



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 7 OF 2019

IDAROUS ABRAHMAN HAMAD.....1ST APPELLANT

MBAROUK ADIBU ALI.....2ND APPELLANT

ISLAHI JUMA NEEMA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellants faced the following charges: **Count I** the appellants were charged with the offence of being in possession of an article connected with the commission of a terrorist act contrary to section 30 of the Prevention of Terrorism Act 2012. The particulars being that on the 3rd day of October 2018 at about 1500 hours at Kotulo Wajir area of Tarbaj Sub-County within Wajir County with others not before court, knowingly were found in possession of 2GB Micro SD Card make San Disk which had video namely 7.mp4 which is for the use in instigating the commission of a terrorist act in contravention of the said Act.

2. On **Count II** they were charged with the offence of being in possession of an article connected with the commission of a terrorist act contrary to section 30 of the prevention of Terrorism Act 2012. Particulars being that on the 3rd day of October 2018 at 1500 hours at Kotulo Wajir area of Tarbaj Sub-County within Wajir County with others not before court, knowingly were found in possession of 2GB Micro SD Card Make San Disk which had a video namely About Rogo low.mp4 which is for the use in instigating the commission of a terrorist act in contravention of the said Act.

3. On **Count III** appellants were charged with possession of an article connected with the commission of a terrorist act contrary to section 30 of the Prevention of Terrorist Act 2012. Particulars being that on the 3rd day of October 2018 at 1500 hours at Kotulo Wajir area of Tarbaj Sub-County within Wajir County with others not before court, knowingly were found in possession of 2GB Micro SD Card Make San Disk which had a video namely Muijiza ya Ndugu Zetu.mp4 which is for the use in instigating the commission of a terrorist act in contravention of the said Act.

4. They pleaded not guilty, were convicted after hearing and each sentenced to serve 15 years imprisonment.

5. Being aggrieved by the above verdict they lodged instant appeal and set out 9 grounds of appeal namely –

(1) That the learned honourable magistrate erred in both law and fact by commencing the trial without ensuring that the appellants had reasonable access to the evidence against them and without confirming that the appellants had been supplied with witness statements and documentary evidence which they were not.

(2) Considering the serious nature of the offences that the appellants were facing and the high chances of being prejudiced the learned honourable magistrate erred in both law and fact by failing to promptly inform the appellants of their right to engage legal representation of their choice or to have gone ahead to have the appellants assigned a lawyer by the State.

(3) That the learned honourable magistrate erred in both law and fact by convicting the appellants while the prosecution evidence was clearly inconsistent, uncorroborated and contradictory to the root of the case.

(4) That the learned honourable magistrate erred in both law and fact by convicting the appellants despite the prosecution's failure to demonstrate the ingredients of possession and in proving that the appellants were in possession either severally or

jointly of the primary prosecution exhibit (2GB Micro SD Memory Card).

(5) That the learned honourable magistrate erred in both law and fact by convicting the appellants by admitting electronic evidence which did not comply with section 106B of the Evidence Act.

(6) That the learned honourable magistrate erred in both law and fact by convicting the appellants after the prosecution had failed to link the appellants to any terrorist group and terrorism activities and more so that there was no *mensrea* and *actus reus* linking the appellants to the offence as framed.

(7) That the learned honourable magistrate erred in both law and fact by shifting the burden of proof to the appellants and dismissing the well-articulated, corroborated and unrebutted defence evidence.

(8) That the learned honourable magistrate erred in both law and fact by ordering that the appellants be repatriated back to their mother country Zanzibar, while they were lawfully in the country and it will be in violation of the East African Community Protocol.

(9) Being first time offenders, the learned honourable magistrate erred in both law and fact by convicting the appellants to serve a harsh, excessive sentence in breach of the Sentencing Policy Guidelines.

6. Parties were directed to file submissions which they did and exchanged.

APPELLANTS' SUBMISSIONS:

7. **Ground 1** – that the learned honourable magistrate erred in both law and fact by commencing the trial without ensuring that the appellants had reasonable access to the evidence against them and without confirming that the appellants had been supplied with witness statements and documentary evidence; which they were not.

