REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 39 OF 2019

HAMISI OMAR MANDAE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Garissa Chief Magistrate's Court

Criminal Case No. 109 of 2018 delivered on 18th October, 2019

by Hon. D. W. Mbuteti (RM))

JUDGMENT

1. The appellant was charged with the offence of receiving instructions for training in terrorism contrary to section 30(B) (I) (a) of the Prevention of Terrorism Act.

2. The particulars being that on or before the 9th day of February, 2018 at unknown place, jointly with others not before court, knowingly he received instructions to attend terrorism training in Somalia, a country designated to be a terrorism training country as per gazette notice No. 200 of 2015 in preparation for the commission of a terrorist act within the Republic of Kenya in contravention of the said Act.

3. He pleaded not guilty and after full trial he was convicted and sentenced 6 years' imprisonment.

4. He was aggrieved by the aforesaid decision. He lodged appeal and set out 5 grounds of appeal namely:

> **(1) That the learned trial magistrate erred in both law and fact in convicting the appellant based on suspicions only and in the absence of evidence.**
>
> **(2) That the learned trial magistrate erred in both law and fact by convicting the appellant despite the prosecution's failure to prove the ingredients of the offence.**
>
> **(3) That the learned trial magistrate erred in both law and fact by convicting the appellant by misinterpreting the law on legal presumption and the facts surrounding the case which were inconsistence and lacked corroboration.**
>
> **(4) That the learned trial magistrate erred in both law and fact by convicting the appellant by shifting the burden of proof to the appellant, after the prosecution failed to prove its case beyond reasonable doubt.**
>
> **(5) That the learned trial magistrate erred in both law and fact by sentencing the appellant to serve 6 (six) years imprisonment which is harsh and extreme under the circumstances.**

5. Parties agreed to canvas appeal via written submissions.

APPELLANT'S SUBMISSIONS

6. The appellant submitted that all that was presented by the prosecution witnesses was purely based on suspicions; considering that the appellant was in the country legally. The superior courts have pronounced themselves in this matter, no matter the level of suspicions it can never be the basis to convict. He relies on the case of **Kelvin Kiswiki Kyongi vs Republic [2018] eKLR paragraph 31 to 33**

7. The appellant was charged with only one count; that of receiving instructions to attend to terrorism training in Somalia a country designated to be a terrorism training country as per gazette No. 200 of 2015 in preparation for the commission of a terrorist act within the Rep that is contended that at the close of the prosecution's case, there was no single attempt to prove any of the ingredients of 0ffence charged.

8. The only reason, that led to the arrest and prosecution of the appellant was mere suspicion. For the simple reason that the appellant could not show the police where his grandmother stayed, that he didn't have a mobile phone and that he was arrested from a bus en-route to Liboi in Kenya.

9. This was 5 Kilometers to the boarder of Somalia; thus police concluded that he was guilty of the offence charged and for that reason the learned trial magistrate erred in both law and fact to collude that the offence was proved beyond reasonable doubt.

10. The court also missed out on a very pertinent fact that the appellant is a citizen of the East African Community which guarantees his free movement throughout the region, so says the **PROTOCOL ON THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY COMMON MARKET** at **part B Article 2 section 4**.

11. On Ground 2 the appellant submitted that the ingredients of the offence vide section 30(B) (1) (a) of POTA are very clear and precise.

12. It was the evidence of all the prosecution witnesses that, after arresting the appellant and when they subjected him to interrogations (which did not comply with the provisions of Article 49 of the Constitution) the appellant was consistent that he had travelled from Tanzania to Liboi for look for his grandmother so that he could travel back with her to Tanzania before he could proceed to seek medical treatment in the company of his mother.

13. That by the time of his arrest and as confirmed by all the prosecution witnesses, the appellant was in Kenya lawful and his visa allowed him to travel and stay in any corner of Kenya and Liboi was not an exception. The issue on whether the appellant was truthful or not in his defence it will be addressed a bit later and neither is it an issue, for the onus to prove the guilt of a prisoner is forever on the prosecution.

14. On Ground 3 the appellant submitted that the learned trial magistrate clearly entertained fanciful thoughts and misinterpreted the law by entertaining provisions that are strange to section 30(B) (1) (a) of POTA. The learned trial magistrate erred in both law and fact by convicting the appellant by misinterpreting the law on legal presumption and the facts surrounding the case which were inconsistence and lacked corroboration.

