to Count I are that the Appellant jointly with his co-accused and others not before court knowingly and unlawfully were found in possession of explosive materials namely:

- 1) Acetone chemical in a two (2) litre plastic
- 2) Hydrogen peroxide chemical in a 200ml black plastic container
- 3) Ammonium nitrate chemical in half (1/2) kg white plastic container
- 4) Sulphur sublimed plastic container
- 5) Four size 'AA' super royal batteries
- 6) One white electric switch
- 7) Eleven centimeter piece of electric conducting wire

3. In count II the Appellant was charged with conspiracy to commit a felony contrary to section 393 of the Penal Code. The particulars to count II are that the Appellant with the two co-accused on or about the 20th day of December 2011 at Kisauni area of Mombasa County jointly with others not before court conspired to improvise an explosive device with the intent to cause loss of lives and harm to innocent citizens.

4. In count III the Appellant was charged with the offence of being in possession of explosives contrary to Section 89 (1) of the Penal Code Cap 63 laws of Kenya. Particulars are that the Appellant with his two co-accused on the 20th day of December 2011 at Kisauni area of Mombasa County, jointly with others not before court without reasonable excuse were found to be in possession of explosives namely:-

- 1) Acetone chemical in a two (2) litre plastic

- 2) Hydrogen peroxide chemical in a 200ml black plastic container
- 3) Ammonium nitrate chemical in half (1/2) kg white plastic container
- 4) Sulphur sublimed plastic container
- 5) Four size 'AA' super royal batteries
- 6) One white electric switch
- 7) Eleven centimeter piece of electric conducting wire

5. In the alternative, the Appellant was charged with the offence of being in possession of explosives contrary to section 89 (2) of the Penal Code cap 63 laws of Kenya. The particulars to the alternative charge were that on the 20th day of December 2011 at Kisauni area of Mombasa County, the Appellant and his co-accused were found in the company of other persons not before court having in their possession explosive materials as per count I and III in circumstances which raise reasonable presumption that they intended to act with such persons in a manner on purposes prejudicial to public order.

6. Upon analysis of the evidence availed, the trial magistrate convicted the Appellant for the evidence availed in count I and acquitted him of Count III as it was materially similar to the offence in count I. The trial magistrate also acquitted the Appellant for the offence of conspiracy to commit a felony contrary to section 393 of the Penal Code.

7. The trial magistrate said that the presence of the chemicals and the time in flash disc that related to making of explosives showed clear and direct connection to the making of an explosive. The trial magistrate found the Appellant's unsworn defence could not stand as it was outweighed by the evidence of PW4 Abdallah who confirmed that the Appellant and would go everywhere with bond.

8. PW1, PW2, PW3 and PW5 also confirmed that the Appellant lived in the house where materials used for making explosives were recovered. The trial magistrate also concluded that there was no doubt that the Appellant was going to prepare an explosive for terrorism or other criminal purposes which crime would have had a deadly outcome.

9. Sentencing proceedings were conducted and the Appellant was consequently sentenced to serve four years imprisonment. The Appellant was aggrieved and he filed the appeal which had the following grounds:-

- (1) The learned trial magistrate erred in both law and fact by convicting the Appellant despite the prosecution having failed to prove the element of possession of explosives as defined by the law.
- (2) The learned trial magistrate erred in both law and fact by convicting the Appellant in finding that the Appellant was found to be in possession of explosives where there was none as told by the experts.
- (3) The learned trial magistrate erred in both law and fact by drawing a nexus between a flash disk containing information on explosives to the Appellant in the absence of any direct or circumstantial evidence.
- (4) The learned trial magistrate erred in both law and fact in convicting the Appellant despite the existence of screaming contradictions, inconsistencies and lack of corroboration in the prosecution's case.
- (5) The learned trial magistrate erred in both law and fact by convicting the Appellant by disregarding his uncontradicted defence which was firmly corroborated by his co-accused who was acquitted hence arriving a wrong conclusion in law.
- (6) The learned trial magistrate erred in both law and fact by shifting the burden of proof on the Appellant hence the entire discussion amounts to a miscarriage of justice.
- (7) The learned magistrate erred in both law and fact by ignoring the evidence tendered by experts who had failed to link the Appellant to the alleged explosives in any way that the Appellant was a stranger at the locus in quo.
- (8) The learned trial magistrate erred in both law and fact by sentencing the Appellant excessively under the circumstances and in violation of the relevant laws or policy guidelines and failure to consider the period the Appellant had been in custody and that he had reformed and to order for his acquittal forthwith.

10. The Appellant prayed that his appeal be allowed and to reverse the decision of the subordinate court and order for his acquittal.

11. This appeal was canvassed by way of written submissions which were highlighted on 15th July 2021.

Prosecution Case

12. PW1, Hassan Mohamed Haji, testified that A1 told him he had rented a house at Mwandoni-Kishanda Grounds. A1 took PW1 to see the house, PW1 got A1 a 2nd hand fan. A1 gave PW1 his name as Ali Ibrahim and that is how his name is written in the marriage certificate with A3. A1 did not say the exact nature of his business in Mombasa.

13. PW2, PC James Kipkosgei Maiyo ATP Headquarters, PW3, Sargent Peter Muli Kivene of ATPU Nairobi testified that he was assigned operations duty in Mombasa where they got information that terrorists were to hold a meeting in Kisauni. He testified that they spotted the suspects on a motorcycle and stopped the two suspects but one tried to escape but was pursued and arrested. One ... and two phones make Nokia 1280 and 6020, two ID cards in the name of Faud Abubakar Mansuab-A2, ID Serial No. xxxxxxxx Card No. xxxxxx, ID Serial No. xxxxxx Card No. xxxxxxxx which were recovered. Driving license was also recovered. That from A1, they recovered purple flash disc and a pouch containing 3 cell phones make Nokia 1280, a Banlon phone and a Samsung GTE 1085F, a black wallet containing Kshs. 2800 and a bunch of keys were also recovered from A1. That the suspects led the police officers to their residence in Kisauni and when A3 opened the house, items in the charge sheet in Count I were recovered.

14. PW4, the caretaker of the house which was rented by Hassan and Hassan occupied it together with A1 the Appellant herein. PW5, Samir Karama Omar, testified that A1 who was known as Ali and one Hassan occupied a house in Kishanda and lived there for four months. He said there was no furniture in the house occupied by A1 and Hassan except a mattress. He said A1 and Hassan used to leave the house between 6.30 am and 8.00 am and could return after 9.30 pm and upon arrival, they could go and sleep on the rooftop except when it was raining. That Hassan told him they used to sleep on rooftop because it was very hot and they did not have a fan. He said there was a time he noticed A1 and Hassan were not in the house for two days and on 17th December 2011, he saw Hassan carrying a paper bag full of clothes. He said A1 remained in the house and the following day he saw a lady sweep the house, he inquired and he was told the man in the house was to get married that day. That when he returned from work, AI confirmed to him that he was getting married and that Hassan had gone to Malindi for an urgent meeting. He also noticed fans had been installed in A1's house and there was some renovations and a bed had been brought. PW5 testified that he went to play football around 6.30 pm and he saw A1 had worn a kanzu and was holding a scarf and running across the field as if he was in a hurry to go to go somewhere. That at 10.00 pm, Ali-A1 returned with his wife and some members of the wife's family. That he went and congratulated Ali-A1 and then went home. That the brother to Ali went to his house and introduced himself as the brother to the bride and that he was the one who was driving the vehicle they came in. The following morning, he instructed his wife to prepare breakfast and talk to the newlyweds as no relative had come to check on them. He said his wife confirmed having taken both breakfast and lunch to the couple. That at 10.00 pm, PW5's wife told him she had not seen A1 return. That a short while later, he heard a motor vehicle park outside the compound and there was commotion. When he checked, there were police officers with A1 and they went to his house. PW5 said they confirmed to the police that Ali-A1 and his new wife occupied the house. The police officers informed them Ali-A1 was not a muslim. That Ali and his wife were made to carry some paper bags. That Ali's wife dismantled her phone and threw down the pieces and the police picked the pieces. PW5 said Ali and his wife were put in different vehicle and that is when he got permission to speak to A1's wife he told her to say the truth. PW5 said police officers told them they had recovered chemicals in the house and they were shown the chemicals. That before the police left, they told them the other person who had been in the house was Hassan and they described him. He said when they heard the matter on the television, they saw Ali, Hassan and Warda. He said Hassan was released on bond and he went to her place of work and told him not to get to court to testify. PW5 said he did not know how Hassan knew his place of work and he closed his business and opened it elsewhere.