8. **Ground 2** – considering the serious nature of the offences that the appellants were facing and the high chances of being prejudiced the learned honourable magistrate erred in both law and fact by failing to promptly inform the appellant of their right to engage legal representation of their choice or to have gone ahead to have the appellants assigned a lawyer by the State.

9. They argued grounds No. 1 & 2 jointly since they are both related to the absolute right to fair trial within the Bill of Rights and Fundamental Freedoms.

10. With the promulgation of the new Constitution 2010, it is now an absolute right under fair trial Article 25(c), that Article 50(2) (g) (h) and (j) must be complied with prior to the commencement of any criminal trial.

“Section 50. Fair hearing

(2) Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by, an advocate, and to be informed of his right promptly.

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”

11. Going through the proceedings, from its commencement to the close of both the prosecution and defence cases it was never indicated anywhere that the appellants were ever informed of their right to legal representation and the right to be supplied with the evidence against them so as to prepare in advance and neither did the learned honourable magistrate ever inquired on the same throughout the proceedings; despite the requirement that the same should be communicated promptly.

12. In view of the above, the whole trial is an a nullity for breach of the jealously safeguarded constitutional provisions which guarantee a fair trial and should be quashed even before consideration of the other grounds of appeal, as it was held in the case of *Joseph Ndungu Kagiri vs Republic [2016] eKLR* where the court held:

“In Thomas Patrick Gilbert Cholmondeley vs Republic, (decided before the promulgation of the 2010 Constitution) the Court of Appeal stated categorically that:-

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.” In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively *R. v Ward [1993] 2 ALL ER 557*; *R v Stinchcombe [1992] LRC (Cr) 68*; *Olum & Anor v Attorney General [2002] 2 EA 508*; and, the Kenyan Case of *George Ngodhe Juma & two others v The Attorney General Nairobi High Court, (Misc. Criminal Application No.*

13. **Ground 3** – that the learned honourable magistrate erred in both law and fact by convicting the appellants while the prosecution evidence was clearly inconsistent, uncorroborated and contradictory to the root of the case.
14. **Ground 4** – that the learned honourable magistrate erred in both law and fact by convicting the appellants despite the prosecution’s failure to demonstrate the ingredients of possession and in proving that the appellants were in possession either severally or jointly of the primary prosecution exhibit (2GB Micro SD memory card).
15. Immediately after the arrest of the appellants and more specifically on the 5th October, 2018, the police filed a Miscellaneous Criminal Application No. 48 of 2018 in seeking to continue holding the appellants (who were suspects then) for fifteen (15) days and they later added two (2) days so as to complete investigations.
16. On paragraph 3 of the affidavit in support it made reference to a text message which was allegedly sent to the mobile phone of the 1st appellant. Throughout the said affidavit, it does not mention where that 2GB micro SD card was ever recovered from any of the appellant. Annexed herein please find the complete set of the Miscellaneous Criminal Application No. 48 of 2018 for ease of reference.
17. It was the joint defence evidence by the appellants that the 2GB micro SD card was planted on them and the evidence on record confirms the same, derived from the inconsistencies and obvious lies in the prosecution narrative. Kindly refer to the defence evidence page 19 lines 28 and 29, page 20 line 1 to 3 for the 1st appellant; page 23 lines 3 to 10 for 2nd appellant. Page 25 line 22 to 28 and page 26 line 1 and 2 the 3rd appellant. According to the appellants, it was their defence that they were forced to sign the inventories.
18. Having denied that they were ever in possession of the 2GB micro SD card, the prosecution had to prove beyond reasonable doubt that the appellants had in their actual possession of the exhibit or that they had knowledge that the same did exist. The only way to have proven possession was by forensic evidence; for the signing of inventories is not conclusive by itself.
19. **Ground 5** – that the learned honourable magistrate erred in both law and fact by convicting the appellants by admitting electronic evidence which did not comply with section 106B of the Evidence Act. As earlier submitted the prosecution’s case is/was entirely dependent on the 2GB micro SD card and the contents therein.
20. The report presented to court as prosecution exhibit 5 was accompanied with a certificate under section 65(8) of the Evidence Act instead of a certificate under section 106B of the Evidence Act, since it relates to electronic evidence.
21. Under section 106B of the Evidence Act as it was held in the case of **Republic vs Ibrahim Bille Jelle [2016] eKLR** as highlighted on pages 8 and 9 –
- “Again on the issue of reliance on electronic data. The law is quite clear that under the Evidence Act (Cap. 80) there are certain requirements to be fulfilled before such electronic evidence can be admissible in court. Print outs of data from use of mobile phone is electronic evidence under the Evidence Act (Cap. 80).**
- Section 106B (1) provides that for electronic evidence to be admissible in evidence specific conditions regarding the state or condition of the gadget or computer are listed under subsection (2).”**
22. **Ground 6** – that the learned honourable magistrate erred in both law and fact by convicting the appellant after the prosecution had failed to link the appellants to any terrorist group and terrorism activities and more so that there was no *mens rea* and *actus reus* linking the appellants to the offence as framed.
23. This one goes without say, now that the entire prosecution evidence has been rendered inadmissible. By the mere fact that the appellants were arrested near the Kenya Somalia border is not sufficient evidence on its own to conclude that they had intentions to engage in terrorism.
24. **Ground 7** – that the learned honourable magistrate erred in both law and fact by shifting the burden of proof to the appellants and dismissing the well-articulated, corroborated and un rebutted defence evidence. The defence evidence was solid and it was not shaken nor rebutted by the prosecution. The appellants firmly corroborated each other but nevertheless the learned honourable magistrate disregarded the said defence evidence without any legal justification.
25. **Ground 8** – that the learned honourable magistrate erred in both law and fact by ordering that the appellants be repatriated back to their mother country Zanzibar, while they were lawfully present in the country and it will be in violation of the East African Community protocol.
26. **Ground 9** – being first time offenders, the learned honourable magistrate erred in both law and fact by convicting the appellants to serve a harsh, excessive sentence in breach of the Sentencing Policy Guidelines.
27. The offence under section 30 of the Prevention of Terrorism Act carried a maximum prison term of 20 years and it goes against the Sentencing Policy to have sentenced the appellants to serve 15 years imprisonment despite having been confirmed to be first time offenders (that is if there was evidence to convict in the first place). There were no aggravating factors to warrant a stiff penalty under the circumstances as directed by the sentencing policy guidelines.