15. It's quite erroneous and illegal for the learned trial magistrate to have used the ingredients of section 30 C (1) of POTA to convict the accused person on a charge premised on section 30(B) (1) (a) of POTA which has distinguishable ingredients. Section 30(B) (1) (a) of POTA does not provide nor entertain any legal presumption.

16. Section 30 C(1) as referred at paragraph 28 of the judgment states, ***"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."***

17. The ingredients herein are very clear and cannot apply to the circumstances of the appellant for he was arrested from a bus which was yet to arrive at its destination in Liboi Kenya. If the police officers were patient enough to monitor the appellant and if he had gone ahead and crossed into Somalia using an undesignated immigration entry or exit then and only then could the learned trial magistrate legally presume what the law provides.

18. Under the circumstances surrounding the arrest of the accused person it can never be conclusively stated that he had intentions to cross into Somalia. What if the appellant had crossed into Somalia using a designated immigration entry or exit point; the presumption automatically collapses.

19. The appellant further submitted that the findings by the learned trial magistrate at paragraphs 29, 30, 31 and 32 of the judgments lacks any basis and foundation on the law and precedent. The above findings are betrayed by the observations made by the learned trial magistrate at paragraphs 26 and 27:

> **"26. In as much as the accused had a valid visa to travel to any part of the country, his intentions to travel to a town like Liboi with its history has to be very clear. If indeed he was going to visit his grandmother there would be no reasons to charge the accused person.**
>
> **27. PW4 also stated that not everybody who travel to Liboi is arrested; only persons who appear suspicious of their intentions are arrested."**

20. On Ground 4 the appellant submitted that it was the defence of the appellant that his travel to Liboi Kenya was to locate his grandmother so that he could take her to Tanzania before he could proceed for medical treatment. It is erroneous on the part of the learned trial magistrate to have found paragraph 19 and page 6 of the judgment and page 25 of the records that the defence of the appellant was an afterthought.

21. For the records speaks out for itself. On page 7 of the records lines 20 to 23; PW1 confirms the defence of the appellant as early as the 9/2/2018. The same was confirmed by PW2 at page 9 of the records lines 13 to 15. The same for PW3 at page 14 lines 10 to 11 and lastly by PW4 at page 15 of the records line 12 that – ***"He said he was going to Liboi to visit his grandmother."***

22. The said defence offered by the appellant was not an afterthought but it was also corroborated by the records presented to court. On

treatment, the learned trial magistrate went ahead to acknowledge while passing sentence at page 19 of the records line 1 to 3 thus – ***"I appreciate he has a medical condition that needs proper care. I believe the same can be accorded in our prison department."*** This one confirms the defence offered by the appellant that he was to take his grandmother back to Tanzania so that he could go and seek medical care for his medical condition.

23. In trying to discredit the evidence offered by the appellant, the prosecution kept on claiming that the appellant failed to give them the mobile number to the grandmother and also failed to show them where the grandmother resides. The doubts in the prosecution's case gave the defence offered by the appellant credibility. Throughout the prosecution's case an inventory of the items allegedly recovered from the appellant was never produced as evidence. Due to the absence of an inventory or exhibit memo, the claim by the appellant that the mobile number to his grandmother was in the passport holds.

24. Since it is the first time the appellant was visiting Liboi, it did not make sense at all for the arresting officers to insist that the appellant takes them to where his grandmother lived! Infact it was the appellant who was to call the grandmother for her to organize his collection and not the other way round.

25. By the mere fact that the appellant is a Tanzanian and that he did not have a mobile phone made the police conclude their own things devoid of supporting facts. If it were mandatory according to the law to carry a mobile phone whenever one is travelling maybe then and only then could a legal presumption be made.

26. The basis, for which the accused person was charged, is based on suspicions and nothing more. Furthermore, the onus is never on the appellant to prove his innocence or that his defence is truthful as it was held in the case of **Joseph Amunga Ochieng vs Republic [2016] eKLR.**

27. He further submitted that it is clear that the prosecution failed to prove its case beyond reasonable doubt and an acquittal was deserving as it was held in the case of **Kevin Kiswiki Kyongi vs Republic (Supra).**

28. On Ground 5 he submitted that for an offence that carries a maximum of ten (10) years, the appellant ought not to have been convicted to serve six (6) years considering that his conviction is premised on suspicions only, and that he was a first time offender and that he had been in prison custody for one (1) year and (8) moths before he was sentenced on the 18th October, 2019.

29. That there were no aggravating factors to justify the six (6) years sentence, and the sentence was therefore harsh and excessive under the circumstances.