15. PW6, Robert John Garrick, a detective counsel for new Scotland yard, Counter Terrorism Command, the Forensic Management Team. He is an advanced exhibits officer, a Bomb Scene Examiner, Bomb Scene Manager and Counter Terrorism Investigator. On 23.12.2011, he was informed by his senior officers that a British citizen, Jermain Grant, had been arrested by Anti-terrorism Police for terrorism offences which had been perpetrated in Kenya. PW6 was requested by his senior to be part of a team to be deployed to Kenya to assist the Kenya Police in their investigations. The 3 accused persons were among those being investigated. PW6 and some of his colleagues attended the government chemist laboratory where they were shown some containers on the table. PW6 said that there were a number of chemicals which if combined would make a number of home-made explosives and in particular, acetone, hydrogen peroxide and battery acid. If the three are mixed in a particular way, they can make an explosive called Triacetona Triperoxide commonly known as TATP. The solution is very unstable and dangerous and anything like dropping or touching it can detonate it. They carried a number of tests on a number of items which when taken singly they did not have any explosives but if mixed, it is possible to make explosive. PW6 concluded that the items were for making explosives. PW6 and his team tested for fingerprints, DNA, took photos of the items, emptied the items into another container so that the container can be tested for DNA and fingerprints. Only limited machines had been carried for testing of fingerprints so the lead investigator was consulted and it was agreed that the items be carried back to the UK for further tests. PW6 and his team flew to Mombasa where they were asked to search the premises where the items were recovered. They visited Kisauni house, Kishada Saleh and house of Abdi Wahid in Nyalii. They were given a number of sim cards, mobile phones and batteries for the phones. Data in the sim cards could not be accessed because it was password protected. This information was forwarded to the Kenya Police who were able to provide the Sim cards codes. PW6 and his team photographed the laptop made DNA tests and finger prints. He later passed the laptop to Detective Colonel Steve Ball who deals with high-tech cases like for computer hard drives, phones to get the data. The scene, Kisauni house at Kishada grounds, Mombasa, PW6 entered the premises alone to conduct a safety search to eliminate any risks for anyone that might enter. He conducted a sketch plan of the premises especially what was in the kitchen. He produced photographs to show what items were recovered. A bag with crystalline substance was recovered from the house. All the items recovered from the house were tested for hydrogen peroxide and the results were all negative of hydrogen peroxide. The purple thumb drive recovered from the house is used for storing data. It was examined for fingerprints and DNA. The same was given to Steve Bowler the high-tech person to examine it. Though he is also a witness and will testify, he informed me that a lot of information in it related to terrorism. It had booklets on explosives and how to prepare home-made explosives. There were explanations on how to prepare TATP explosives, the process and the requirements. Later on, PW6 and his team received exhibits from ATPU and he concluded that the contents in the bag when taken together they can make an explosive device because they are wires with batteries. The wire, switch and metre can make a detonator which can be switched on and off which can be used to trigger, activate or remote control explosive device. PW6 further said that the tape can be used to join things together. The electric wire can be used to make a circuit to electrically use and even test the device.

16. PW7, Mohamed Sharriff Abdalla, an Assistant Registrar of Marriages and Divorce at Mombasa recalls he was approached by one Hassan on 18.11.2011 who wanted to solemnize a marriage. He was told it would be at Bricks home in the evening on that day where he went to the house at Mwandoni. Many guests had been invited including the bride's family. The groom came shortly thereafter. The groom was called Mohamed Ibrahim while the bride was called Warda Brek. PW7 solemnized and registered the marriage. PW7 told the bride and groom that they will not be given the marriage certificate unless they showed him their identity cards. 2 t 3 days later, PW7 learnt that the couple had been arrested. No one went for the certificates. PW7 said he knew the bride's family well but the groom was a stranger to him.

17. PW8, Ashraf Ahmed Hassan, a contractor in the construction industry. PW8 said that in December 2011, he received a call from one Samir, his tenant, who told him to go to the house in Kisauni-Kishada area as something bad had happened. He went to the house and found a large crowd. Samir told PW8 that Hassan who was a tenant in one of the houses had been arrested after being found in possession of some

dangerous powders though he did not have full particulars of the same. Two days later, PW8 was summoned at CID headquarters Mombasa where he was questioned about his tenants in the Kishada house, especially Hassan.

18. PW9, James Mbogo, attached Antiterrorism Unit Mombasa, in December 2011, he was in the same unit doing investigation duties. On 21.12.2011, he was instructed by his senior to take some exhibits to Nairobi. He arrived in Nairobi at 7.00 am on 22.12.2011 and had an exhibit memo MFI-79 dated 22.12.2011 with exhibits M1-M10. He took them to the government chemist in Nairobi and they were received by one Sunguti. He has never met the 3rd Accused on 28.12.2013 but saw him in their offices though he does not recall when. PW9 was told by his seniors that the 3rd Accused was a suspect but PW9 did not know the offence that he had committed.

19. PW10, No. 82753 CPI Samuel Ouma based at Anti-Corruption Police Unit Mombasa did general investigations. On 25.12.2011 at around midday, he received a phone call from their in charge Chief Inspector Otieno who instructed him and PC Oscar Omollo to join a team of officers under the in charge Sgt Muli to proceed to Kaloleni Giriama and arrest a suspect who was using mobile phone number 0788xxxx. PW10 in the company of others drove to Kaloleni area and kept in touch with their in charge who was monitoring the phone signals. At 3.30 pm, PW10 and his team reached the home of Jimmy Ngara Chandugu who was picked up for further questioning. They drove back to Jimmy's home and arrested his son Frank Nyenyo Chandugu, the owner of mobile phone number 0788xxxx who is the 3rd Accused herein. On cross examination by Mr. Chacha, PW10 stated that he does not know how the telephone number is involved in this case.