28. On the contention that the learned honourable magistrate erred in both law and fact by commencing the trial without ensuring the appellants had reasonable access to the evidence against them.

29. In response, the proceedings on 1st November 2018 is very clear when the matter came up for hearing, all the appellants indicated to the court that they were ready. They not indicate that they had not been supplied with witness statements and documentary evidence or not.

30. Nevertheless, they proceeded and participated fully in the proceedings. The record will demonstrate that they even cross-examined witnesses which is symptomatic that they had prepared themselves for the case. In the entire trial they never raised the issue of the statements.

31. On the aspect of the court failing to promptly inform the appellant of their right to engage a legal representation of their choice or to have the appellants assigned a lawyer by the State our response is:

“In the Supreme Court of Kenya Petition No. 11 of 2017 – Charles Maina Gitonga vs Republic, at paragraph (b) the Supreme Court nuanced thus:

“Noting that legal representation is not an inherent right available to an accused person under Article 50 of the Constitution or any provisions of the repealed Constitution and that under section 36(3) of the Legal Aid Act No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial.”

32. The Legal Aid Act No. 6 of 2016 came into force on 10th May 2016. The case that is the precursor to the instant appeal was adjudged in 2018. The Act, it is to give effect to Articles 19, 48, 50(2) (g) and (h) of the Constitution.

33. Further section 36(1) of the aforementioned Act also provides for eligible persons for legal aid and the appellants from the said section don't qualify for legal aid.

34. On the issue of inconsistent, uncorroborated and contradictory evidence, we wish to respond as follows; different witnesses perceive same things differently and their account will vary depending on their perceptions. What is critical is for the trial court to analyze and see if there are convergences that confluence to prove the existence of a given occurrence.

35. In the *Criminal Appeal No. 16 of 2017 Nairobi Court of Appeal – PON vs Republic*, the Judges opined thus:

“With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

36. The appellants' contention is that indeed in the present appeal, there were some contradictions and discrepancies in the prosecution's case. But the same were minor and should be ignored by this honourable court.

