



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 168 of 2015**

**MOHAMED ABDI ADAN.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani  
Cr. Case No. 589 of 2014 delivered by Hon. C.C. Oluoch (Mrs.) SPM On 30<sup>th</sup> September, 2015.)*

**JUDGMENT**

**Background**

Mohammed Abdi Adan, the Appellant herein was charged with three counts of collecting information contrary to Section 29 of the Prevention of Terrorism Act No. 30 of 2012. The particulars of **Count I** were that on or before 25<sup>th</sup> March, 2014 at Olesauni Building in Fedha Estate in Nairobi county, in preparing for the commission of a terrorist act, was found holding a Toshiba laptop Serial number 3C187866R which had video clips, photo images and downloaded map Images of vital installations within the republic of Kenya namely:

**Video Clips from Laptop**

1. Parliament Buildings
2. Continental house
3. Sheria House
4. Hotel Intercontinental
5. Teleposta Towers
6. Holy Family Basilica
7. City Hall building
8. The Supreme Court Building

9. Kenyatta International Conference Centre
10. Kencom House
11. **Hilton Hotel**

**Photo Images from Laptop for:**

1. Hilton Hotel
2. Sheria House
3. Parliament
4. Kenyatta International Conference Centre (KICC)
5. Supreme Court
6. Hotel Intercontinental
7. Teleposta Towers
8. Apt Mosque
9. Holy Family Basilica
10. Mzee Jommo Kenyatta's Mausoleum
11. City Hall Building

**Downloaded Maps of:**

1. Central Bank of Kenya
2. Shampelle Conservancy in Magadi Area
3. University of Nairobi-Kenya Science Campus
4. Kericho and its environs
5. Nairobi City Centre streets e.g. City Hall Way, Wabera Street
6. Utalii Sports Ground
7. The Boma Hotel
8. Uhuru Gardens along Langáta Road
9. Athi River area
10. Hell's Gate National Park
11. Nairobi City Centre showing KICC, University of Nairobi, Fairmont the Norfolk.
12. Muthaiga Golf Club

13. Fox Drive in along Thika Road

14. PCEA Gateway Church and USIU hostels along Thika Road

**Count II:** On or before 25<sup>th</sup> March, 2014 at Olessauni Building in Fedha Estate within Nairobi County, in preparing for the commission of a terrorist act, was found holding a Spy Pen Camera which had video clips and photo images of the Administration Police College (APTC), the information for the use in the commission of a terrorist act.

**Count III:** On or before 25<sup>th</sup> March, 2014 at Olesauni Building in Fedha Estate within Nairobi County, in preparing for the commission of a terrorist act was found holding a Black External Storage Device, which had video clips and photo images of the Administration Police College (APTC), the information for the use in the commission of a terrorist act.

**In Count IV** he was charged with being in possession of articles connected with a terrorist act contrary to Section 30 of the Prevention of Terrorist Act No. 30 of 2012. It was alleged that on 25<sup>th</sup> March, 2014 at Olesauni Building in Fedha Estate within Nairobi County was found being in possession of two (2) remote control gadgets, a black external storage device, a Spy Pen Camera, A Spy camera wrist watch and Toshiba Laptop S/No. 3C187866R, the property intended for facilitating the commission of a terrorist act.

The Appellant was arraigned in court and after the trial the learned trial magistrate found him guilty in counts 1, 2 and 3 and was acquitted in count 4. He was sentenced to ten years imprisonment in each of the counts. The sentences were to run concurrently. Being dissatisfied with that court's decision the Appellant preferred the current appeal. In a Petition of Appeal dated 14<sup>th</sup> October, 2015 he was dissatisfied that he was convicted purely on the basis circumstantial evidence, that the fact of his being in possession of the recovered information was not proved, that the learned magistrate erred when he convicted him despite the contradictions and inconsistencies in the evidence that were acknowledged by the prosecution and the court, that the trial magistrate erred when he convicted him without considering his defence, that the learned trial magistrate erred when he convicted him after finding that he had no nexus with a terrorist organization, that the learned trial magistrate erred when he took into account irrelevant and extraneous considerations that did not form part of the evidence tendered and that the honorable magistrate erred by admitting evidence tendered under the wrong regime of the Evidence Act.

