



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEALS NOS.106 & 107 OF 2013

(An Appeal arising out of the conviction and sentence of Kiarie W. Kiarie – (Mr.) CM delivered on 6th May 2013 in Nairobi CM. CR. Case No.881 of 2012)

**AHMAD ABOLFATHI MOHAMMED.....1ST
APPELLANT**

SAYED MAISOUR MONSAVI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Ahmad Abolfathi Mohammad, hereinafter referred to as the 1st Appellant, and Sayed Mansour Mousavi, the 2nd Appellant were the 1st and 2nd accused respectively in the trial before the trial court. Their appeals have been consolidated as they arise from the same trial. The Appellants were facing three charges in the trial court. In the first count, both Appellants were charged with **committing an act intended to cause grievous harm** contrary to **Section 231 (f)** of the **Penal Code**. The particulars of this offence were that on or before 20th June 2012 at Mombasa Golf Course along Mama Ngina Drive in Mombasa Municipality, the Appellants jointly with others not before court, put an explosive substance namely RDX (Cyclotrimethlyne trinitramine) at the said golf course with intent to cause grievous harm to the golf players. In the second count, both Appellants were charged with the offence of **preparation to commit a felony** contrary to **Section 308 (1)** of the **Penal Code**. The particulars of the offence were that on or before 20th June 2012 at Mombasa Golf Course along Mama Ngina Drive in Mombasa Municipality, the Appellants jointly with others not before court were found armed with 15 kilograms of RDX (Cyclotrimethlyne trinitramine) in circumstances that indicated that they were so armed with intent to commit a felony namely grievous harm. In the third count, both Appellants were charged with the offence of **being in possession of explosives** contrary to **Section 29** of the **Explosives Act**. The particulars of the offence were that on or before the 20th June 2012 at Mombasa Golf Course along Mama Ngina Drive in Mombasa City within Mombasa County, the Appellants jointly with others not before court had in their possession 15 kilograms of RDX (Cyclotrimethlyne trinitramine) explosive for unlawful object. When they were arraigned in court, the 1st and 2nd Appellants pleaded not guilty to all the three counts. After trial, the trial court found both Appellants guilty as charged on all the three counts. In respect of the first count, both Appellants were sentenced to serve life imprisonment. In respect of the second count, both Appellants were sentenced to serve ten (10) years imprisonment and respect of the third count, both Appellants were sentenced to serve fifteen years (15) imprisonment. All sentences were

ordered to run concurrently. The 1st and 2nd Appellants were aggrieved by their convictions and sentences and filed their respective appeals to this court.

In their respective petitions of appeal, the 1st and 2nd Appellants raised several grounds of appeal challenging their convictions and sentences. In summary, the 1st and 2nd Appellants were aggrieved that their conviction was unfounded and not supported by evidence on record. They complained that the sentences imposed by the trial court were harsh and excessive. They complained that the trial magistrate was impartial in the conduct of the trial. The 1st and 2nd Appellants were of the view that the circumstances of the case exonerated them of the offences charged. They faulted the trial magistrate for failing to apply the established legal principles in drawing inferences from circumstantial evidence. The 1st and 2nd Appellants further complained that the trial magistrate failed to analyze the evidence to arrive at the decision that they were guilty of the offences charged. They further pointed out that there were shortcomings and/or contradictions in the prosecution's evidence case. The Appellants were aggrieved that they were not accorded a fair trial. They were concerned that their defence had been ignored. For the above reasons, the 1st and 2nd Appellants urged the court to allow their appeals, quash their convictions and set aside the sentences that were imposed on them.

