



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 38 OF 2017

MUSA SHABAN KABUGHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 844 of 2015 – M. Wachira CM)

JUDGMENT

The appellant was charged in the Chief Magistrate's Court at Garissa with being a member of a terrorist group contrary to Section 24 of the Prevention of Terrorism Act 2012. The particulars of the offence were that on 12th August, 2015 at Garissa Police Station within Garissa County, was found to have been recruited to join the Al-shabaab militia, an outlawed terrorist group, and openly confessed to have been recruited as a member of the said terrorist group.

When he appeared before the Magistrate's Court on 14th August, 2015, he was recorded to have pleaded guilty to the charge. He was thus convicted and sentenced to serve 15 years imprisonment.

He has now come to this court on appeal through his advocate Chacha Mwita, on the following grounds of appeal:-

- 1. The Learned Magistrate erred in both law and fact by convicting the appellant on a plea that was not an unequivocal.**
- 2. The learned Magistrate erred both in law and fact by convicting the appellant in breach of his Constitutional rights, safe guards, and protection.**
- 3. The learned Magistrate erred both in law and fact by meting an excessive sentence of 15 years imprisonment for a first time offender for an offence that carried a maximum of 30 years imprisonment.**

Counsel for the appellant Mr. Chacha Mwita also filed written submissions to the appeal. In addition counsel highlighted the submissions orally in open court at the hearing of the appeal.

In particular, counsel submitted that the appellant was not brought to court within 24 hours of arrest contrary to the provisions of Article 49 (1) (f) of the Constitution of Kenya 2010, and also submitted that the appellant was not informed by the trial court about his rights to be represented by an advocate contrary to Article 50 of the Constitution.

Secondly, counsel submitted that the language used in court was not clear. According to counsel it was not clear whether the language was English, Kisomali or Kiswahili. As such counsel submitted, the appellant was not accorded a fair trial.

Counsel further submitted that the magistrate wrongly relied on a document described as a confession to convict the appellant. Counsel lastly, submitted that the sentence was extremely harsh for a first time offender.

The Principal Prosecuting Counsel, Mr. Okemwa, submitted that the appellant admitted the offence in open court. As such the documents on what he said to the police were correctly relied upon by the trial court.

Secondly, counsel submitted that English, Kiswahili and Kisomali languages were used throughout the proceedings and it was clear that the appellant understood the charges as well as the facts.

Counsel also submitted that the Constitutional requirement for bringing the appellant to court within 24 hours after arrest was complied with, and if there was any violation of same, the remedy was a claim for damages which did not vitiate the conviction herein.

Counsel further submitted that the appellant was allowed to mitigate before sentencing. In the circumstances of the case, counsel submitted the sentence was justified. Counsel also submitted that the appellant did not ask for legal representation from the court, and in any case such legal representation is not automatically provided by the state.

I have considered the appeal and the submissions of counsel for the appellant and the Prosecuting Counsel. I have also perused the record of the proceedings.

The appellant was convicted on his own plea of guilty and sentenced.

I will start with two technical points, the first being not provided with an advocate.

In my understanding, though the Constitution of Kenya 2010, gives a right to every accused person to be represented, by advocate of his choice, it does not impose a duty on the State to provide such legal services for free. In certain cases such as capital offences of Murder in the High Court, the law requires the State to provide legal representation to those who cannot afford the same. Even in those cases, it has to be indicated that an accused person is not capable of hiring his own lawyer. In the present matter, at no point did the appellant suggest to the court that he needed legal representation. In my view therefore, there was no violation of the provisions of Article 50 of the Constitution of Kenya 2010.

With regard to the allegation that the appellant was held in custody for more than 24 hours, before charge or production in court, the appellant has not indicated when he was arrested and when he was charged. A perusal of the charge sheet shows that the appellant was arrested on 12th August 2015 and arraigned in court on 14th of August 2015. The Constitution of Kenya 2010 under Article 49(1) (f) requires that an arrested person be brought to court within 24 hours of arrest. The appellant was brought to court after 24 hours, but such violation did not vitiate the conviction. He can file a civil case for damages where the State will also have a right to give their position.

The next issue concern the language used in court. My perusal of the record shows that the interpretation in the proceedings was English, Kisomali and Kiswahili. In my view, the appellant must have understood the language used in court as he said a lot in his mitigation. As such the case of **George Mbugua Thiongo -vs- Republic- Nyeri Criminal Appeal No. 302 of 2007(2013) eKLR** applies. In that case the Court of Appeal stated that the attendance of a Court Clerk throughout proceedings and the contents of record can establish whether an accused person understood the language which was used in court. In the present case the conduct of the appellant on record and what he said in mitigation convinces me that he understood the language used.

The appellant's counsel has complained that a confession or admission of the appellant to the police was wrongly used by the magistrate to convict the appellant. I do not think so. The appellant had already admitted committing the offence, so he was recorded as being guilty on his own admission. The prosecutor was then required to give a summary of the facts which he did. The appellant's statement to the police was merely given as part of the facts summarized by the prosecutor. The appellant did not object to the production of that statement. That statement merely confirmed the plea of guilty of the appellant.

In my view therefore, the appellant having agreed to the facts, the magistrate was correct in relying on the same and convicting the appellant.

With regard to sentence, the appellant was said to be a first offender. The maximum sentence for the offence is 30 years imprisonment. He was imprisoned for 15 years.

Sentencing is an exercise of discretion by the trial court. The appellant said before the magistrate that he merely went to the police when he found that he was not able to withdraw money from M-pesa network because his money was in Tanzanian currency.

In my view, and with the seriousness of the offence, the sentence of 15 years imprisonment was justified as the appellant though asking for leniency did not show any remorse to the offence.

To conclude I dismiss the appeal and uphold both the conviction and sentence of the trial court. Right of appeal explained.

Dated and delivered at Garissa on 23rd November, 2017.

George Dulu

JUDGE