20. PW11, Detective Constable Stephen Ball, attached to New Scotland Yard Counter Terrorism Department, is a digital media expert which involves the examination of electronic media, computers, flash discs, CDs among others. PW11 said that on 2.1.2012, he was part of the unit deployed in Mombasa from the UK with invitation by the Kenyan Authorities. He was to examine any media relating to the 1st Accused. He was handed an exhibit, an R.G.B. 200 using forensic techniques where he examined the contents. It was a purple flash disc make Sony 2GB. PW11 extracted the files that were in the flash disc and prepared a report in relation to examination of the exhibits. It is the court document titled court report on operation 07 MFI 82, pages 8-12 over the examination. Page 9 is a photograph of the flash disc and page 8 is the bag that the flash disc had been put in. On page 13, PW11 found the items listed in the flash disc. It shows a page marked explosives introduction document. It was created on 11.12.11. Page 14 is a summary of the document. Paragraph 3 shows one must understand electrical terms, volts, waltz, amps, and ohms. This is what was written between the stars. The import of this is per page 15 is that the M11 MFI 73 is a multi metre which is for testing electrical circuits. PW11 stated that he had previously worked as a motor vehicle electrician so he has knowledge in electronics. At page 16 titled explosives introduction document was developed on 11.12.11. A brief of the document is on page 17 which shows a reference to Somalia 4 times in the document and potential targets as the police. It refers to land mines, remote controls, brief case bombs, a book booby trap, deception bombs or booby trap, torch booby traps. Booby traps can deceive those doing search. Page 19 refers to flag or banner booby trap and safe house booby trap. On the flag trap, if one removes the flag, the device explodes. Page 20 is another document titled explosive chemicals. Chembase was an internet drawn document/downloaded from the web created on 24.11.11. The chemical ingredient to be used for explosives is on page 21. The flash disc had been used to download the items from the internet but the website is no longer available. Page 23 is titled print out of explosives which was created on 24.11.11. Page 24 shows it was linked to other websites. It refers to anarchist look book which I know is for methods of creating explosives and other harmful things against the establishment. Page 26 is another page titled print out of form created on 18.11.11. It relates to formaldehyde, what can be used to make an explosive PETN-Pentaerythritol tetranitrate-page 27. Page 28 is a page titled print out of aqua ammonia material safety data sheet. It is for ammonia which can be used to make explosives. Page 29, conditions to avoid if the named items are added they can form an explosive. Page 30 is a saved internet page titled explosives created on 24.11.11 which gives a short history of explosives. It refers to ammonium nitrate fuel, fuel misted P.E.T.N on page 31. Page 32, a web page lifted explosive chemicals Wikipedia created on 24.11.11. Page 33 relates to different chemical elements that can be used to make explosives. Page 34-a saved web page titled Science Madness Discussion Board created on 24.11.11. It relates to glycerin nitrates and contribution by different authors on page 35. Page 36 on alternative ways of making RDX mention created on 24.11.11. Page 38 we page titled Science madness Hescanune Disperchlorate which is an explosive on page 39. Page 40, a saved web page on explosive combinations shows its dangers of combining chemicals-page 41. Page 42 is a web page list of commonly available chemicals for manufacture of chemicals. Page 44 a saved web page for ammonium hydroxide. Contents are hazards of ammonium hydroxide which was saved on 24.11.11. Page 46 web page for ammonium hydroxide. Page 48-web page for ammonium hydroxide which can be used to make chemical explosives. Page 50 saved web page for methylamine synthesis which is a substance that can be used as explosives. Page 52, a saved web page for power lab explosives peroxide over view which can also make explosive. Page 54 internet web page for Hexamine fuel table which can be used for camping stoves and explosives. Page 56 is for Hyxamethyl Lemetetranine which can make RDX, HMX and HMTD which are explosives. Page 58, a web page titled types of explosives covers different types of explosives. Page 60 web page titled formalin created on 18.11.11 form an education website for formalin. Refers to formalin and formaldehyde. Page 62 web page for formaldehyde which can also be used for explosives such as RDX. Page 64 save web page called Types and used gives a brief explanation of different categories of explosives and their intended uses. Page 66 a document called Mujahideens explosives handbook created on 11.12.11 on pages 67 to 69. Page 70 are notes during terrorists groups. Page 71 is a document titled Black Book Companies published by Paladine Press. Page 74 is a document-Explosives (Helpful), page 75 topics on explosives. This page goes up to page 77. Page 79 document called additive 019 created on 24.11.11 which deals with ammonia an ingredient of explosives. This closes the issue of explosives. Page 81 were old deleted internet archives which were no longer recoverable and were in Arabic. News International Murda, News nternational Gaza Nato kills 6 children, News International 25 dead west of Afghanistan, News International different topics, up to page 86. These were all create on 5.12.11 and they were all deleted. Page 87 shows 127 recovered documents dealing with ideology. Of these 66 have the words jihad or extremist instructions. The have been listed on page 88. They are extreme in nature. They are also the pages listed. The word join caravan means when to take arms to go to battle with jihad. Page 89 to 215 deal with the technical details of the 127 documents. Page 126 is a summary of the evidence that the flash disc was said to have been found on the 1st Accused. On 18.11.11 and 11.12.11, the downloading was into the drive which provided an explanation of explosive devices. Chemicals and the use of explosives. This is suspicious and the other files also filed like the explosives handbook show the interest of persons on the construction of an improvised device. It also mentioned the multi metre which is for testing electrical circuits so they were making explosives. Page 127 on the ideology is extreme and advocate the aim of self-jihad. Page 218 contains timelines in which the information was downloaded. This goes up to page 222. PW11 said that the document is just a snapshot of what is in the file. The file has more information and has been saved in a CD.

21. PW12, Lorna Kirstin Philip, is a senior forensic case officer at the Forensic Explosives Laboratory. The laboratory exists to provide scientific services to the police to investigate the criminal use of explosives. PW12 said that she is employed by the Ministry of Defence, so her work is to assist the UK police force and at the request of her government, she also assists other foreign governments and agencies. PW12 said that in December 2011, a request was received at her laboratory for a scientist to come and assist with investigations in Kenya.

She travelled to Kenya on 27th December 2011 with a team from the Metropolitan Counter Terrorism Command. When they arrived in Kenya, there were a number of exhibits which PW12 conducted tests on. After testing the items, they were further examined by other team members where they took a number of samples of the exhibits that were to be sent to the UK so that further tests could be carried out in the laboratory. Some tests were done in Kenya but not others. The items had been marked M1 to M10 and they were in open packages as the scientists in the laboratory had taken some samples in the exhibits. PW12 took some samples and carried out simple tests to determine the nature of the exhibits. She was testing for peroxide based explosives and infrared spectroscopy which is an analytical test which can give the composition of certain chemicals. PW12 worked with Sunguti in Kenya. PW12 did not mark the exhibits, other experts also tested the exhibits for DNA and fingerprints. Detective constable Garric also took samples for each exhibit which he raised as an exhibit which he marked and was returned to the UK so that further tests could be conducted. On 29.12.2011, PW12 and the team travelled to Mombasa to assist with search of a number of premises and also took further exhibits which were in Mombasa. PW12 was taken to a house in Kisauni which had been identified as having some chemicals that needed to be tested. At the house, PW12 conducted a number of tests on a 500ml bottle labelled Horizon containing a clear colourless liquid. This was tested for hydrogen peroxide which was negative. Other items in the house were tested and it showed they were not hydrogen peroxide. After this, the team searched the premises and a number of items were recovered. They included a clear coated wire, AA size batteries PC Garrick raised them as his exhibits which were marked as RJG-111 identified as MFI 57, another wire marked as RJG-112 identified as MFI 58, four AA batteries RJG 114, 115, 116, and 117 identified as MFI 60, 61, 62, and 63 respectively. The wires and batteries could suggest an attempt to make an electric circuit which can be used to initiate an electric device. However, they can be used for many other purposes. PW12 said that later on 3.1.2012, she attended the ATPU Mombasa headquarters to look at items that had been removed from the three addresses. They were plastic containers with a label identified then as a protein drink powder. PW12 tested the open bags of the containers for explosives but they were not explosives. After that testing, DC Garrick took a sample of the powder and raise them as an exhibit and had them sent to the UK. The powder was said to come from the house of Abdi Walid. The other items that PW12 examined that had explosive elements but could also have other uses and which were said to have been recovered from the Kisauni house include a multi metre-M11(MFI 73), a roll of electrical tape-M12(MFI 76), 4 AA size batteries-M14(MFI 23 a-d), a switch-M14(MFI 2), a soldering iron-M19(MFI 74), a multi tool-M21(MFI), a pair of pliers-M24(MFI 77). PW12 then left Mombasa on 4.1.2012 to return to the UK and at the laboratories, she received the exhibits from Kenya along with a CD that contained a report from a number of computer files is Exhibit 84. PW12 conducted a number of tests on the samples and examined the CD. The files in the CD were examined for information on making of explosives. PW12 said that according to her analysis on the sample that came from M1, it showed that it was acetone. Acetone is a liquid that can be used to manufacture the primary high explosive called triacetone triperoxide also known as TATP. Acetone can also be used as a solvent or a cleaning product. To make TATP, acetone has to be mixed with hydrogen peroxide and an acid. A primary high explosive is a very sensitive material that would detonate or explode simply from impact, friction, spark, or heat. Therefore, it is extremely dangerous. Even for a primary explosive, TATP is very sensitive so has no commercial use. It is too dangerous to be used as an explosive. PW12 also looked at exhibit M2 and according to her analysis, it showed that it was urea used to manufacture explosives – urea nitrate. If one reacts urea with nitric acid, it forms the explosive urea nitrate. Urea can also be used as fertilizer. PW12 says that at the Kisauni house, he did not find a farm. PW12 also examined exhibit M3 which was confirmed to be 500 grammes of Sulphur, a chemical fuel that is one of the components of the explosives known as black powder or gun powder. The other ingredients for gun powder are potassium nitrate and charcoal. Sulphur can also be used as a soil treatment in gardening. The sample M4 was found to be a water based solution of hydrogen peroxide and hydrogen peroxide is used to manufacture TATP but it can also be used as a disinfectant or antiseptic. Item M5 was lead nitrate which can be used to manufacture highly explosive ingredients, lead azide or lead styphnate. One needs sodi azide to make lead nitrate. To make lead styphnate, one needs magnesium and styplinate. M6 was shown to be a liquid containing water and acetone which is commonly used as a nail varnish remover and can also make TATP. M7 was an empty bottle the label showed that should have been a battery acid of one litre. The acid that is used in car batteries is sulphuric acid and it can be used to make TATP. It can also be used to refill batteries. PW12 then looked at the CD which contained several documents and she looked to see if there was information on explosives. No. 2 a Wikipedia page tells how forumlahyde can be used to make an explosive known as PETN and RADX, No. 3 gave chemical information on ammonia solution but it did not mention exclusively about an explosive, No. 4 was a scientific paper on formaldehyde but it did not give any information on explosives, No. 5 was a web page from an American University with information on formulation but it did not mention explosives specifically, No. 8 a Wikipedia page for a chemical called hexamthlyne tetranime which is also known as medamine. The information included that hemaine could be made from a formaldyde ammonia and that one could use Heamine to make a huge explosive RDX, HMX and HMTD, No. 9 was a Wikipedia page on Mexamine fuel table. It said that Hedsmine can be made from formaldyde and ammonia but did not mention explosives specifically, No. 10 was a web page titled ‘power labs peroxide explosives overview’. The information included the procedure to make explosive HTM from primmonium hydroxide, formaldehyde, citric acid and hydrogen peroxide. There were no quantities of the ingredients needed but the procedure was viable and would produce an explosive called NMT, No. 11 was a web page labelled Methylamine synthesis FAQs and it gave information on the different ways of making methylamine but it did not specifically mention explosives, No. 12 a web page for an online encyclopedia with an entry for ammonium peroxide which was described as a solution of ammonia gas but it did not give anything on explosives information, No. 13 was a Wikipedia page for ammonium peroxide which had information that the hexamine though it used the final chemical name, it can be made from ammonia on formaldehyde, No. 14 contained information on Ammonium Hydroxide but there was information on explosives, file No. 824, 825, 958, 959, 960, 961, 962, 963, 964, 966, 967, 1018, 1125, 1126, 1127, 1128, 1129, and 1183 contained information on explosives. PW12 says that a large number of files found in the CD suggests that someone went through a lot of trouble to get information on explosives.