During the hearing of the appeal, the 1st and 2nd Appellants presented to the court written submission in support of their appeal. This court further heard oral submission made by Mr. Wandugi on behalf of the Appellants urging the court to allow the Appellants' appeal. A response to the submission was made by Ms. Atina on behalf of the State. Mr. Wandugi submitted that the sentence imposed by the trial magistrate on the first count was too harsh a sentence that it induced a sense of a 'travesty of justice' on the Appellants. As regards the sentence imposed by the trial magistrate in respect of the third count, learned counsel for the Appellants submitted that the sentence of fifteen (15) years imprisonment meted on the Appellants was illegal. He submitted that the maximum sentence for the offence under the **Explosives Act** is seven (7) years. He further submitted that the non-compliance with **Section 200** of the **Criminal Procedure Code** rendered the trial a nullity. He submitted that the trial court's judgment rests on erroneous inference on circumstantial evidence. In this regard, it was Mr. Wandugi's submission that, the trial court imported extraneous facts into the judgment in order to conveniently invoke the doctrine of circumstantial evidence to convict the Appellants. He submitted that the trial court committed a misdirection of facts throughout the trial by misconstruing the witnesses' evidence and the offences the Appellants were charged with. He argued that the trial court further ignored evidence exonerating the Appellants. Learned counsel for the Appellants further submitted that the prosecution failed to prove its case against the Appellants to the required standard of proof beyond reasonable doubt. On this argument, counsel for the Appellants submitted that the trial court misdirected itself in finding that the substance RDX (Cyclotrimethylene trinitramine) was an explosive within the meaning of **The Explosives Act**. He further argued that the prosecution failed to establish that the Appellants committed the offences alongside other people as stated in the charge sheet. Learned counsel for the Appellants further submitted that the trial court shifted the burden of proof to the Appellants. He further submitted that the trial court failed to consider the Appellants' defence before arriving at the decision to convict them. Mr. Wandugi also argued that the trial court failed to consider the Appellants' mitigation before sentencing them. He therefore urged the court to allow the appeal. Ms Atina for the State opposed the appeal. She submitted that the trial court complied with **Section 200** of the **Criminal Procedure Code**. She submitted that the substance RDX (Cyclotrimethylene trinitramine) was established to be an explosive within the meaning of the **Explosives Act**. She further submitted that the Appellants' defence was considered before the trial court proceeded to convict them. Ms. Atina was of the view that the trial court properly exercised its jurisdiction in imposing the life sentence on the Appellants on the first count having noted the seriousness of the offence.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (see Njoroge -vs- Republic [1987] KLR 19). The issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellants of **committing an act intended to cause grievous**

harm contrary to **Section 231(f)** of the **Penal Code**, of **preparation to commit a felony** contrary to **Section 308(1)** of the **Penal Code** and **being in possession of explosives** contrary to **Section 29** of the **Explosives Act** to the required standard of proof beyond any reasonable doubt.

The facts leading to the charges against the Appellants as presented by the prosecution are as follows. Sometime early June 2012 The Anti-Terrorism Police Unit of the Kenya Police received intelligence report that two Iranian nationals suspected of possessing explosive materials had entered the country. They managed to obtain their passport numbers through their intelligent networks. PW2 John Muluzi Malaulu of the Anti-Terrorism Police Unit testified that on 19th June 2012 they got information that two Iranians were staying at Laico Regency Hotel within Nairobi. PW2 mobilized police officers to look for the suspects at the Hotel. PW1 Sergeant Kennedy Musyoki and PW13 CIP Charles Ogeto were amongst the officers sent out to find the suspects. They testified that on reaching Laico Regency Hotel they were informed by the hotel's management that the suspects had checked out of the hotel and were headed to the airport. They were informed that they had left in a Toyota Probox with registration number KBJ 011J.

The vehicle was intercepted in a traffic jam within Nairobi city. The occupants of the vehicle were the 1st and 2nd Appellants together with a driver. The 1st and 2nd Appellants were asked for their identification papers. The 1st Appellant produced passport no. V201292677 (**PEXH 1**) while the 2nd Appellant produced passport no. V2395095 (**PEXH 2**). The police found that the Appellants' passport numbers matched that obtained from the intelligence report. The passports indicated that the 1st and 2nd Appellants arrived in the country on 12th June 2012 through Jomo Kenyatta International Airport on a two week holiday visa. A search was conducted on the Appellants and the police recovered two (2) air tickets (**PXH 20 & 21**) and four (4) mobile phones (**PEXH 22-25**). The Appellants were arrested and taken to the Provincial Police Headquarters within Nairobi where they were detained.