### **Submissions**

The Appellant was represented by Mr. Mbugua Mureithi advocate and the Respondent by learned State Counsel Ms. Aluda. Both parties filed written submissions and took the opportunity to highlight them. The Appellant submitted that the prosecution did not prove his connection to terrorism or any known terrorist organization. It was his view that the ingredients of the offence under Section 29 of the Prevention of Terrorism Act were not established namely; that the Appellant falls within the category of people the section under which he was charged contemplates committing the offence, that the Appellant took part in some mode of collection and lastly that the Appellant had committed or intended to commit a terrorism act for which the information was collected. Therefore, he submitted that an offence under Section 29 could only be perpetrated by two kinds of offenders; members of terrorist organization or persons committing, instigating, preparing or facilitating the commission of terrorist acts. He submitted that in the case in question the prosecution failed to prove the ingredients outlined above and further that they failed to prove the terrorist act that the Appellant was trying to perpetrate.

He further submitted that the possession of the information could not be, per se, regarded as evidence intended for preparation to commit a terrorist act. He submitted that the holding of information must be directly connected to a known terrorism act. He relied on **R v. Zafar & others [2008] 2 WLR 1013** to buttress this point. He submitted that the trial magistrate's conclusion that the Appellant was not a member of a terrorist group, and the fact that there was no evidence that the premises where information was found in were targets of terrorist attacks should have led to the collapse of the prosecution case.

He proceeded to submit that possession of the exhibits in question was never proved. That is to say that the fact that the Appellant was found 'holding' the alleged electronic gadgets could not be construed to constitute possession in the context of Section 29 of the Prevention of Terrorism Act. Further, that since the Act did not define the Appellant could not be deemed to be in possession of items that were deleted at the time of the recovery. He buttressed this point by setting out the definition under the **Oxford Advanced Learner's Dictionary**. He also submitted that the learned trial magistrate erred by applying the definition of the word possession under Section 4 of the Penal Code whereas that definition is restricted only to offences under the Penal Code as set out in the case of **Stephen v. Republic[1973] EA 22** and **Abdi Osman Ahmed v. Republic[2007] eKLR**.

He submitted that the learned magistrate erred when he relied on the legal tenancy of the house in Ole Sauni as prove of possession, ignoring the fact that according to PW7 and the Appellant there were other occupants of the house in question. This, he submitted, was also attested by the evidence that other persons were arrested at the locus in quo. He relied on **John Maina Kamunya v. Republic[2009] eKLR** to buttress the submission.

Counsel further submitted that the trial magistrate shifted the burden of proof to the Appellant. This was evidenced in the judgment in which the learned magistrate held that the failure by the Appellant to offer an explanation and his choice to distance himself with the objects was not enough to dispel the proof. He submitted that possession of the said gadgets was not illegal and since the Appellant had disputed possession in court, Section 111 of the Evidence Act could not be applied in the circumstances. He relied on **Abdi Yusuf Maalim v. Republic[2015] eKLR** to buttress this point.

He submitted that the trial magistrate erred when he made a finding that the Appellant was implicated in the making of the videos and photos on the basis of circumstantial evidence. He submitted that the evidence adduced did not meet the standard necessary to allow the use of circumstantial evidence to infer guilt. He submitted that the only evidence that linked the Appellant with the taking of the videos and photos was the evidence of PW6 which only went so far as to evidence the particulars in the first count and could not therefore be relied upon to support counts 2 and 3. He further submitted that the identification of the Appellant was dock identification which was unreliable. The cases of **David Wahome Wanjohi v. Republic[2015] eKLR** and **Joel Saiyanga Ole Mwaniki & another v. Republic[2007] eKLR** were cited in this regard.

Counsel went on to submit that the learned magistrate erred in taking into consideration irrelevant factors in his judgment and further failed to take into consideration the Appellant's defence before arriving at her verdict.