22. PW13, Detective Inspector John Reilly attached to the Metropolitan Police London works for a counter-terrorism command which includes investigation of terrorism offences. PW13 said on 27.12.2011, they were deployed in Nairobi at the request of the Kenyan government. His team which included Officer Paul Cowley the photographer, Lorna Philip a scientist, DC Garrick and Orlette Hunt went to the government chemist office in Nairobi where they were sent to conduct examination of chemicals, fingerprints and DNA. PW13 did not accompany the team when they went to carry out the tests. The officers were under PW13’s supervision. After the examination, PW13 had a meeting with Lorna who informed him that there were materials for making volatile explosive TATP. On 30.12.2011, PW13 and his team travelled to Mombasa where they got further briefing at the ATPU headquarters. It was requested that the high tech officer DC Ball travels from London to Mombasa which he did. At the address, photographs were taken both inside and outside and they requested that the premises be searched again. During the search a number of exhibits were recovered both inside and outside the houses. The recovered item were photographed and the items indicated that someone intended to construct improvised explosive device. PW13’s team also examined some of the recovered items in London which were subjected to forensic examination. PW13 states that phones and sim cards were subjected to forensic analysis which includes fingerprints and DNA. M43 had a text message which PW13 and his team believed was important and it said “*Habib is already there.*” There was also a number of text messages recovered from the phone, two of them were thought to be guarded text messages. They were sent twice within a minute and they said “*there are lions inside, one of them is very watchful like a bat watches a...*” This came from M41. There were 3 sim cards recovered, M39. The sim card of M43 which had the same number as the sim card from the black bag. The sim card from Frank Ngala had the same number as the sim card folder found in the black bag. Another sim card M3 had the same number as the sim card from the black bag. They were recovered from where the 1st Accused’s had been staying. A YU sim card

found hidden under the table had contacts shared with M40. From M40 there were a number of phone text messages. On 19.12.2011 at 18.58 hour, there was a message *"I am at the place haven't seen him"*, at 19.12 hours *"where you"*, at 20.24 hours *"where your friend, we need to see him very much important"* the message were recovered from the phone which was found in Jermain Grants trouser pocket. PW13 says the phone was sent for analysis and evidential report with regard to the phone was prepared.

23. PW15, No. 76929 CPI Kenner Opassi the detective with Anti-terrorism Police Unit Mombasa. On 14.12.2011 at the Anti-terrorism police unit Mombasa, he received information of suspected terrorist activities. Names were provided and one of the suspects was Faud Abubakar, a resident in Mombasa and Peter Joseph from Canada. The two were arrested bearing in mind that they were dangerous terrorists. PW15 said that information was also received that they were assembling explosives in their residences. All the personal belongings were confiscated after being searched. Faud was found with a Nokia make 1280- PMFI 10, a Nokia 6020, a Kenyan National Identity Card in his name MFI 4, original signed copy MFI 1-5, a Kenyan National Driver license PMFI 7, a pen knife PMFI 6, a Samsung phone, a flash disc PMFI 12, a black waist porch PMFI 16, cask Kshs. 2700 PMFI 17, a black wallet PMFI 13. The suspects were escorted to Bamburi Police Station with the arresting officers being Sergeant Muli and PC Maiyo among others but PW15 was not among them. PW15 was asked to prepare an inventory of the recovered items. The main target was to trace the residence of the suspects but they were reluctant at first. When they went to search the house, they found a lady. Chief Inspector Otieno took photographs of the house before anything could be done. In the bedroom, there was a two-inch mattress which was folded. Inside the mattress was a mosquito net and a yellow nylon bag MFI 70. There was also a black yellow bag MFI 71. The bags had containers labelled Acetone Laboratory chemicals in a 2-litre container labelled Lead Nitrate MFI 37. A 12 kg container of sulphuric sublime MFI 36, another ½ kg container-Urea, 200ml container of Hydrogen peroxide MFI 38, AA batteries MFI 23 a-d, a 30 cm ruler MFI 26, a soldering rode MFI 75, a black masking tape MFI 76, a digital multimeter MFI 73, a yellow hand pliers, MFI 77, several electrical wires, MFI 57-59, an electrical switch MFI 24. PW15 decided to question the lady on who the owner of the house was and she said that the owner had travelled to Uganda. The lady looked like she had panicked. The two suspects were in the house but they had been disguised by being covered so the lady did not know who the two were. When the two were uncovered, the lady ran to the toilet, she did not relieve herself but immediately flashed the toilet. She came out holding a Techno make phone PMFI 46 and struggling to return the battery into the phone. They immediately realised that she had removed the sim card and flashed it down the toilet. PW15 and his team went and searched other locations where the suspect had been seen visiting. After the search, the suspects and the lady were taken to different police stations, one was taken to Makupa Police Station and the other two to Port Police Station. The kishada house was locked and police offices from Kiambeni Police Station were stationed to guard the house. The following day, an apprehension report was filed and a request for 10 days was made to court for completion of investigations. Court granted 7 days. PW15 was informed by Chief Inspector Otieno and Mr. Murage to conduct a further interrogation of the suspect at Makupa Police Station. PW15, CPL Mogire and an officer from NSIS went to Makupa Police Station to talk to Peter Joseph, whom the lady had identified as Mohamed Ali. The suspect told them that his real name was Jermain John Grant and he said that all the previous information about his name were not true. He also said that he was not Canadian but British. He did not have a passport and gave a lengthy explanation as to why he did not have a passport. He was charged for giving false information, being unlawfully present in person and being in possession of the above items in his house. The suspect Peter Joseph was charged with the above and he pleaded guilty to the two counts. After arresting the suspect, PW15 and his team were surprised to realize that the phone for Peter Joseph that they had been tracking was still functioning and was being used by another person. The team went to Kaloleni and arrested Frank Nyenjo who had been using it. It is make Sagem MFI 72 and several sim cards were recovered from the said suspects. The sim card in the phone is MFI 68. PW15 prepared exhibit memo which was used to send some exhibits to the government chemist in Nairobi. The exhibit memo is PMFI 91. A request was also made to the British High Commission for assistance. This was done through Anti-terrorism headquarters. On 29.12.2011, a liaison officer from British High Commission and who also works in Scotland Yard was sent to assist.