PW17 Sergeant Erick Opagal Okisai testified that he interrogated the Appellants on 20th June 2012. He testified that he could only communicate with the 1st Appellant since the 2nd Appellant could not communicate in English. PW17 testified that in the course of interrogating he established that an item had been hidden in Mombasa. He therefore relayed that information to PW2. They suspected the thing to be harmful and therefore organized for a flight to Mombasa that evening to recover the item. PW17 was accompanied by PW2, PW5 PC Wachira and the Appellant to Mombasa. When they arrived in Mombasa, the 1st Appellant led them to Mombasa Golf Club. The 1st Appellant pointed a thicket out to them as the spot where the item had been hidden. PW2 dug up the grounds to recover the item. A blue paper bag (**PEXH 3**) was recovered. The bomb experts and the scene of crime police officers were called to the scene. Since it was at night, the scene was secured until the following morning. When PW8 SS Salim Malonya of the Provincial CID office, Coast Province in charge of the bomb unit arrived at the scene, he excavated the blue paper bag and X-rayed it. He found no detonator or wire in it. He found that it was safe to transport the package to the Provincial Police Headquarters. PW9 CIP Tumbo Luka Abla photographed the scene. The photographs were developed by PW12 CIP Raphael Mutuku Mutua who produced them into evidence (**PEXH 10(a)-(o)** and (**PEXH 12 (a) - (f)**). He also prepared his report which was also produced into evidence (**PEXH 19**).

At the Provincial Police Headquarters, the package was opened. They found a black bag inside the blue polythene bag. Inside the black bag were two black polythene paper bags (**PEXH 5(a) and (b)**). Inside both the black polythene bags were white polythene bags with a white powdery substance. PW 8 weighed the white powdery substances and found them to weigh 3.5 kilograms and 11.5 kilograms respectively. Samples of the white powdery substance (**PEXH 9 (a) and (b)**) were sent to the government chemist for scientific analysis. PW8 remained with the recovered items until 30th June 2012 when he handed them to PW11 Acting Inspector Naporu Peter through an internal memo (**PEXH 16**). PW11 placed the exhibits in an evidence bag (**PEXH 17**) and escorted the exhibits from Mombasa to Nairobi for the hearing of the case.

The PW16 Catherine Serah Murambi a chief chemist working with the government chemist testified that she received **PEXH 9(a)** in a small plastic bottle marked A. the bottle contained some white crystalline powder weighing 24.2 grams. She also received **PEXH 9(b)** in a bottle containing white crystalline

powder weighing 25 grams. She was asked to ascertain the contents of the bottles (**PEXH 27**). (**PEXH 9(a) and (b)**) were found to contain Cyclotrimethylene trinitramine commonly known as RDX. According to PW16, RDX is a very powerful military high explosive. She testified that it is a secondary explosive in that it cannot explode on its own. She testified that for it to explode it requires stimulus consisting of some energy in form of mechanical heat or flame or friction for it to be set off. According to PW16, RDX is considered as one of the most powerful military explosives. She compiled her report which was produced as (**PEXH 28**).

The evidence of PW6 John Juma Alex Ogola, a driver at a Moi International Airport was that on 12th June 2012 at about midnight, he drove the Appellants from the airport to Castle Royal Hotel where he left them. PW3 Centrine Juma and PW4 Wycliffe Museli Komu were working at Castle Royal Hotel in Mombasa at the material time. PW3 was employed as a cashier. PW4 was a receptionist. Their evidence was that the Appellants arrived at the hotel on 13th June 2012 at about midnight. They were received at the reception by PW4 who assisted them in registering them at the hotel. PW4 testified that the Appellants filled a registration form (**PEXH 11(a)**) and produced copies of their passports (**PEXH 11 (b)**) at the reception. They had been booked at the hotel by the Golfers Travel Association (GTA) who gave them the hotel direction form (**PEXH 11 (c)**). Voucher information (**PEXH 11(d)**) was produced showing the duration of the Appellants bookings. They were to stay for ten (10) days but they reduced the days to five (5). The amended booking voucher was produced as (**PEXH 11(e)**). PW3 invoiced and cleared the Appellants on 16th June 2012 when they checked out of the hotel. The invoices were produced as **PEXH 13, 14 and 15**).