Learned State Counsel, Miss Aluda submitted that there was sufficient and concrete evidence on record to support a conviction against the Appellant. She submitted that circumstantial evidence could form a basis of a conviction. She submitted that the possession of the exhibits by the Appellant was clearly evidenced by a number of witnesses who linked him to the occupation of the house at Ole Sauni which meant that the doctrine of constructive possession as defined out under Section 4 of the Penal Code could be applied.

She submitted that the contradictions and inconsistencies related to dates which under Section 214(2) of the Criminal Procedure Code was not material. She further submitted that the inconsistencies about the place where the Appellant was arrested was immaterial as the scene of crime was a different place. Furthermore, the inconsistencies did not dent the witnesses' credibility. She relied on **Justus Mutungi Kitela v. Republic[2015] eKLR** to buttress this point.

Counsel submitted that the trial court took into consideration the Appellant's defence which she said was but an after-thought. She submitted that the Appellant did not show that he was not aligned to a terrorism group. In addition, he failed to explain either his possession of spying gadgets or why he took videos and photographs of key installations with a hidden device. She submitted that the trial magistrate took into consideration only things that were relevant in coming in arriving at her decision. On the application of the wrong regime of the law, she submitted that the Appellant ought to have raised this issue before the trial court. She urged that the appeal be dismissed.

## **Evidence.**

In the exercise of its first appellate jurisdiction this court is mandated to reanalyze and reevaluate the evidence and come up with its independent conclusions. It should however bear in mind that it has neither seen nor heard the witnesses and therefore give due regard for that. See: **Okeno v. Republic[1972] EA 32.**

The prosecution's case was that acting on intelligence reports, officers from the Anti Terrorism Police Unit intercepted a bus in which the Appellant was traveling to Nairobi whereupon he led them to his house where they recovered various devices which were later found to contain various media information, mainly video and photos, that would be used to commit terrorist acts.

**PW1, PC Vitalis Kibet** of Anti Terrorism Police Unit, hereafter ATPU, Nairobi recalled that on 24<sup>th</sup> March, 2014 he was on patrol around Kasarani in the company of PC Shuma, PC Owen Kimeu and CPL Lentirangoi Gabriel when at around 1800hrs their commander CPL Gabwell received information that one Mohammed Abdi Adan, who was believed to be a member of the outlawed Al Shabaab militia group, was en route from Garissa to Nairobi on board a G Coach bus. The corporal instructed them to head to Makongeni area on the Garissa-Thika road. They arrived at the location at about 2000hrs and at around 2240 hrs the bus in question arrived. They stopped it and conducted a search on all the passengers who they asked to produce their identification card. They were able to identify Mohammed Abdi Aden using his identity card and after talking to him briefly he agreed to take them to his house. He informed them that he lived in Fedha Estate. Before they proceeded to his house, they recovered from him a few mobile phones, a wallet and a national identity card.

PW1 testified that there was no one in the house. The house was a one bed roomed with a sitting room and kitchen. He could remember that a Toshiba laptop, Sony camera, DVDs, wall clock were among the things recovered from therein. He testified that an inventory was made by the officer conducting the search. They escorted the Appellant to Ngomongo Police Station while the items recovered were taken to ATPU headquarters.

In cross examination, stated that he did not know where the information that the Appellant was an Al Shabaab member originated from and that the call was received by the corporal on his personal phone. He stated that it was the Appellant who opened the door with his own keys. He also stated that the exhibits recovered were not booked at Ngomongo Police Station and that one 'Gabriel went with the exhibits to his home'.

**PW2, CPL Gabriel Lentirangoi** of ATPU accompanied PW1 on the date the Appellant was arrested. He corroborated the evidence of PW1 save to add that the date the inventory was done on 26<sup>th</sup> March, 2014 and not 25<sup>th</sup> March, 2014. He and one Chuma signed the inventory but the Appellant declined on ground that he could identify the exhibits. He took the exhibits to his office where he prepared a memo which he forwarded alongside the exhibits to the ATPU laboratory. In cross examination he stated that four other suspects were arrested in Eastleigh who also lived in the same apartment building as the Appellant. He also stated that they breached the Appellant's door using explosives.

