REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 87 AND 88 OF 2014 (CONSOLIDATED)

IBRAHIM BISHAR ADAN

ROBLE GAIYE HASSAN ..... APPELLANTS

VERSUS

REPUBLIC ……..…….....…..……... RESPONDENT

(From the conviction and sentence in Wajir SPM Criminal Case No. 116 of 2014 – L. Kassan PM)

JUDGMENT

BACKGROUND

The two appellants Ibrahim Bishar Adan (1st appellant) and Roble Gaiye Hassan (2nd appellant) were charged jointly with two counts. Count 1 was for malicious injuries to property contrary to section 339 (2) of the Penal Code. The particulars of the offence were that on the night of 19th and 20th February 2014 at Eldas Township in Eldas Sub County within Wajir County jointly with others not before court willfully and unlawfully while armed with ammunition namely hand grenade destroyed the dwelling house of Adan Keynan and endangered the life of Rahoy Barut Hussein who was residing therein. Count 2 was for commission of a terrorist act contrary to section 4 (1) as read with section 2 (a) (1v) (v) of the Prevention of Terrorism Act 2012. The particulars of the offence were that on the night of 19th and 20th February 2014 at Eldas Township in Eldas Sub County within Wajir County jointly while armed with an ammunition namely hand grenade committed an act of terrorism by hauling the said grenade to the house of Adan Keynan resulting to serious damage to the said house an act which was carried out with aim of advancing a political cause and causing fear amongst the members of the public. Roble Gaiye Hassan was the 1st accused while Ibrahim was the 2nd accused during the trial court.

Both of denied the charges. After a full trial the learned magistrate found Ibrahim Bishar Adan (1st appellant) guilty of both counts as charged. As for Roble Gaiye Hassan (2nd appellant), the trial court found him guilty under section 41 (ii) of the Prevention of Terrorism Act for failing to secure the arrest and prosecution of the person who hurled the grenade. The court also found him guilty of an offence under section 20 (1) (b) of the Penal Code in that he failed to act in the best interests of justice to avoid the destruction, though he was not charged under any of those two sections of the law.

With regard to sentence, the court discharged each of the appellants on count 1 under section 35 (1) of the Penal Code. In count 2 for commission of a terrorist act, Ibrahim Bishar Adan (1st appellant) was sentenced to serve 20 years imprisonment. Roble Gaiye Hassan (2nd appellant) was sentenced to serve 7

years imprisonment for his conviction under section 41 (ii) of the Prevention of Terrorism Act.

Dissatisfied with the decision of the trial court, each of the appellants filed their separate appeals. However on 24th October 2014, a joint petition of appeal was filed on their behalf by counsel, Stephen Gakonyo Wanyoike Advocate on the following grounds:

1. The learned magistrate erred in law and in fact in failing to take cognizance of the fact that the prosecution witnesses adduced contradictory evidence and therefore should not have been relied upon.
2. The learned magistrate erred in law and in fact in failing to consider the evidence of PW2 who was caretaker of the house which was alleged to have been maliciously damaged, in which he confirmed to the court that he never heard any explosion and neither did he ever see any person at the scene of crime when the alleged offence is said to have been committed.
3. The learned magistrate erred in law and in fact in failing to take cognizal of the fact that the owner of the house which is alleged to have been maliciously damaged under a subject of terrorism attack never lodged any complaint to the police station creating doubts as to whether he had real information regarding the alleged incident and whether such an attack took place.
4. The learned magistrate erred in law and in fact in failing to take cognizance of the fact that PW1 and PW5 evidence was recorded on 30th of February 2014 after the appellant had already been summoned to record a statement at the police station more than a month after the alleged incident is said to have occurred and therefore giving room to with hunting evidence.
5. The learned magistrate erred in law and in fact in holding the contradictory evidence of PW1 and PW2 was credible and justifying the variation in their evidence was due to fear and yet proceeding to rely on it to arrive to a conviction.
6. The learned magistrate erred in law and in fact in relying on hearsay evidence to convict the two appellants on allegation of circumstantial evidence which was never substantiated by any material evidence or an independent witness.
7. The learned magistrate erred in law and in fact in holding that PW4, PW9, PW10, and PW11 were defence witnesses who had been summoned by the 2nd appellant (Ibrahim Bishar Adan) to adduce evidence on his behalf while in fact they were prosecution witnesses.
8. The learned magistrate erred in law and in fact in convicting the 1st appellant (Roble Gaiye Hassan) on the ground that he failed to disclose having prior knowledge that the 2nd appellant (Ibrahim Bishar Adan) had intention of committing a crime.
9. The learned magistrate erred in law and in fact in failing to take cognizance of the reason why the prosecution failed to summon the Administration officer one Mr. Ichere who was on duty on the night of 19th and 20th February 2014 manning Eldas Administration Police Camp (post) which was immediate next to the premises allegedly said to have been maliciously destroyed.
10. The learned magistrate erred in law and in fact in disregarding in total the appellants and their witness evidence which was very credible as it was supported by some of the prosecution witness evidence.
11. The learned magistrate erred in law and in fact in holding that there was enough circumstantial evidence to justify a conviction against the accused persons not withstanding the fact that all the prosecution witnesses unanimously stated that they had no knowledge of the person who committed the offence.
12. The learned magistrate erred in law and in fact in awarding for an excessive and harsh sentence.