PW7 Dennis Kamanga Kamau a driver employed by Avenue Prestige Company testified that In June 2012 he was called by Castle Royal Hotel to provide taxi services to the Appellants. He picked the Appellants at about 9-10 a.m. The Appellants wanted to be shown '**interesting places**' within Mombasa town. He testified that as they were moving around, the Appellants asked him to take them to Mama Ngina drive. They did not know the place. PW7 testified that once they were there, the Appellants asked him to park near a kiosk next to the golf course. He testified that the Appellants stepped out of the car while he remained in the car. The Appellants then walked towards the golf course where they remained for about ten (10) minutes. When they came back they requested to be shown where they could have lunch. PW7 took them to a restaurant within town and they parted ways. The following day he received a call from Castle Royal Hotel to provide taxi services to the Appellants again. The Appellants again told him that they wanted to go to Mama Ngina drive again. He drove them and parked the vehicle at the same spot he had parked the previous day. This time the Appellants did not walk into the golf course. They stayed there for about ten (10) minutes before they left. He took them to the same hotel he had taken them for lunch the previous day and left them there. He testified that he later picked the Appellants from Castle Royal Hotel at about 3.00 p.m and drove them to the airport.

The evidence of PW14 Simon Mwangi Wambugu was that he met the Appellants at Mombasa Golf Club on 15th June 2012 at about 6.30 p.m while he played golf. PW14 was the chairman of the golf club. He testified that he found the Appellants standing at the edge of the tee box of hole no. 9. Since it was unusual to find outsiders at the club, he inquired from them what they were doing there. The 1st Appellant said he was '**looking**'. PW14 continued playing and left the Appellants at the same spot.

When the Appellants were placed on their defence, they denied committing the offences. They testified that they arrived in the country on 11th June 2012 on a holiday visit. PW1 testified that when they arrived in the country, their luggages were checked at the airport and they were cleared to enter the country. He confirmed that they stayed at Royal Castle Hotel during their stay in Mombasa. He testified that the hotel organized taxi services for them to tour the town. He testified that they visited a park and a night club. They later travelled to Nairobi and stayed at Laico Regency Hotel. There, their luggages were also checked before they were cleared into the hotel. The 1st Appellant testified that they were accosted by police officers while on their way to the airport. He claimed that he was handcuffed and locked into a dark room where he fell unconscious; He claimed that police officers tried to interrogate him but he could not communicate in English. The 1st Appellant claims that he cannot recall the events after he was taken into police custody.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made by counsel for the Appellants and on behalf of the prosecution. As stated earlier in this judgment, being the first appellate court, this court is required to look afresh at the evidence adduced before the trial court with a view to ascertaining whether such evidence can sustain the conviction of the Appellants as established by the trial court. Being a court of first review, this court has the benefit of submission made by counsel of the parties to this appeal. There are several issues that emerge for determination by this court. The first issue is whether the provisions of **Section 200** of the **Criminal Procedure Code** were breached when the convicting magistrate took over the proceedings from the magistrate who first heard the case. **Section 200(3)** of the **Criminal Procedure Code** requires that where a succeeding magistrate takes over the proceedings, the accused persons have a right to demand any witnesses who had previously testified to be recalled or alternatively for the entire trial to commence *de novo*. In the present appeal, when the succeeding magistrate took over the proceedings, counsel for the Appellants indicated that they did not have objection to the case proceeding from where it had reached. They did not make a request for the recall of any witnesses. This court has taken into consideration that the fact that since the Appellants were represented by counsel, they were advised of their rights under **Section 200(3)** of the **Criminal Procedure Code**. The Appellants cannot therefore, on appeal, allege that they were not accorded such right. It was clear from submission made by the Appellants' counsel that this was not the main thrust of their appeal. That ground of appeal lacks merit and is hereby dismissed.