**PW3 NoEliud Langat SSP** testified that he was based at the CID headquarters Bomb Disposal Unit. He recalled that he was supplied with a memo asking him to examine some electronic gadgets. He examined the items which were; one brownish electronic gadget with an aerial and a reddish pressable button and a greyish electronic gadget with a pressable button. The two items were car alarm remote control devices but not improvised explosive devices (IEDs). They could operate as IEDs if they were incorporated in the triggering device He produced a report in court.

**PW4, Elisha Mwakazi** worked for Alliance Realtors Limited at their Embakasi Branch as a rent collection agent. He collected rent at Ole Sauni Apartments. He confirmed that House No. F3 was rented to Mohammed Abdi Aden of Identity number 24433636 and telephone number 0720202259 as at 1<sup>st</sup> September, 2013.

**PW5, PC Timothy Ngende** worked with ATPU, IT section. He received some exhibits from PW2 for purposes of conducting a forensic examination. The extraction of the data was not possible as the SIM card in question was blocked. The other phone was attached to the machine but nothing was extracted as the phone was not supported by the forensic device. He testified that he also subjected a SIM card from a Somali mobile provider and recovered 5 text messages which he forwarded to an interpreter. He testified that on 8<sup>th</sup> July, 2014 he connected the spy unit watch to a forensic enabled computer and found that it was faulty and did not work. He also took the IMEI number of the recovered Orange modem and sent it to the mobile provider who did not provide any data. From the first of the memory cards labeled Kinstar he retrieved 344 jpeg photos and 7 videos. The transcend memory card was empty. The recovered DVDs contained movies but one was empty. The Sony optical camera's memory card had 80 deleted jpeg images. He then carried a forensic audit of the black USB device and retrieved 7 deleted video clips that were in a compressed folder. The videos showed the Administration Police Training College.

The spy camera had 12 deleted videos of the APTC compound and 85 deleted jpeg images of the same location. He retrieved 443 video files from the Toshiba laptop's hard drive. From them he retrieved two video files that captured various city landmarks and prominent buildings. In the video were persons speaking in a native language. There was also a conversation in the video between the persons and a camera man. He testified that it was not possible to tell when the video was taken as it had been deleted and its path was unavailable. He prepared a report on 28<sup>th</sup> July 2014 which he submitted as an exhibit. In cross examination, he stated that the Appellant's face was not viewed in any of the videos.

**PW6, Nelson Irungu Chege** was a photographer at the Kenyatta Mausoleum. He recalled that on 15<sup>th</sup> September, 2014 he was asked to go to Milimani Police Station by an officer called Eric who had earlier that week met him at his work station. At the station the officer started asking him questions about his family and work. He also asked him to assist him in an investigation he was carrying out and he agreed. He was shown a video clip and as he watched it he saw he was a subject in the video. He then recalled meeting two Somali looking men in early 2014. One of the men was in a suit while the other had a striped shirt. The one in a suit asked him if he remembered him to which the witness testified he could not forget him. The man asked if he could take a photograph at the mausoleum and one was taken near the flags where the man in the striped shirt stood. He testified that as they went to process the photograph the man in the suit asked if they could take a photograph inside KICC and the witness informed them that that was possible only if they had identity cards. A photograph was then taken outside the grounds. He testified that he took a photograph of the man in the suit 'holding' the KICC building and they went to process the photographs. He identified the Appellant in court as the man in the suit.

**PW7, SGT Noor Abdi Aden of** Administration Police Training College (APTC) at Embakasi, a brother to the Appellant testified that he had never lived with any of his brothers. The Appellant lived in Garissa. When their mother fell sick they moved her to Fedha Estate for her to get treatment in Nairobi. She stayed in Nairobi for about 5-6 months and that it is the Appellant who lived with her. He testified that although he once took his mother to the APTC for a TB examination, the Appellant had never visited him inside the college. In cross examination he stated that his child, his sister's daughter and another girl were living in the same house from which the recoveries were made. He was informed on 25<sup>th</sup> March, 2014 that his two brothers and his sister's son had been arrested.