24. PW16, Detective Constable David Atkinson from Metropolitan Police Counter-terrorism Command, New Scotland Yard, London. They investigate matters related to terrorism. PW16 recalls that on 8.5.2012 in the evening, he was at home in England when he received a telephone call from his boss Detective Inspector John Reiley who asked PW16 to meet him at Heathrow Airport as there were a number of exhibits that needed to be taken to Kenya for the trial of Jermain Grant and others and they urgently had to be in court on 9.5.2012 which was the following day. Mr. Reiley handed PW16 three blue boxes which had exhibits and a list of the said exhibits in the boxes. Arrangements had been made with Kenya Airways for PW16 to take the exhibits. PW16 flew and landed in Nairobi on 9.5.2012 in the morning. PW16 called a colleague who advised him to take the exhibits to Mombasa ATPU where one Mr. Kilonzo was to take them from him. He met Mr. Kilonzo at the airport. They went to the police headquarters where the exhibits were checked off. They noticed that there were several discrepancies between the items on the list and the ones in the box. The same was corrected with Chief Inspector Luka Tumbo. The statement was completed and exhibited the property receipt DJI 1 then flew back to Nairobi then to London. On the last page, there were additional items which were not in the list. PW16 and Chief Inspector Luka countersigned the list which was produced in court by PW16 as Pexhibit 94. The list comprises of exhibits that the British police had taken. PW16 was only a carrier to ensure they are safely returned to the Kenya police.

25. PW17, No. 232685 Chief Inspector Luka Tumbo Abner based at the Mombasa detachment Anti-terrorism Police. On 9.5.2012 at round noon while at work, he received Detective Constable Atkinson from the Metropolitan Police in the UK who had some exhibits which were confirmed and the inventory PMFI 93 signed. PW17 said that Detective Constable Atkinson came with the inventory. It had some handwritten additions which were 4 in number and they included one black Samsung phone, one orange and white toothbrush, original packaging from M2, and one sim card marked RJG 109 MFI 56. Atkinson is the one who inserted the handwritten items. PW17 gave them to Chief Inspector Kilonzo for custody.

26. PW18, No. 73682 S. Sgt. Mwachudhi Salim Malonya, attached to the Bomb disposal and hazardous material response unit at the Coast Regional Headquarters, Mombasa. The nature of his work was to deal with bomb threats, any hazardous materials and unexplained items. He was the head of the above unit and he is a master bomb technician by experience and training. On 20.12.2011 at 9.00 am while in his office, he was asked by Chief Inspector Martin Otieno to analyze material exhibits that had been recovered the previous night at Kisauni to determine whether they could make explosives or IEDS. He did so then prepared a report. PW18 said that the report indicates that the items that were in his interest as a bomb expert were 2 litres acetone, hydrogen peroxide four in a 2 ml plastic container, ammonium nitrate in a 1 ½ kg container, lead nitrate chemical in a 5 ml plastic container, 4 size AA super batteries, an electric rocker switch, an electric conducting wire, and a multi-metre wire. He concluded that the items can be used to prepare an improvised explosive device (IED). An IED is constructed from readily available chemical mixtures and the mixtures do not necessarily mean they were made for making bombs. However, an IED is improvised by making fabricating item by using ordinary chemical or biometrics which are meant to destroy, disfigure or harass. They are also called home-made bombs which are made by improvised items. The main component of the IED is a power supply which can be the batteries detonators (rods and actual explosives which are used as the main charge. One will need a switch or fuse. The items

recovered were 4 AA batteries which can be used as a power source in an IED. The electric rocker switch can be used as a firing switch in the IED. The conducting wire can make a circuit in the IED. The multi-meter can be used to insulate naked wires in the IED. The chemical could make mixtures which can explode. Binary explosion can explode or cause confusion. Acetone is used as a fuel in the IED. Hydrogen peroxide can be used as oxidizer while sulphur is used as a binder. Lead nitrate is used as a fuel. The material were not wired together to make the IED but can be used by a person with knowledge on explosives. PW18 produced his report dated 14.2.2012 as Pexhibit 94.

27. PW19, No. 231954 Mr. Martin Otieno Omumbo the officer in charge of the ATPU office Mombasa. On 14.12.2011, he received intelligence report that there were some suspects who had explosive materials which they intended to make an explosive for a terrorist attack PW19 instructed some officers to carry out surveillance on the two suspects Faud Abubakar Mansuar and Jermain Grant. PW19 deployed officers to different locations to effect arrest of the suspects. Sgt. Peter Muli and PC James Miyo were assigned Kishada grounds in Kisauni. At around 11.30, PW19 received a call that two suspects had been arrested and some items recovered from them. They were instructed to meet at a designated place with the suspects and PW19 was showed the recovered items. The house at Kishada was searched and a few items were recovered. All the recovered items were recorded in the inventory. PC Opassi prepared the inventory and the two suspects signed it. PW19 was the one who coordinated arrest of the accused persons. PW19 and his team confirmed from a Sheikh who had solemnized the marriage between Warda and Jermain that the two had actually gotten married. PW19 said that he was in possession of the marriage certificate which shows the marriage took place on 18.12.2011 in Warda Breik's Islam House in Mombasa. The witness to the wife was Ali Breik Islam, a brother to the bride. The other items were taken to the Government Chemist for analysis. The Scotland Yard officer was called by the head office in Nairobi to assist with investigations. They went to the scene and more items were recovered. One of items was a sim card which was recovered from under the TV trolley using chewing gum.

Defence Case

28. DW1, Jermain Grant, said that he is 34 years old, he was born and raised in London, and he is UK citizen who came to Kenya in December 2011. After about two weeks, DW1 met Faud Abubakar at the beach where he had gone to swim. He told him he was preparing for marriage but was staying at a hotel. A week or so before the marriage, he offered DW1 a room in his house and he would get a week in the house from his honeymoon. Two days before the marriage, Faud left and took with him a yellow paper bag. DW1 did not know the contents of the bag. The alleged chemicals were found in Faud's room which was the first while DW1's room was the second one. DW1 said that he started preparing to buy furniture which was the dowry demanded for the marriage. Faud left with his keys and DW1 had never entered the room. The wedding took place on 18.12.2011 and the marriage was solemnized in a house belonging to Warda's relative. DW1 said he never knew Warda well and was introduced to her by a friend of her family, one Hassan. DW1 had met Warda twice at her family home. She knew very little about DW1. The marriage was solemnized and on the same night, DW1 and Warda went to Faud's house for the honeymoon where they were escorted by family members and spent the night. The following morning, some of Warda's relatives went to the house as per the Swahili tradition. DW1 left the house at around 11.00 am to do some shopping in town. Later in the day, DW1 met Faud who wanted to congratulate him for the marriage. He had a motor cycle. DW1 says that suddenly, they were surrounded by two to three cars, one of them being a matatu with tinted windows. Some men who were armed came out of the matatu and slapped DW1 and Faud. One held DW1 by the arm but they did not introduce themselves nor the purpose for the arrest. They were ordered into the matatu. DW1 said that they took his phone and put a black hood on his head. He was asked who he was and they stated shouting at him. He was hit with a blunt object on the face. He heard someone else being pushed into the car and he knew it was Faud. They were taken to the police station where they stayed for an hour, beaten up then put in the car again and driven to Faud's house. DW1 said that he was asked for keys to the house which he did not have but his wife was inside and she opened the door. DW1 saw another yellow paper bag which was open and had plastic containers inside. DW1 recognized the paper bag and it looked like the one Faud had left with. DW1 said that he was asked about contents of the paper bag but he did not know. The police showed him an A4 paper which had a list of items written and underneath the word 'owner' which he was asked to sign but he refused and he was hit. He still refused to sign. The same form was given to Faud and after reading it, he agreed to sign it. Thereafter, they were taken back to the police station where DW1 was placed in the cells for the night. He was then moved to another police station.