The second issue for determination is whether the prosecution adduced evidence which connected the Appellants with the crime. It was clear from the evidence adduced by the prosecution witnesses that the prosecution relied on both direct and circumstantial evidence in their bid to secure the conviction of the Appellants. Counsel for the Appellants argued that the prosecution had not adduced any evidence to connect the Appellants with the commission of the crime. *Is this the position?* According to the prosecution, the police received information from the intelligence sources that the Appellants were planning to commit a terror attack in the country. The intelligence report was not specific. It however identified the nationality of the Appellants and their identity. The Appellants were arrested after they had checked out of Laico Regency Hotel in Nairobi. They were intercepted in a taxi that was taking them to the Airport. A search was conducted on their persons and their luggage. Nothing significant to this case was found. The Appellants were taken into custody by the Anti-Terror Police Unit. They were interrogated. According to the prosecution witnesses who interviewed the Appellants, the 1st Appellant understood English while the 2nd Appellant appeared not to understand the language. Upon conclusion of interrogation, the 1st Appellant disclosed to the police that there were certain substances which had been hidden in a golf course along Mama Ngina Drive in Mombasa. The police took immediate action and flew the 1st Appellant accompanied by several police officers to Mombasa.

Upon arrival in Mombasa, the 1st Appellant took the police officers to some bushes within the golf course along the said Mama Ngina Drive. The time was 11.00 p.m. at night. The 1st Appellant pointed at a spot on the ground. A police officer dug about 2 inches in the ground and saw a blue polythene bag. The excavation was stopped until the following day when a bomb expert was called to the scene. The bomb expert dug up the blue polythene bag and found inside some white substances. He x-rayed the bag with a view to establishing whether there was a detonator. The x-ray established that there was no detonator in the bag. Samples were taken from the bag. The bag and its contents were measured. It was established that the white substance weighed 15 kgs. A sample was taken to the Government Chemist who established that the substance was RDX (Cyclotrimethylene trinitramine). This is a powerful military high explosive. The Government Chemist testified that on its own, the substance cannot explode. It required a stimulus consisting of some energy in form of mechanical heat or flame or friction for it to set off. The substance was produced into evidence by the prosecution.

The Appellants have argued that there was no evidence adduced by the prosecution witnesses which connected them with the crime. On re-evaluation of the evidence adduced by the prosecution witnesses, it was clear that the prosecution established that it was the 1st Appellant who escorted the police to the golf course along Mama Ngina Drive in Mombasa where the RDX was found buried in the ground. The 1st Appellant showed the police the specific place on the ground where the explosive substance was buried. This court holds that the 1st Appellant had special knowledge of where the substance was buried. The

substance was buried in a hidden place. The only inference that this court can draw from the evidence adduced by the prosecution is that it is the Appellants who buried the said substance in the place where it was found. This is circumstantial evidence. The law regarding circumstantial evidence is that the court must consider whether the exculpatory evidence adduced by the prosecution is inconsistent with the innocence of the accused and points to no one else other than the accused as the persons who committed the offence. In the present appeal, the prosecution established that it was the 1st Appellant who escorted the police to the specific spot at the golf course where the explosive substance was recovered.

Further, the prosecution adduced evidence which established to the required standard of proof beyond any reasonable doubt that the Appellants were in the vicinity of the place where the RDX was recovered a few days earlier. The prosecution established that the Appellants were in Mombasa for a period of four (4) days between the 12th and 16th of June 2012. Within this period, they were resident at Castle Royal Hotel. PW7 Dennis Kamanga Kamau, a taxi driver, testified how on two days within this period the Appellants requested him to drive them to, among other places, Mama Ngina Drive. On these two days, PW7 stopped at Mama Ngina Drive and saw the Appellants survey the area. The Appellants cannot therefore argue that they were new in the area and were not aware of the exact location of the place where the RDX was recovered. The testimony of PW7 places the Appellants squarely at the golf course at Mama Ngina Drive within the material time. Further, the evidence of PW14 Simon Mwangi Wambugu places the Appellants at the golf course on 15th June 2012 at 6.30 p.m. PW14 was playing golf at the time and inquired from the Appellants what they were doing at the golf course at the time. The 1st Appellant responded that he was just **'looking'**. PW14 left them at the scene and continued playing golf. It was near this particular spot that the RDX was later found by the police. This court therefore holds that both direct and circumstantial evidence places the Appellants within the proximity of the area where the RDX was buried and later recovered.