RESPONDENT'S SUBMISSIONS

30. The Respondent submitted that from the evidence of PW1 and PW3 they expressed that the appellant told them that he had come from Tanzania to look for his grandmother in Liboi. But later, when further interrogated by PW1 he has a diametrically different account. He said that he had been called for work at Kismayu in Somali to offload ships.

31. PW3 too interrogated the appellant. He told PW3 that he was going to Kismayu to look for work.

32. Later on, when the appellant was interrogated by investigating officer, PW4, he stuck to his earlier version that he was going to Liboi to visit his grandmother. It is Respondent's submission that the different account nuanced to the officers by the appellant was symptomatic that there was something up his sleeve for his heading to Liboi with the intention to cross over to Somalia.

33. On the issue of the ingredients for the offence, the Respondent submitted that this can be devised from the section under which the appellant was charged. He was charged with receiving instructions for training in terrorism contrary to section 30(b) (i) (a) of the Prevention of Terrorism Act. It provides thus:

> **"30 (b) 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 on 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 10 years.**
>
> **2. For purposes of subsection (i) it is irrelevant whether: -**
>
> **(a) The person in fact receives the training; or**
>
> **(b) The instructions or is provided for particular acts of terrorism."**

34. The Respondent submitted that in the charge sheet, they had referred to a Legal Notice No. 200 of 2015 where Somalia was designated as

a terrorism training country by virtue of section 31 (C) of the POTA No. 30 of 2012.

35. Section 30 (c) creates a presumption that a person who travels to a country designated by the Cabinet Secretary without passing through designated immigration entry or exit points, be deemed to have travelled to that country to receive training in terrorism. The travel is not the offence but creates a presumption of training.

36. In the instant case the appellant is a Tanzanian citizen and had valid documents to be in Kenya. But the said documents could not obviate the appellant to genuinely enter Somalia.

37. The appellant's contention that he is a citizen of East African Community which guarantees his free movement throughout the region vide protocol on the establishment of East African Community Common Market is a jaundiced observation.

38. The Respondent submitted that the East African Community Protocol on the establishment of the East African Community Common Market, under Part D establishes for free movement of persons and labour.

39. Under Article 7(4) provides that, **"the free movement of persons shall not exempt from prosecution or extradition, a national of a partner State who commits a crime in another partner State."**

7 (5). Is critical as far as the instant appeal is concerned. It states:

"The free movement of persons shall be subject to limitations imposed by the host partner on grounds of Public Policy Public Security or Public Health."

40. By having designated Somalia as a terrorism training country vide the gazette notice No. 200 of 2015 in essence, it was limiting the free movement envisaged under the protocol.

41. On the contention that there was misinterpretation of the law on the face of the charge sheet, the Respondent submitted that it indicates the appellant was charged under section 30(B) (i) (a) of the POTA; looking at the particulars, it is clear the appellant was to travel to Somalia hence the section 30 (C) of the POTA was not embodied in the section which anormally can be cured by section 382 of the Criminal Procedure Code.

42. The issues of the appellant defence was considered against the prosecution's case. Initially he indicated that he was travelling to Liboi to locate his grandmother. But he had also indicated to PW2 that he was travelling to Kismayu to work-offload ships. The defence did not dislodge the prosecution's case. The sentence meted out is well within the law.

ISSUES, ANALYSIS AND DETERMINATION

43. After going through the evidence on record and parties' submissions, I find the issues are; whether ***the prosecution proved its case beyond reasonable doubt and whether the sentence was harsh and excessive.***

44. 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."

45. The prosecution had the sole onus to prove that –

i. On or before 9th February, 2018 at an unknown place –

ii. Jointly with others not in court –

iii. Knowingly received instructions –

iv. *To attend terrorism training in Somalia (a terrorism training designated country).*

46. The trial court in convicting appellant held that;

> ***"The above provisions introduce the element of presumption of anybody who travels to a designated terrorist training country shall be presumed to have travelled to the country to receive training on terrorism acts. The same presumption can also be used to presume that anybody who intends to travel to a designated terrorist training country in non-clear circumstances intends to travel to the country to receive training in terrorist training activities. Having established that the accused person was intending to travel to Somali, and given that the accused was not forth coming with this information, this court can only presume that he had intentions to go to Somali which is designated as a terrorist training country. Furthermore, the instructions the accused was given to travel to Somali, was intended for purposes connected with the commission or preparation of terrorist acts. The act by itself of receiving instructions to go to a designated terrorist training country is in itself an offence. This also in consideration of the presumption that the accused person was travelling to Somali to receive training on terrorist activities. I therefore find that the prosecution has proved its case beyond reasonable doubt as required by law."***

47. The prosecution in their submissions and evidence take position that, the evidence of PW1 and PW3 expressed that the appellant told them that he had come from Tanzania to look for his grandmother in Liboi. But later, when further interrogated by PW1 he has a diametrically different account. He said that he had been called for work at Kismayu in Somali to offload ships.

