



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 34 OF 2017**

**IBRAHIM ADAN ABDIRAHMAN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 846 of 2011 by Hon. T. L. Ole Tanchu (SRM))**

**JUDGEMENT**

1. The appellant was charged in the Magistrate's Court at Garissa with two counts. Count 1 was possession of an article for the use in instigating the commission of a terrorist act contrary to section 30 of the Prevention of Terrorism Act No. 30 of 2012. The particulars of the offence were that on 10<sup>th</sup> August, 2015 along Chardende – Bura East Road within Tana River County was found in possession of a drawing of an Improvised Explosive Device (IED) which, are articles for use in instigating the commission of a terrorist act. Count 2 on the other hand was for being unlawfully present in Kenya contrary to section 53 (1) (j) as read with section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence were that on the same day and place being a Somali national was found to be unlawfully present in Kenya without a valid entry permit.

2. He pleaded guilty to Count 2 for being unlawfully present in Kenya and was convicted and sentenced to pay a fine of Kshs.50,000/= and in default to serve one (1) imprisonment. With regard to Count 1, he denied the charge and was tried. He was convicted of the offence of possession of an article for the use in instigating the commission of a terrorist act and sentenced to serve ten (10) years imprisonment.

3. He has now come to this court on appeal with respect to Count 1. He filed his initial appeal in June 2017. Before the appeal was heard, he filed an amended petition of appeal and written submissions.

4. At the hearing of the appeal the appellant relied on his amended petition of appeal and written submissions. He elected not to make any oral submissions.

5. Mr. Balongo the learned Prosecuting Counsel opposed the appeal and said that all the grounds of appeal had no merit. He urged this court to disallow the appeal and uphold both the conviction and the sentence.

6. I have considered the grounds of appeal, the written submissions of the appellant as well as submissions of the Prosecuting Counsel. In his grounds of appeal, the appellant stated that the case was not proved beyond any reasonable doubt. He also complained that the magistrate relied on the evidence of a single witness. He further complained that two (2) people were initially arrested for the same offence but one (1) was later released. He said also that there was contradiction between the charge sheet and the evidence on record. He said further that the case was initially heard by another magistrate Hon. Margaret Wachira and later taken over by Hon. Ole Tanchu without compliance with section 200 of the Criminal Procedure Code.

7. I have to start my reminding myself that, this being a first appeal, I am required to re-evaluate the evidence on record and come to my own independent conclusions and inferences, bearing in mind that I did not have the opportunity to see witnesses testifying to determine their demeanour. I rely on the case of **Okeno v Republic [1972] EA 32**.

8. With regard to failure of the succeeding magistrate to comply with section 200 of the Criminal Procedure Code (Cap. 75), that ground of appeal has no substance. The case was not partly heard by Hon. Margaret Wachira (CM) as no evidence was taken by that magistrate. Hon. Wachira only recorded a plea of guilty to Count 2 of being unlawfully present in Kenya, convicted and sentenced the appellant. I dismiss that ground of appeal.

9. It is true that the evidence of possession of the note book containing information on how to assemble an Improved Explosive Device was that of one (1) witness PW1 Snr. Private Edwin Kiptoo Agui of the Kenya Defense Forces. However, in my view, that evidence was believable as the incident occurred in broad daylight at 10.00 am and the evidence is clear and straight forward that the book was found in the bag of the appellant which contained among other things his clothes.

10. In my view therefore, the magistrate was entitled to believe that prosecution evidence.

11. The appellant gave a long sworn defence statement talking about his having come to Kenya and assisting his uncle in selling in a shop in Nairobi. He did not talk however specifically in details about that note book. The military officers who were on the roadblock and inspected the Sabrina Bus passengers did not have anything to benefit from implicating him in this case. I agree with the magistrate that the note book was found in the bag of the appellant. He was thus in possession of the same.

12. The charge however, in my view was defective. In this regard, the appellant was charged under Section 30 of the Prevention of Terrorism Act No. 30 of 2012 which states as follows –

**“30 - A person who knowingly possesses an article or any information held on behalf of a person for the use in instigating the commission of, preparing to commit or committing a terrorist act commits an offence, and is liable, on conviction, to imprisonment for a term not exceeding twenty years.”**

13. It is clear to me that from the above provisions of section 30 of the Act, that the article or information in possession of an accused person has to be held on behalf of a person. There being no allegation in the charge sheet that the note book and drawings therein were held on behalf of any person, the charge as it stands was fatally defective as it does not disclose an offence under section 30 of the Act. In my view therefore, the appellant having being convicted of a fatally defective charge, both the conviction and sentence imposed cannot be sustained.

14. May be the prosecution should have charged the appellant under another appropriate section of the law in the same Act. However, it is not for this court to determine the section under which somebody should be charged.

15. The consequence of the above is that the appeal is allowed and the conviction Count 1 for possession of an article for the use of instigating the commission of a terrorist act under Section 30 of the Kenya Citizenship and Immigration Act is quashed and sentence set aside.

16. As the appellant was however convicted and sentenced for being unlawfully present in Kenya, I order that he be repatriated to his home country of Somalia as his continued stay in Kenya is illegal.

17. Orders accordingly.

**Dated, Signed and Delivered in open court at Garissa this 29<sup>th</sup> June, 2018.**

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**George Dulu**

**JUDGE**