Counsel for the Appellants forcefully argued that even if this court were to reach a finding that the Appellants were the ones who buried the RDX at the golf course in Mama Ngina Drive Mombasa, nevertheless, the prosecution had not established that indeed RDX was an explosive within the meaning ascribed to it by **The Explosives Act**. The Appellants further argued that the RDX by itself was not an explosive material. It required a stimulus or other substances to make it an explosive. The prosecution insisted that RDX was an explosive and therefore a dangerous substance. **Section 2 of The Explosives Act** defines 'explosives' to include:

“(a) gunpowder, nitro-glycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury or of other metals, coloured fires and every other substance, whether similar to those herein mentioned or not, which is used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect

(b) any fuse, rocket, detonator or cartridge, and every adaptation or preparation of an explosive as herein defined; or

(c) any other substance which the Minister may, by notice in the Gazette, declare to be an explosive.”

It is clear from this definition that RDX is an explosive within the meaning of ascribed to it by **Section 2 of The Explosives Act**. RDX is ***“manufactured with a view to produce a practical effect by explosion.”*** According to the Government Chemist, all that was required to make RDX an explosive is a stimulus. No stimulus was found with the RDX. However, in the evaluation of the evidence by this court, it was clear that RDX has no other function other than being used as an ingredient of an explosive. It has no dual use which is applied in the ordinary course of normal human life. It has no civilian use. Its use is restricted to military use. In the premises therefore, this court was not persuaded by the argument advanced by the Appellants that RDX is not an explosive within the meaning ascribed to it under **Section 2 of The Explosives Act**.

Having established that the prosecution has proved to the required standard of proof beyond any reasonable doubt that the Appellants were found in possession of the explosive material, the issue that remains for determination is what purpose the Appellants had the said explosive material in their

possession. According to the prosecution, the Appellants brought the said explosive material into the country in preparation to commit a felony namely to commit acts intended to cause grievous harm to the people of Kenya. This court could discern any other explanation that displaces the theory advanced by the prosecution to the effect that the Appellants were found in possession of the said RDX specifically to do harm to the people of Kenya. The trial court correctly observed that Kenya and its people has been a victim of terror attacks perpetrated by extremists and foreigners. This court holds that the RDX found in possession of the Appellants had no other purpose other than to be used as an explosive in circumstances that would have caused grievous harm to the people of Kenya. The prosecution did not however adduce any evidence in regard to where the specific target of attack would be. Suffice for this court to state that the Appellants' intention in possessing the RDX was to perpetrate a terror attack in Kenya. This court therefore finds no merit with the appeal lodged by the Appellants against conviction. This court holds that the prosecution established, to the required standard of proof, the three counts that were brought against the Appellants. The prosecution established that, the Appellants, jointly and severally, were found in possession of an explosive material in circumstances that clearly suggested that they were preparing to commit a felony by causing an explosion that would have caused grievous harm to the people of Kenya. The appeal against conviction lacks merit and is hereby dismissed. The defence offered by the Appellants did not dent the otherwise strong case adduced against them by the prosecution. This court finds their defence to be a sham.

On sentence, this court has taken into consideration the fact that the Appellants failed in their mission to perpetrate a terror attack in Kenya. It was clear from the evidence that the Appellants were not acting alone or it was intended that they would be part of a group that would perpetrate a terror attack in Kenya. It was evident that the police nipped in the bud the intended terror attack. In that regard, the police should be commended for their vigilance that obviously saved the people of Kenya from a terror attack. The Appellants have been charged with what essentially constitutes an inchoate offence. The Appellants did not succeed in their criminal intention. This court is of the view that taking into consideration the entire circumstance of this case, the sentence of life imprisonment imposed on the Appellants was not justified. That sentence is set aside and substituted by a consolidated sentence of this court sentencing the Appellants to each serve fifteen (15) years imprisonment. This court has taken into consideration the period that the Appellants were in remand custody before they were convicted. The sentence shall take effect from the date that the Appellants were convicted by the trial court. After completion of their sentence, the Appellants shall be repatriated to their country of origin. The RDX shall be destroyed. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2016

L. KIMARU

JUDGE