**PW8, IP David Onyango** of APTC college at Embakasi testified that PW7 who was one of the Sheikhs at the college. He testified that he knew the Appellant who occasionally visited the college especially for Friday prayers. He testified that he was shown various video clips by the investigating officer, one IP Opagal, which he identified as various sites at the APTC. He testified that all visitors to the APTC were screened and had to show their identity cards and disclose the purpose of their visit. This did not apply to officers and persons known to the officers manning the gate. He stated that the Appellant occasionally resided at the college.

**PW9, CIP Shavinya Mameti was** based at the crime scene support services section, Nairobi. He recalled that on 14<sup>th</sup> November, 2014 at around 1500hrs he received PC Timothy Nyende who was attached to ATPU. The latter took about twenty six photographs at various sites of APTC.

**PW10, No. 75355 IP Eric Opagal**, was an investigator at APTU. He investigated the case. He summed up the evidence of all prosecution witnesses and preferred the charges against the Appellant. In addition, he testified that although the identity card used by the tenant where the recoveries were made bore the Appellant's the number, it belonged to one Zainabu Yusuf Mohammed, the Appellant's mother.

After the close of the prosecution case, the trial court ruled that a prima facie case had been established to warrant the Appellant be put on his defence. He gave a sworn statement of defence. He testified that around the time he was arrested he was living in Garissa, Warba Location where he was a madrassa teacher. He recalled that on 24<sup>th</sup> March, 2014 he was traveling from Garissa to Nairobi on board a G Coach bus. He arrived in Nairobi at around 2130hrs alighting at Eastleigh's 12<sup>th</sup> Street. He then contacted his cousin Abdi Sheikh who told him he was on 11<sup>th</sup> Street and would pick him up. He did and they went for supper at Qumilayl Hotel after which they left for the cousin's house in Section 3 where the Appellant was to spend the night. As they approached the 12<sup>th</sup> Street roundabout they were stopped by two men in civilian suits who asked for their identification cards. The men examined their cards and claimed that they were fake at which point a white van arrived and officers aboard loaded them in. They blindfolded them using black cloths. They asked where he was staying, where he was going and also confiscated his mobile phone and wallet.

He testified that from October, 2013 he was taking care of his mother who was undergoing treatment at Ole Sauni Building. He confirmed he occasionally slept there. He testified that Ahmed Abdi Aden, Abdi Noor and Zahra Bushir were also staying in the house with his mother. He stated that at the time of his arrest, he had returned to Nairobi from Garissa after taking back home his mother. Also arrested were Abdi Fatar and Ahmed who were also charged. He stated that he did not witness the recovery of anything from his house. He denied he had any association with the Al-Shabaab group. He denied he knew where APTC was and ever visiting the establishment. He denied having visited Uhuru Park and paying the rent where his mother lived. In cross examination he stated that he lived with his cousin in Eastleigh and only slept at his mother's place once or twice a month. He also testified that he had never been to the Central Business District during his entire stay in Nairobi.

### **Determination.**

I have considered the submissions by the parties and the evidence on record. I find that the following issues arise for determination:

1. *What entails the offence set out under Section 29 of the Prevention of Terrorism Act (POTA)?;*
2. *Whether possession by the Appellant was proved;*
3. *Whether the offence was proved beyond a reasonable doubt.*

On the first issue for determination, Section 29 of the Prevention of Terrorism Act provides that;

***A person who is a member of a terrorist group or who, in committing or in instigating, preparing or facilitating the commission of a terrorist act, holds, collects, generates or transmits information for the use in the commission of a terrorist act commits an offence, and is liable, on conviction, to imprisonment for a term not exceeding thirty years.***

The provision itself deals with collection of information. The Appellant submitted that as drafted the offence in question set out three ingredients, namely; that the accused falls within the category of persons that the section contemplates, that the accused engages in one, some or all of the modes of holding, collection, generating and transmitting information outlined in the section and thirdly that the accused has committed or intends to commit a criminal activity for which the information was collected. His view was that these ingredients of the offence were not proved beyond a reasonable doubt.