29. DW2, Frank Ngunyo Chandugu, 48 years old, a matatu driver, recalls on 25.12.2011 on Christmas Day at the Chonyi home he was with his parents and relatives. Suddenly about 8 people who were strangers came to the home and asked for the owner of the homestead. DW2's father stood up and DW2 was pulled away. One of the individuals showed them his identity card and said they were police officers. DW2 told his father, Jimmy Ngala, to accompany them. After about three minutes, they came back and asked for DW2. He identified himself and was beaten up, handcuffed and they collected all the phones. DW2 said that he was put in the car and forced to put his head on his thighs. He was taken to his house in his house in Bersheba where they broke the padlock and searched the room. DW2 was then given a paper to sign. When he was taken to Urban Police Station, he found his father being held there. He was locked in the cells, photographed, his fingerprints were taken and he was given several forms to sign. Thereafter, he was taken to Central Police Station. On 26.12.2011, he was returned to Urban Police Station. He was asked whether he has been to America. He said he has only visited Mombasa, Chonyi and Kilifi Town. He was shown several phones and asked to pick out his. He was then asked for his telephone number and he gave it as 0721xxxx. DW2 told them that while driving the matatu and on reaching Docks, he lifted the handbrake and saw the phone. He kept the phone for three days for the customer who had dropped it to come for it. When nobody went for the phone, DW2 put a Zain line in the phone. DW2 told them he had kept the sim card found in the phone at home. DW2 and his father were taken to Chonyi where they gave out the sim card. DW2 was asked about his ex-girlfriend's number whom he had contacted. The police interrogated her and she confirmed he had contacted her. DW2's father was released and DW2 was locked up at Central Police Station and charged.

30. DW3, Warda Breik Islam, said she is a henna decorator. She was arrested on 19.12.2011 when she had just been married. So she was arrested at her husband's house. She said that her wedding was on 18.12.2011 at 7.00 pm in her parent's home. She got married to one Ali Mohamed whom she did not know. DW3's relative called Bimaka called his brother Ali Breik and told him that a friend to his brother was looking for a wife. Bimaka said he liked DW3's family who was proposing one who was still unmarried to marry the said friend. DW3 had 12 siblings, she was the 11th born and was the only one who was still unmarried. Ali went and asked whether she was agreeable to the proposal but she asked for time to think about it. After 2 days, DW3 asked her brother that she wanted to see the said man. Bimaka and his brother Hassan took the man to her family at around 4.00 pm where she was introduced to the man. DW3 said she would give her answer later. Two days later, DW3 told her brother Ali that she had agreed to the marriage. After a few days, Bimaka, Hassan and the man went to DW3's home for dowry negotiations. Only DW3's family spoke with the three about dowry. Ali went and asked DW3 what kind of dowry she wanted as it is their culture for the bride to decide on the dowry to be paid. DW3 said she wanted Kshs. 50,000 and household furniture. The man paid Kshs. 30,000 then promised to bring the balance and the furniture later. DW3 saw the groom face to face twice, on

introduction day and on the wedding day. The Kadhi who officiated the marriage asked for their identity cards but DW3 did not trace her identity card at the time but promised to take it to him later. The groom did not produce his identity card. After the wedding, DW3 was taken to the house in Kishada where she had never been before and she was told by her husband that the house belonged to his friend. The next day, DW3 slept and when she woke up, she realised that there were people peeping into the room through the window then there was a knock on the door. DW3 said she saw her husband and some people who asked her whether she knew her husband. They then started searching the bedroom. The men did not identify themselves, they were in plain clothes and her husband was in handcuffs. None of the people was a woman. She was asked to dress up so she wore her buibui. DW3 said that she saw some things in the dining area that had not been there before the men came. DW3 was taken to various houses and asked whether she had been there and she stated to the men that she has never been to the houses. She stated that nobody called her so that they can conspire to make explosives and she has never talked with her husband on phone.

31. DW4, Ali Breik Islam, the brother to DW3 said that it is not true that her sister tried to make explosives. She got married to Ali Mohamed on 18/12/2011 but they never knew Ali before the marriage. DW4 received a call from his brother-in-law Bimaka Mohamed who told him that there was foreigner who was a friend to his brother Hassan who was looking for a lady to marry. He said he was requesting whether they could have Warda marry the foreigner. DW4 told him that he would talk to his sister which he did including talking to his father who was still alive by then. After two to three days, his sister asked to see the foreigner. DW4 called Bimaka and informed him who said that Hassan would take the foreigner to their home the following day, which they did. Hassan told DW4 that he knew the foreigner well and he was of good behaviour. DW4's father had no objection to the marriage. About two weeks later, they went back for dowry negotiations. DW3 said she wanted Kshs. 50,000 and furniture for dowry. The groom paid Kshs. 30,000 and the balance was to be paid after the wedding. The wedding was done on 18.12.2011 but the Sheikh went away with the marriage certificate because the bride and the groom did not produce their identity cards. DW4 then escorted the newlyweds to their new home. The following night at around 10 or 11 pm while DW4 was sleeping, Samir called his younger brother Ahmed and informed him that Warda and her husband had been arrested. They did not state the reason for the arrest. They went looking in different police stations but at Provincial Police Station, they were told to go to court at 2.00 pm which they did and they were surprised to find out that the two had been charged with being in possession of explosives.

Appellant's Submissions

32. The Appellant submits in respect to grounds 1, 2, 3, 4 and 7 of the appeal that from the legal interpretation of Section 29 of the Explosives Act clearly exposes the drafting of count 1 as a misrepresentation of the law and in violation of Section 134 of the CPC on how charges are to be drafted and the required clarity of the same. The particulars of Count 1 clearly refer to explosive making materials (including 4 AA batteries and an eleven centimeter electric wires...) and not explosives as defined at Section 2 of the Explosives Act.

33. The Appellant submits that it was confirmed by the prosecution and affirmed by the Honourable trial magistrate that Ammonium nitrate was included in the particulars of count 1 but in reality there was no such recovery. The evidence of PW3 on the exhibits that were allegedly recovered from the house in Kishada-kisauni and it doesn't include Ammonium nitrate. The same is reflected in the evidence of PW15 and the evidence PW18 the investigating officer.

34. The Appellant submits that it was confirmed and firmly so by PW6, PW12, PW15 and PW18 (UK Scotland Yard detectives and ATPU investigation officers) that the alleged recoveries that are subject of count 1 did not constitute an explosive or explosives as they were, unless some mixing was to take place and no such mixing of the ingredients had ever taken place.

35. The Appellant submits that despite confirming that there were no explosives recovered from the Kishada house, it was the evidence of PW12 that the said material also had other legitimate uses. By so stating, the onus was on the prosecution to prove that the Appellant was possessed of relevant *mens rea* and *actus reus* to employ the said materials for illegal use and not legitimate use but the prosecution failed in this regard.