48. PW3 too interrogated the appellant. He told PW3 that he was going to Kismayu to look for work.

49. Later on, when the appellant was interrogated by investigating officer, PW4, he stuck to his earlier version that he was going to Liboi to visit his grandmother.

50. Under the provisions charged the prosecution was principally to establish beyond reasonable doubt whether the appellant had received Training or instruction for purposes of terrorism.

51. However, for purposes of subsection (i) it is irrelevant whether: -*the person in fact receives the training; or the instructions or is provided for particular acts of terrorism."*

52. Thus, this court's understanding is that one has to receive the training or instructions for either particular acts or general acts of terrorism for one to be taken to have committed the offence under the invoked provisions in the charge sheet.

53. The appellant submitted that the trial magistrate erred in both law and fact by convicting the appellant despite the prosecution's failure to prove the ingredients of the offence. The prosecution had the sole onus to prove that; on or before 9th February, 2018 at an unknown place. To start with this statement demonstrates that the prosecution did not have the facts on the specific dates where it is alleged that the appellant received the alleged instructions and neither is the location known on where the alleged instructions were given.

54. Then there is element of "Jointly with others not in court" – Throughout the prosecution's case, there was no evidence tendered to suggest that other people were involved in giving the alleged instructions or giving any instructions or facilitating the travel of the appellant in any way for the purpose as alleged by the prosecution.

55. Another ingredient is that" Knowingly received instructions" – The question would beg; the appellant received instructions from who and which/what instructions? The prosecution never even attempted to provide any clue on that. In this regard, the defence tendered by the appellant stood firm and it was never rebutted despite him tendering unsworn evidence.

56. Another angle in prosecution case was that, appellant was to attend terrorism training in Somalia (a terrorism training designated country) – According to the prosecution, the essence of the alleged instructions is that the appellant was to travel to Somalia to attend terrorism training

57. This was a theory devoid of any supporting facts. After the police received the alleged tip off on someone inquiring on the direction or location of Liboi (not Somalia), the officers arrest the appellant from a bus which was yet to reach its destination.

58. Even if the appellant had intentions to travel to Somalia, it was never explained from which point was he to cross over to Somalia (official or unofficial route?) and where was he to receive the training and from whom? The prosecution's case was and remained extremely doubtful from its inception to the end.

59. The learned trial magistrate clearly erred in presuming (in the absence of facts/evidence) that the appellant had received instructions (from unknown source/s) to travel to Somalia for the purpose of committing or preparing to commit terrorist acts as reflected on page 26 of the records on page 7 and paragraph 32 of the judgment.

60. The presumption in section 30C (1) of POTA was never intended to be read together with the offence in section 30B (1) (a) of POTA. It can only be presumed under section 30C (1) of POTA after the suspect crosses over to Somalia by using undesignated immigration entry or exit points.

61. In the present case the appellant was arrested while in Kenyan soil and while holding a valid visa. Furthermore, the ingredients of the offence vide section 30C (1) of POTA could not fit the circumstances of the arrest of the appellant. The analysis by the learned trial magistrate was wanting and a misdirection.

62. All that was presented by the prosecution witnesses was purely based on suspicions; considering that the appellant was in the country legally. The superior courts have pronounced themselves in this matter, no matter the level of suspicions it can never be the basis to convict. This was the holding in the case of **Kelvin Kiswiki Kyongi vs Republic [2018] eKLR paragraph 31 to 33** where the court held:

> ***"This is a case where the appellant seems to have been convicted merely on suspicion. However as was held by the Court of Appeal in Sawe vs Republic [2003] KLR 364:***
>
> ***"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."***

63. The court does not have to belabor on other grounds as success of this ground suffices to overturn the trial court verdict.

64. Thus, the court finds merit in appeal and makes the following orders;

> ***i) The appeal is allowed, the conviction is quashed and sentence set aside.***
>
> ***ii) The appellant shall be set at liberty forthwith unless otherwise lawfully held.***

DATED, DELIVERED AND SIGNED AT GARISSA THIS 23RD DAY OF JUNE, 2020.

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C. KARIUKI

JUDGE