My understanding of the provision is that in establishing the offence, the prosecution must prove that a

member of a terrorist group, or other person, in committing or in instigating, preparing or facilitating the commission of a terrorist act does any of the following;

- *Holds*
- *Collects*
- *Generates, or*
- *Transmits information of a terrorist act.*

Therefore, in the first scenario the prosecution is mandated to prove the following elements; that the accused was affiliated to a terrorist group and in that capacity he either held, collected, generated or transmitted information and finally that this information was used in instigating, preparing or facilitating the commission of terrorist acts. The second scenario involves proving that the accused in any other capacity other than being a member of a terrorist group held, collected, generated or transmitted information and secondly that the information in question was used in instigating, preparing or facilitating the commission of terrorist acts.

After reviewing the evidence on record and the judgment of the lower court it seems that the case against the Appellant fell under the second scenario. I shall revisit this issue later in this judgment.

The Appellant also submitted that the particulars in the respective counts were that the Appellant was found holding certain devices in which the information was contained. He submitted that the use of the term 'hold' under Section 29 did not imply being in possession, which is not defined in the Act. Further that given that it was established that the information in the recovered devices in question was deleted, the Appellant could not be said to be in possession. He defined the word 'hold' under the Oxford Advanced Learner's Dictionary, 7<sup>th</sup> Edition as:

**“To carry something; to have somebody/ something in your hands, arms etc...”**

He submitted that the finding by the trial court was contrary to the ordinary literal meaning set out above, thus faulty. This court consulted the Concise Oxford English Dictionary, 10<sup>th</sup> Edition which defines 'hold' to mean, inter alia, **“keep possession of”** which would mean that the trial magistrate's decision that 'hold' refers to 'be in possession of' is correct.

I now delve into the issue of possession. The items that were used as exhibits in this matter were found in a house that was rented under the Appellant's name. The trial magistrate relied on the doctrine of constructive possession as set out under Section 4 of the Penal Code. The Appellant has however submitted that this definition could not be applied under POTA as it was strictly applicable for offences charged under the Penal Code. In the case of **Kamau s/o Njeroge & Mwangi s/o Kanywa v. Reginam[1954] EACA 257** it was held, inter alia, that the definition of possession under Section 4 of the Penal Code is far wider than the common law definition of possession and is therefore only applicable where the term definition appears in wording in the Penal Code. The court further held that:

***“Under the Common Law, possession can, of course, be joint or several but to establish constructive possession there must be evidence that the person not in actual possession has a power of control over the person in actual possession. In the Penal Code definition the doctrine of constructive possession has been made wider by omitting the element of control.”***

In view of the above holding, the application of the doctrine of constructive possession could not apply with regard to the offences the Appellant was charged with. The prosecution had to thus prove that the Appellant had control over the house where the items were recovered and was therefore the owner of the items found therein.

The Appellant submitted that although his name was on the tenancy lease agreement to the house he did

not live there and that his mother occupied the house in question where she lived with other relatives. He submitted that this was proved by the fact that the telephone number indicated in the lease belonged to his mother. He submitted that he also never paid rent to the house in question and this was done by his brothers. He submitted that after his arrest it is clear that the keys to the house were not one of the items recovered from him which further illustrated that the Appellant was not in physical control of the premises.

PW7 who was the Appellant's brother testified that the Appellant was the one living with his mother in the house in question. In cross examination, he stated that his child, his sister's daughter and another girl were staying in the house at the time as well. He testified as per DMFI 2, an affidavit sworn in Misc. Criminal Application 532 of 2014 which sought the remand of eight suspects, including the Appellant for 7 days, three of the persons named there were at the Ole Sauni house on the day in question. These were Abdiaziz Abdullahi Warsame(his sister's son), Mohamud Ahmed Abdi(his brother), Abdifatar Omar Mohammed(an in law). Therefore it is not clear that the Appellant had control of the property in question. In his defence he testified that he did not live at Ole Sauni and only occasionally slept there, usually once or twice a month.