36. The Appellant submits that the alleged recovery of the flash disc is shrouded with confusion, inconsistency and contradictory evidence for it to be ascribed exclusive possession of by the Appellant for reasons that it was the joint claim by PW2 and PW3 that the flash disc was recovered from the Appellant while hanging on his neck which was reiterated by PW18 but PW2 was not specific on where the said flash disc was recovered from. Also, PW2 and PW3 did not sign the inventory of the alleged recoveries as witnesses. It was the evidence of PW15 that he was instructed by PW18 to prepare the said inventory which he wasn't led to mark for identification and neither was he led to produce the same as an exhibit. The evidence of PW15 clearly absolved the Appellant from the alleged possession of the flash disc. Further, the Appellant submits that having placed a sticker on the flash disc as 'unclaimed', PW15 cannot on the same breath claim that the arresting officer told him that the flash disc was recovered from the Appellant and this was after the Appellant had claimed that it was found with Faud his co-accused. The Appellant submits that from the evidence of PW6, all the containers recovered from the Kishada house and the flash disc were taken to the UK for DNA profiling and possible finger print lifting. However, by the close of the prosecution's case, the results on the DNA profile and fingerprints lifting were never presented as evidence and it concludes that there was no direct or indirect evidence to link the Appellant to the containers and flash discs allegedly recovered on 19.12.2011.

37. The Appellant submits that the prosecution failed to prove beyond reasonable doubt that the Appellant was found in possession of explosives and further failure to draw a nexus between the Appellant and the said flash disc which gave life to the unsworn evidence of the Appellant to the effect that he did not have knowledge nor did he ever exercise any control over the said explosives making materials that are subject of count 1. The Appellant submits that the failure to rebut the defence evidence tendered by the Appellant, his evidence attracted total corroboration from the evidence of the 2nd accused to the effect that none of them knew about the existence of the explosive making materials that she had never seen the Appellant with the flash disc and none of them ever exercised control over the explosives making material.

38. The Appellant submits that the sentence meted out to the Appellant was harsh and legally excessive to the effect that Section 333(2) of the CPC was never given its true meaning and interpretation as it was held in the Court of Appeal case of *Ahamad Abolfathi Mohamed & Another v Republic* [2018] eKLR. The reasoning in the case was also applied in cases of *Collins Gichuhi Gaturu v Republic* [2020] eKLR. The Appellant further submitted that the Appellant was convicted and which is subject to his Appeal which was registered in court on 27th December 2011 and concluded on 9th May 2019. By the 27th December 2018, it adds up seven (7) years since the Appellant was arraigned

and charged in court plus five months up to his conviction and sentencing. Regardless of the subsequent charges that were filed at the Shanzu Law Courts where the Appellant was acquitted upon an appeal to the High Court by the state, the acquittal was overturned and he was sentenced to serve an accumulated term of nine (9) years should not stop the Honourable Court from ordering that the Appellant has already paid his dues to society for an offence that carried a maximum of seven (7) while he has been in custody for more than the seven (7) years and counting.

Respondent's Submissions

39. The Respondent submits that the Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR when determining what constitutes an explosive held that from the above definition, an explosive will include any blasting powder or substance which is used or manufactured with a view to producing a practical effect by explosion. We have no doubt in our minds that that from the evidence of PW16, RDX is a blasting powder within the meaning of the above section. In our view, the mere fact that RDX requires a detonator or stimulus to produce a practical effect by explosion does not take it outside the definition of an explosive. There is no dispute that it is used or manufactured to produce a practical effect by explosion, whether or not a detonator or a stimulus is required for that eventuality.

40. The Respondent submits that based on the foregoing and reasoning in the above case, the items listed on the charge sheet thus constitute explosives. There is therefore no defect as alleged by the Appellant in how the charge sheet was drafted as all throughout the prosecution's case evidence was laid out to the effect that the items recovered were explosives and meant for an unlawful purpose.

41. The Respondent submits that from the above, the existence of the flash disc cannot be disputed as the same is confirmed by PW6, PW11, PW12, and PW14 who all stated that the same was recovered from the Appellant. The fact therefore that the Appellant did not sign the inventory at the time of recovery by PW2 and PW3 cannot absolve him. As held in *David Letira Lekai v Republic* [2016] eKLR; the purpose of an inventory is to keep a record of exhibit recovered during the investigation. Failure to prepare an inventory or keep an inventory duly signed by the accused cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence.

42. The Respondent submits that on the recovery of the chemicals in the Kishada house, Section 4 of the Penal Code defines possession as 4(a) "be in possession of or "have in possession" includes not only having in one's own personal possession but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other reasons.

43. The Respondent submits that in *Martin Oduor Lango & 2 Others v Republic* [2014] eKLR the court of appeal held that the definition under Section 4 is wide enough to encompass even constructive possession as is in the case herein.

44. The Respondent submits that the Appellant's defence therefore of the chemicals being recovered in Faud's room which was always under lock and key is an afterthought as the same was never raised during cross examination neither was any evidence led by the defence to suggest that the police broke into the said room or that it was locked at the time. From the evidence of PW5 and other corroborating witnesses, the appellant and Faud lived with barely nothing but a mattress and no furniture, there were no valuables to keep under lock and key. The Appellant was well aware of the contents of the house.

45. The Respondent submits that it is not true that the trial court disregarded the Appellant's defence and shifted the burden of proof to the appellant. The trial court analyzed the defence put forward by the appellant and guided by section 111(1) and 119 of the evidence and circumstances of the case the trial court at page 581 of the record reasoned that the explanation of the appellant was not convincing as the caretaker, PW4 confirmed that the first accused lived in the material house and would go anywhere with the said Faud. PW1, PW2, PW3, and PW4 confirmed that the Appellant lived in the said house. At page 582, the trial court held further that the literature found in the flash disc mainly related to making explosives and chemicals and fuse that were found are what could be used to make explosives which the Appellant had knowledge of.

46. The Respondent submits that on sentencing, it is true that the trial began in December 2011 and was concluded in May 2019 when the Appellant was sentenced to four years imprisonment. The Appellant contends that the said sentence is harsh and excessive given the length of time the trial took which was not considered as per section 333(2) of the Criminal Procedure Code. The Respondent submits that under Section 29 of the Explosives Act, one is liable to a maximum of 7 years imprisonment if found guilty. The Appellant was sentenced to serve 4 years. This was after the trial court in its sentencing notes considered the fact that the Appellant had been serving a nine year sentence as of 2015 while the trial was on going. This time in custody can therefore not be claimed. However, the trial court went ahead to balance these circumstances and imposed the sentence of 4 years which we submit is fair and just. There is no reason for this honourable court to disrupt the same.

47. The Respondent submits that in determining the appeal, the Honourable Court is urged to consider what constitutes proof of facts as stipulated in Section 3 (2) of the Evidence Act together with principles of reasonable doubt as in the celebrated judgment of Viscount Sankay in *DPP v Woolmington* and add that reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice, rather it is based upon reason and common sense.

48. The Respondent submits that the prosecution proved its case against the appellant to the required legal standard and prays that the honourable court find so, confirms the conviction and sentence and dismiss the appeal for lack of merit.

Analysis and Determination

49. 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."

50. Issues for determination are as follows:-

1. Whether the prosecution proved the element of possession of explosives as defined by the law and whether the Appellant was found in possession of explosives
2. Whether the prosecution's case had contradictions, inconsistencies and lack of corroboration
3. Whether the learned trial magistrate considered the Appellant's defence and whether the burden of proof was shifted to the Appellant
4. Whether the learned trial magistrate considered evidence tendered by the expert witnesses
5. Whether the sentence was excessive under the circumstances

Whether the prosecution proved the element of possession of explosives as defined by the law and whether the Appellant was found in possession of explosives

51. Section 29 of the Explosives Act provides:-

'Any person who makes or knowingly has in his possession or under his control any explosive, in circumstances which give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of an offence and liable to imprisonment for a term not exceeding seven years, and the explosive shall be forfeited.'