SUBMISSIONS FOR THE APPELLANT

Before hearing of the appeal M/s. Kamende & Company Advocates filed written submissions for the appellants.

During the hearing of the appeals, Ms. Kamande for the appellants asked that the appeals be heard together and they were so heard together by the court.

Counsel highlighted the written submissions submitted that both appellants had been charged in the same trial at Wajir court with malicious damage to property and commission of a terrorist act. The prosecution

called 12 witnesses, while the defence called 6 witnesses. Counsel submitted that PW1 Mohamed Abdi stated in evidence that he did not know the exact location of the explosion and whether Roble Hassan (the 2nd appellant) was involved in the incident. Counsel emphasized that the witness did not go to the home of Hon. Keynan, and that he had left Ibrahim Adan (2nd appellant) at a compound.

With regard to PW2 Rahoy Barut Hussein, counsel submitted that he did not hear the blast though he lived in Keynan's house. He had also not noticed anything unusual by the 21st of February and was surprised when he was told about the incident. According to this witness (PW2) there was a strong wind that night which might have caused part of the house to collapse.

Counsel submitted also that PW3 Ibrahim Adan, the caretaker did not hear any explosion. He was informed about the explosion by Sheik Abdi who was not called as a witness in court to testify. PW3 merely said that three days earlier Roble Hassan (2nd appellant) had said that he would die in Keynan's house. Counsel emphasized that though PW4 Rashid Kudow Hassan said that he heard an explosion, he said that same might have occurred at the Administration Police Camp which was adjacent to Keynan's house. Counsel pointed that though PW5 Mohamed Kunow said that he was with PW1 and another chewing miraa, he did not meet any of the accused persons after the explosion. According to the counsel, the court misdirected itself by stating that the witness was threatened though there was no evidence to that effect.

Counsel further submitted that PW7 a police officer received an exhibit memo from one Moses who was not called to testify. His evidence was thus doubtful. PW8 and 9 according to counsel gave contradictory evidence. The said evidence also contradicted that of PW5 regarding what happened at the borehole. PW10 said that he did not see any of the appellants at the borehole while PW11 merely said that they escorted a member of the County Assembly with Ibrahim Adan (1st appellant) at 3am. They did not see Roble Hassan (2nd appellant) at the borehole.

Counsel emphasized that the learned magistrate did not take the contradictions seriously. In addition, the owner of the house did not lodge a complaint to the police nor testify in court. As such, the offences had not been proved. In addition counsel submitted, statements of PW1 and PW5 were recorded after the appellants had recorded statements in which event they could easily have found a reason to implicate them. According to counsel the learned magistrate relied on hearsay evidence to convict. The circumstantial evidence was also contradictory and not adequate to justify a conviction. In addition, no witness from the nearby Administration Police Post was called to testify.