37. On the issue of electronic evidence, indeed a certificate was not produced. But then, the production of the report was not objected to by the appellant.

38. On the issue of possession; possession is defined under the Penal Code in an abstract sense under section 4 of the Penal Code and section 2 of the Firearms Act as cited by the appellants.

i. Being 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 any other person.

ii. If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

39. The above ingredients are on point in the instant case from the prosecution's case the appellants were in possession of the 2GB micro SD card.

40. The sentence meted out is within the law. The appeal is unassailable and humbly request for the same to be dismissed.

Prosecution's Case:

41. FNo. 82330 PC Ali Noor Nengicha (PW1) was the first prosecution witness and in brief testified that on 3/10/2018 they were on duty at Kotulo Wajir along with his colleagues Cpl. Mbogo, PC Katana, PC Omete and PC Bulle when they received information from members of the public that some people who spoke Swahili language were asking for directions to Somali. They were informed that the people had taken the road towards Elwak and upon following the said road they encountered the said people after around 5km.

42. They stopped the said persons and upon searching their persons found that each had valid travel documents and a phone. According to him the 1st accused person had a techno T249 phone, the 2nd accused had a nondescript Techno mobile while the 3rd accused person had an

Itel phone.

43. On further interrogation the persons stated that they were on their way to Somalia to look for work.

44. They then arrested the persons and presented them before a multiagency team for further interrogation and when the three could not supply satisfactory answers as to why they were journeying to Somalia, they sent their phones to the ATPU ICT department for analysis where it was revealed that the phones contained a video inciting people to commit terrorism acts.

45. He was specific that the incriminating information was in a memory card which was in the Itel phone. His evidence remained firm when subjected to cross examination.

46. PC Geoffrey Omeche (PW2) gave materially identical evidence as PW1 and also maintained his testimony when cross examined.

47. Both the above witnesses identified the three accused persons herein as the persons they had arrested on the material day.

48. PW3 PC Yvonne Mulobi Mwikali stated that she is attached to the ATPU Cyber Crime Lab and testified that on 11/10/2018 their lab had received three phones namely Itel IT 2090, A Techno T312 and a Techno T349 with instructions to analyze their contents. They observed that the Itel phone had a microsim for Zantel and a micro SD card of 2GB. The Techno T312 had a Safaricom and Zantel simcards while the Techno T349 had a Safaricom and Tigo micro simcards.

49. She testified that they checked the San disk micro SD card using universal forensic extraction device and they found videos which she proceeded to project live in court.

50. According to PW3, the first video, labeled 7.mp4 was 23 minutes long and apart from supporting the Alshabaab in Somalia it also praised those who carried out bombing in Kampala.

51. The 2nd clip was an audio (also played live in court) where the speaker talks about RPG and highlights that they can be used to shoot down planes.

52. In the third clip (also an audio) the speaker appeals to listeners to move to Somalia where they would gain mastery of the weapons.

53. PW3 summed her evidence with the opinion that according to the extracted videos the accused persons had interest in terrorism matters.

54. She produced the digital forensic examination report as Pexh.5 and a compact disk (CD) containing the videos as Pexh.10.

55. Cpl. James Mbogo (PW4) was the investigating officer in this matter and gave evidence materially similar to that of PW1 and PW2 save that according to him the micro SD card was being shared between the three accused.

56. He produced the items recovered from the accused; the inventory of the said items and other exhibits gathered in the course of investigation in the following order. Two Techno mobile phones and one Itel phone as Pexh.1, 2 and 3.

57. Inventory of the phones as Pexh.4a,b,c. passport for the 1st accused as Pexh.6. Emergency travel documents for the 2nd accused as Pexh.7. Passport for the 3rd accused as Pexh.8. SD memory card as Pexh. 9. Exhibit memo to accompany Techno T349 as Pexh.11. Exhibit memo to accompany Techno T312 as Pexh.12 and exhibit memo to accompany the Itel phone as Pexh.13.

58. In cross examination he stated that he had found the memory card from the 1st accused person and was firm that the said memory card was in the 1st accused's phone.

Defence Case:

59. When placed on their defence all the accused persons elected to give a sworn defence and gave materially similar statements.