52. Under Section 2 of the Explosives Act, an explosive is defined as:-

a) gunpowder, nitro-glycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury or of other metals, coloured fires and every other substance, whether similar to those herein mentioned or not, which is used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect;

b) any fuse, rocket, detonator or cartridge, and every adaptation or preparation of an explosive as herein defined; or

c) any other substance which the Minister may, by notice in the Gazette, declare to be an explosive, but does not include ammunition as defined in the Firearms Act (Cap. 114);

53. According to the Appellant's counsel, count 1 of the charge sheet was defective and a misrepresentation of the law and violation of section 134 of the CPC of how charge sheets are to be drafted for reasons that Section 2 of the Act defines explosives and not explosives making materials. It was argued that explosives and explosive making materials are not one and the same thing and that there was conflict between particulars of the offence and evidence on record which warranted the acquittal of the Appellant.

54. The Respondent's submission was that the item listed in the charge sheet constituted explosives as based on the reasoning in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR. In consideration of the definition in Section 2 of the Explosives Act which has to be read together with Section 29 of the Act, the couching of the charge sheet as materials for making explosives cannot be said to be defective as indeed Section 2 defines those materials as explosives in themselves. The evidence of PW6 confirms that the chemicals recovered when combined could make homemade explosives which is highly unstable, dangerous and any act of touching or dropping can detonate it. It is not too remote to conclude that the electric wires, the batteries and switch were all meant to be used to assemble the materials to make a detonator using the pair of pliers that were recovered from the same place.

55. Whether the Appellant was found in possession of the explosives making materials, evidence by PW1 Hassan Mohamed, PW5 Slim Karama, PW2 PC James Kipkosgei and PW3 Sgt. Peter Muli was to the effect that the 1st Accused lived in the house where materials were recovered and PW4 Abdalla Ali Salim also said he lived there and would go everywhere with Fuad whom he claimed had allowed him to use one room in the house. Although the Appellant in his unsworn statement claimed that he had no knowledge of the exhibits allegedly recovered from the house where he resided with 'Hassan' and the 3rd Accused and that the flash disc that PW2 alleged to have recovered from him in fact belonged to the arresting officer, PW2'S evidence that the flash disc that was recovered from the Appellant is corroborated by the evidence of PW3 and unfortunately the claims by the Appellant in his unsworn statement could not be tested for credibility. The flash disc was investigated by PW11 and PW12 and found to contain several files related to explosive chemicals and how to create and make explosives among others. The only inference that one can draw from the evidence is that the Appellant was indeed found in possession of the flash disc which had information on how to assemble the materials in their residence into explosives. The 3rd Accused who had been married to the Appellant just one day before the arrest said that the Appellant did not tell her that the house belonged to anyone else. The trial magistrate rightly found that the Appellant was in constructive possession of the materials for making explosives and that his explanation that the house did not belong to him is not convincing.

Whether the prosecution's case had contradictions, inconsistencies and lack of corroboration

56. The contradiction pointed out by the Appellant's counsel is that of PW5 as against that of PW1, PW4 and PW15 in respect to whether the Appellant was the owner of the house or it was Hassan who was the owner of the house. A perusal of the evidence of PW1, PW4, PW5, and PW15 does not bring out any material contradictions and the Appellant's counsel has not given particulars of contradictions he is alluding to. PW5 was the immediate neighbor of the Appellant and Hassan and they had better information concerning them as they interacted with them on a daily basis. There is no evidence which indicated that the Appellant and his wife were living in any particular bedroom and PW1 who fixed the fan did not distinguish. PW1 said the house had 3 bedrooms and the Appellant's allegation that the room belonging to Hassan was locked is not supported.

Whether the learned trial magistrate considered the Appellant's defence and whether the burden of proof was shifted to the Appellant

57. Consideration of the Appellant's defence is found on page 51 of the judgment that his explanation that he was invited by Fuad to the house to use only one room was not convincing as the caretaker PW4 confirmed that he lived in the material house and would go everywhere with Fuad Abubakar. The trial magistrate also noted that PW1 and PW5 also confirmed that the 1st Accused also lived in the same house and when arrested by PW2 and PW3, they led the police to their house. The Appellant also denied having been found with the flash disc and claimed that one of the arresting officers had it on his neck but he did not identify which of the officers had the flash disc and the trial magistrate believed the prosecution's evidence that the flash disc was recovered from the Appellant. The unsworn statement of the Appellant was therefore considered by the trial magistrate in arriving at his determination. The Appellant was only placed on defence when the trial magistrate was satisfied that the prosecution had proved their case beyond reasonable doubt.

Whether the learned trial magistrate considered evidence tendered by the expert witnesses

58. The expert witnesses who testified were PW6 Robert John Garrick, PW11 Stephen Ball, PW12 Lorna Kirstin Philip, PW13 John Reiley, and PW16 David Atkinson. PW6, Robert John Garrick was a detective counsel for new Scotland Yard, Counter Terrorism Command, was involved in the investigation of the items recovered from the Appellant's house and he concluded that they were for making explosives. PW11 investigated the flash disc and found documents related to how one can make explosives and he printed contents of the flash disc which were downloaded between 18th November and 11th December 2011. He said 98% of the documents were written in English and 2% in Arabic. The evidence of PW12 at page 272 of the proceedings that the trial magistrate considered in his judgment is that acetone is a liquid that can be used to manufacture an explosive called TATP and that it is a very sensitive material that can detonate simply from impact, friction, spark or heat, it is extremely dangerous, and has no commercial use. She also said that the ½ kg urea can also be used to make an explosive known as urea nitrate when mixed with nitric acid. She also found 500 grams Sulphur which she said is one of the components of black powder or gun powder. There was also a 200mls of hydrogen peroxide which had 100mls of the liquid which is used to manufacture TATP and can also be used as a disinfectant or antiseptic. PW13 accompanied the experts who conducted examination of the exhibits that were recovered from the Appellant's house in Kisauni. From the judgment of the trial court, it is the evidence of the prosecution witnesses as well as the experts as shown on pages 47, 48, 49 which made the trial magistrate conclude that *"...the presence of these chemical and the literature in the flash disc that related to the making of explosives show a clear and direct connection with the making of an explosive. The chemicals were therefore single parts of the intended explosives that were to be created..."*

59. The fact that the expert witnesses said in cross examination that they did not find a bomb or that the items recovered were not in themselves explosives unless some mixing was done cannot exonerate the Appellant for reasons that the definition in Section 2 of the Explosives Act describes some of the items recovered as explosives in themselves even before being mixed. It would be catastrophic to sit back and wait for explosive components to be assembled before one can say that it is an explosive and that would be risking lives and property.

60. The Appellant introduced himself as Ali Mohamed to his wife the 3rd Accused and hurriedly made arrangements for a marriage but when the Kadhi required his identification documents, he did not have any and the marriage certificate was retained until such time that he and his wife avail the documents. On his arrest, he introduced himself as Peter Joseph again without any documents. He was all along known to be a Canadian nationality and it was not until he was interrogated that it came out that he was a Briton known as Jermain Jhon Grant. The Appellant presented himself with false identity and he was obviously up to no good. The police officers acted in good time to stop the intended crime.

Whether the sentence was excessive under the circumstances

61. The penalty provided for under Section 29 of the Explosives Act is a maximum of 7 years imprisonment if one is found guilty. The Appellant was sentenced to serve 4 years imprisonment in consideration that he was serving another sentence. This court finds that in view of the offence for which the Appellant was convicted, the sentence is fairly lenient and does not deserve to be unsettled. The Appellant did not indicate when he was charged for the offence for which he is serving 9 years imprisonment for the court to consider whether he is entitled to the benefit of the provisions of Section 333(2) of the Criminal Procedure Code.

62. In conclusion, the appeal herein lacks merit and the same is dismissed. The Appellant has 14 days within which to appeal and orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 21ST DAY OF OCTOBER 2021**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Mulamula for Respondent

Mr. Chacha for Appellant

Appellant PIP

HON. LADY JUSTICE A. ONG'INJO

JUDGE