Counsel lastly, submitted that the sentence was harsh and excessive and that the magistrate took into account a far fetched proposition that the house in question accommodated many people while there was no evidence to that effect. Counsel urged this court to allow the appeal, quash the conviction and set aside the sentences.

SUBMISSIONS FOR THE RESPONDENT

Learned Assistant Director of Public Prosecutions Mr. Wanyonyi, opposed the appeal. Counsel submitted that the incident occurred at night but the appellants made utterances prior to the incident. The prosecution called 12 witnesses including the OCS who investigated the case and interrogated the appellants and others.

Counsel submitted that, though there was no direct evidence connecting the appellants to the commission of the offences, the circumstantial evidence was adequate to sustain a conviction. Counsel relied on a case of ***Republic Vs. Taylor*** which explained the application of the doctrine of les gestae which was an exception to the hearsay rule. In counsel's view, the fact that the appellants told PW1 that they would bomb Keynan's house and 20 minutes thereafter, an explosion was heard from Keynan's house pointed irresistibly to the conclusion that they were the offenders. It was clear according to counsel that Ibrahim Adan (1st appellant) had done what he had promised to do. Counsel also relied on the case of ***Peter Moto Odera Vs. Republic*** on circumstantial evidence.

Counsel submitted further that PW1, PW3 and PW5 argued about politics that night before the incident. Though there was some discrepancy on the exact time of the incident, counsel submitted that such was normal as nobody at that time was interested in keeping exact times of occurrence of incidences. Counsel emphasized that it was generally agreed that the incident occurred at 4am that night.

Counsel submitted also that Ibrahim Adan (1st appellant) threatened a witness at a petrol station, and that evidence was not rebutted. Counsel emphasized that PW5 was uneasy because he was so threatened. Counsel submitted also that PW2 who did not hear the explosion was asleep during the time of the incident but later noticed a hole and litter in the house. Therefore in counsel's view, there was nothing wrong with him saying that he did not hear the explosion that day. According to counsel, PW3 the caretaker of Keynan's house heard an explosion though he thought it came from the borehole, and reported the incident to the police. Therefore the argument that the owner of the house Mr. Keynan did not report the incident to the police could not hold.

Counsel emphasized that an expert witness was called by the prosecution who established that a grenade was thrown at the house and that it was a terrorist act. Counsel submitted that calling the administration police officer from the nearby Administration Police camp was not necessary.

On the alibi defence of Roble Hassan (2nd appellant), counsel submitted that he was seen running away from the scene and as such he was connected to the bombing.

Lastly, counsel submitted that the sentence was lawful and was neither harsh or excessive in the circumstances of the case.

RESPONSE FOR THE APPELLANT

In response to the Assistant Director of Public Prosecution's prosecuting counsel's submissions, Ms. Kamende for the appellants submitted that in the case of ***Peter Moto*** relied upon by the state was distinguishable as in that case, counsel the accused was found in possession of a weapon used in commission of the offence. Counsel submitted that the present case was different.

Counsel submitted also that the State had admitted that there were discrepancies in the prosecution evidence and as such the trial magistrate should never have convicted. Counsel emphasized that the OCS relied on intelligence reports and that his evidence was shaken during cross examination.

SUMMARY OF FACTS

During the trial, the prosecution called 12 witnesses. The prosecution version was that on the night of 20th February 2014, the two appellants went and sat near a borehole close to the house of Keynan and an Administration Police camp. They chewed miraa together with some of the prosecution witnesses until around 3am, which was a normal habit. As they chewed miraa, they discussed politics and other matters.

In the process, the 1st appellant Ibrahim Bishar Adan made comments against Hon. Keynan. According to the prosecution evidence he stated that Hon. Keynan was giving contracts to people who were not residents of Wajir, and threatened to bomb Hon. Keynan's house and said that one of the witnesses would be a victim in that house.

At the end of the discussions the two appellants left the group and proceeded to the direction of the house of Keynan. A few moments thereafter, an explosion was heard from the direction of that house, however it was not immediately known if that explosion was in Keynan's house or nearby Administration Camp. It was common knowledge that there were tribal clashes then and a lot of tension existed between the Gare and Degodia clans. The evidence of the prosecution was that shortly after the explosion, the 2nd appellant Roble Hassan was seen running away from the house of Keynan.