In the circumstances, i find that constructive possession of the items by the Appellant was not established by the prosecution. Furthermore, other persons arrested at Ole Sauni were charged, in which case the issue of controlled possession had to be determined severally. As such, the evidence at hand did not prove the Appellant's joint ownership of the exhibits in question or his sole control over the house in question.

The learned trial magistrate concluded that the Appellant took the videos that were recovered which contained the footage of vital buildings in the central business district. She further linked these images to those taken at the APTC and found that they too were taken by the Appellant. This implies that the trial magistrate concluded that the Appellant generated the information that was to be used for terrorism activities. In arriving at this conclusion the trial magistrate relied on the evidence of PW6 that he was the person in the video footage conversing with the Appellant, whom he identified in the dock. The trial magistrate did warn herself, guided by the case of **Muiruri & 2 other v. Republic[2002] KLR 274** before relying on the dock identification.

This court has interrogated the evidence on record and one issue stood out to this court with regard to the video evidence adduced; the conversation between the Appellant and the witness. The person taking the footage approached PW6 and asked the witness if he remembered him at which point the witness produced a photograph from an album he had in his possession, which according to the trial magistrate's judgment, resembled the Appellant. Interestingly, the witness in question did not testify to having previously met the Appellant which begged questions as to how he was in possession of a photograph of the Appellant. In the circumstances above this court finds that, as set out in **R v. Forbes[2000] UKHL 66, "[i]dentification on parade or in some other similar way in which the witness takes the initiative in picking out the accused should be made a condition precedent to identification in court"**. In the circumstances of the case the investigating officer ought to have called for an identification parade and reliance on the exception under **Muiruri 's case** (supra) does not suffice. This is further made necessary by the fact that in his evidence he described the men who approached him as '**looked like Somalis**' which in light of the fear fueled xenophobic environment prevailing at the time would mean that reliance on such dock identification was fundamentally tainted and could not found a conviction.

With regards to the other video that was taken at the APTC the magistrate relied on the evidence of PW8 that he had seen the Appellant at the college several times when he came to pray at the mosque. This evidence contradicted that of PW7 who testified that the Appellant had never visited him. This then corroborated the Appellant's defence that he had never been to the place. The trial magistrate did find that the best people to establish the Appellant's presence at the location were the men manning the gate. PW8 in his evidence explained this away by stating that relatives of officers were not subjected to the regular security check up procedures at the gate. I find this testimony unsatisfactory given that it is common knowledge that such facilities are under heavy security guard and that certain security protocols must be observed by all persons entering such places. His explanation might be probable if the Appellant lived within the grounds in question which would breed familiarity. But this did not apply as evidenced by

PW7 who testified that the Appellant never visited him at APTC. I find, in the circumstances, the evidence of PW8 untrustworthy. In view thereof, I find that the prosecution did not prove that the Appellant recorded or generated the information in question. It follows that that the prosecution did not prove a very crucial element of the offence; that the information allegedly collected was used in committing or meant for use in instigating, preparing or facilitating the commission of a terrorist act. No evidence was adduced to this effect in the lower court.

This court must finally comment on an issue of grave concern, which is with regard to the chain of custody of evidence. According to PW1, after they collected the exhibits from the house, they booked the Appellant at Ngomongo Police Station. They did not however book the exhibits which PW2 took home with him before submitting to the ATPU the following day. This was unprocedural by all means and raised serious questions as to the reliability of the evidence.

In light of the above, it follows that this is an appeal with merit. The prosecution did not prove the case beyond a reasonable doubt. The same is allowed. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free. It is so ordered.

**DATED AND DELIVERED THIS 27<sup>TH</sup> DAY OF MARCH, 2017**

**G.W.NGENYE-MACHARIA**

**JUDGE**

***In the Presence of:***

*1. M/s Gikonyo h/b for Mbugua Mureithi for the Appellant.*

*2. M/s Sigei for the Respondent.*