60. They first narrated their journey from Zanzibar through Tanzania and through the Lungalunga border point and onwards to Kotulo where they were arrested.

61. They averred that the initial arrest had been done by Kenya Defence Force officers and they then gave a woeful tale of how they had been tortured by the said officers prior to being handed to police officers.

62. They further asserted that they had travelled to Kenya to study the Quran and denied any intention to commit terrorist acts. They further stated the memory card in issue herein had been planted on them during interrogation and vehemently denied any knowledge of the same prior to their arrest. None of them called any witness.

63. When cross examined and asked where they were going and whether they had any invitation to the institution where they were to study the Quran, all three accused persons failed to name the institution where they were to undertake the said studies and admitted that they had no invitations. They also could not name the person that had referred them to Kenya for the said studies.

ISSUES, ANALYSIS AND DETERMINATION:

64. After going through the evidence on record, and parties' submissions, I find the issues are; whether ***the appellants rights to documentary evidence and witnesses statements supply was violated along with the right to be informed that they could get advocate of their choice? If above is in negative, whether electronic evidence was invalidly admitted? Whether the contradictions in the prosecution case was fatal to the same case? Did the prosecution prove case beyond reasonable doubt? Was repatriation order lawful? Was sentence excessive?***

65. On the first 2 grounds, the appellant complain that that the commenced trial without ensuring that the appellants had reasonable access to the evidence against them and without confirming that the appellants had been supplied with witness statements and documentary evidence which they were not.

66. The record of the court bears the complaint right and the respondent answer is that since the appellant participated in cross examination of the witnesses and never raised the issue, they were thus prepared in their defence. These were foreigners who were in custody and the court never bothered to ensure they had statements and documentary evidence which was in fact produced as exhibits.

67. Further they were neither informed of their right to procure a counsel of their choice or be allocated one. The issue of the counsel aforesaid, the prosecution does not respond as to why they were informed of right to procure a counsel of their choice but only on right of allocation of an advocate submitting that legal representation is not an inherent right available to an accused person under Article 50 of the Constitution or any provisions of the repealed Constitution and that under section 36(3) of the Legal Aid Act No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial. The prosecution relies on the case of ***Supreme Court of Kenya Petition No. 11 of 2017 – Charles Maina Gitonga vs Republic.***

68. With the promulgation of the new Constitution 2010, it is now un limited right under fair trial Article 25(c), that Article 50(2) (g) (h) and (j) must be complied with prior to the commencement of any criminal trial.

“Section 50. Fair hearing

(2) Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by, an advocate, and TO BE INFORMED OF HIS RIGHT PROMPTLY.

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”

69. Going through the proceedings, from its commencement to the close of both the prosecution and defence cases it was never indicated anywhere that the appellants were ever informed of their right to legal representation and the right to be supplied with the evidence against them so as to prepare in advance and neither did the trial court ever inquired on the same throughout the proceedings; despite the requirement that the same should be communicated promptly.

70. In the case of ***Joseph Ndungu Kagiri vs Republic [2016] eKLR*** where the court held:

“In Thomas Patrick Gilbert Cholmondeley vs Republic, (decided before the promulgation of the 2010 Constitution) the Court of Appeal stated categorically that:-

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”

71. Considering the serious nature of the offences that the appellants were facing and the high chances of being prejudiced the trial court erred in both law and fact by failing to promptly inform the appellants of their right to engage legal representation of their choice or to have gone ahead to have the appellants assigned a lawyer by the State.

72. The above flaw is adequate to nullify the instant proceedings.

73. Having found the aforesaid defect and all flaw in the proceedings, it behooves the court to determine whether a retrial should be ordered. The case law in guiding the court in this determination is rich. In the re-known case of ***Opicho vs Republic [2009] KLR 369***, the Court of Appeal held as follows:

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a trial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.”

74. In view of the above principles stated in the authority above, I find the instant case to be suitable for re-trial. Thus court makes the following orders;

i. The proceedings in the trial court are quashed together with conviction and the sentence.

ii. The matter is remitted back to the principal magistrates' courts at Wajir for re-trial by any other magistrate save the one who heard it and convicted appellants.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 21ST DAY OF NOVEMBER 2019.

.....

C. KARIUKI

JUDGE