In the house of Keynan there was a person sleeping who did not hear any explosion. The next morning, the chief and others tried to investigate the source of the explosion, but did not find any clue.

Though the person who slept in Keynan's house found a broken part of the roof, he thought that such was due to strong winds as a similar incident had occurred before. He cleaned the debris and threw it out.

It was on 21st February, which was two days after the incident, people led by the caretaker of Keynan's house Ibrahim Adan PW3, found holes in the walls of the bathroom of the house and thought that this was a grenade attack. Police were then called, investigations conducted, and items taken to a ballistic expert who made a report that indeed a grenade had exploded at Keynan's house. The appellants were arrested several days later and charged with the two offences.

When put on their defences both appellants gave sworn testimony denying commission of the offence. They called a number of witnesses who also testified.

From the evidence on record the learned magistrate convicted the appellants as earlier stated in this judgment and sentenced them. There from arose the present appeals.

ANALYSIS

This being a first appellate court, I have to start by reminding myself that I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno Vs. Republic [1972] EA 32.***

I observe that the appellants were charged with two counts on the same incident or facts. One count was for damage to property using a grenade. The other count was for committing a terrorist attack using the same grenade in the same incident. In my view the two charges being based on the same incident were not proper. The prosecution should have highlighted either to charge the appellants with damaged property or with committing an act of terrorism using the said grenade. The way the charges stand is like charging somebody with robbery and theft at the same time for the same act of forcefully taking something from another. In my view the charges were confusing to the appellants. They were thus defective.

Coming to the merits of the appeal I find that the learned magistrate was not correct in saying that the two charges were proved against Ibrahim Adan. The person who collected the debris of the grenade was not called to testify. It is thus not clear how, where and by whom the particles were collected, preserved and later transmitted to the ballistic examiner. The ballistic examiner might have received explosives from a grenade. However there was no prove that the said items were recovered from Keynans house and by whom and how.

The other important point to note is that the investigating officer clearly stated that he did not suspect Ibrahim Bashir Adan until a month later when he went to his house and found him with a magazine and that is when he was sure that he committed the present offences. In my view had it been true as said by witnesses who were chewing miraa at the borehole that this appellant had committed the offence and threatened that he would vomit the offence, then it would not take the investigating officer who was the OCS a month and also investigating another matter, for him to conclude that the appellant also committed this offence. In my view the evidence that connects the 1st appellant Ibrahim Adan to the incident is evidence of suspicion. In my view mere suspicion however strong cannot be the basis of a criminal conviction. One has to take in mind that there was clan tension that day. Even if there was such an occurrence at Keynans house it was possible that it could be a spill over clan issues. I find that the circumstantial evidence lead irresistibly to the conclusion that the 1st appellant was the culprit. The magistrate stated that he discharged the appellant on the first charge of damage to Keynans property. In my view that was a realization that the charges were duplex. However the magistrate was not bold enough to point that out. I find that both the first count and second count was not proved against Ibrahim Adan.

With regard to Roble Hassan, the learned magistrate went out of his way to convict him for offences which he was not charged with. Those were offences for which he did not defend himself. Indeed a trial court can convict for a minor offence which is proved when the main offence has not been fully proved. The offences for which the appellants were charged were highly technical. The offences for which the

learned magistrate convicted him were also highly technical. In my view it was wrong for the learned magistrate to convict him for an offence or offences on which he was not charged, because he would not be able to defend himself on those offences. That would cause him prejudice. I find that the learned magistrate who was on a mission by going out of his way to find a conviction against Roble Hassan. On the totality of the evidence on record I find that there was no evidence to sustain the convictions by the learned magistrate against Roble Hassan.

With regard to the sentence as I have found that the convictions cannot be sustained the sentences will also have to be set aside.

DETERMINATION

Consequently, and for the above reasons I allow the appeals of the appellants. I quash the convictions entered against each of the appellants by the trial court and set aside the sentences imposed. I order that each of the appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 19th day of January, 2016

GEORGE DULU

JUDGE