



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

**CRIMINAL APPEAL NO. 109 OF 2015**

**RICHARD BARAZA WAKACHALA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Manderu SPM Criminal Case No. 601 of 2015 – D. K. Mutai RM)**

**JUDGMENT**

The appellant was charged in the magistrate's court at Manderu with two counts. Count 1 was for travelling to a terrorist designated country without passing through designated immigration exit point contrary to section 30B (1) (a) and section 30B (2) (a) as read with section 30C (1) of the Prevention of Terrorism Act 2012. The particulars of the offence were that on 27th October 2015 at around 1300hours at Manderu Township within Manderu County was found to have travelled to a terrorist designated country Somalia without passing through designated immigration exit point contrary to section 30B (1) (a) and 30B (2) (a) as read with section 30C of POTA.

He was also charged with a second count of failure to report departure in accordance to Section 172 of the Immigration Act. The particulars of the offence were that on the same day, place and time was found to have crossed Kenya-Somalia border through the entry and exit point having not reported his departure to the immigration officer as required.

He was recorded to have pleaded guilty to both charges. The facts were thereafter given by the prosecutor, and he responded to the facts and stated that his intention was to join Alshabaab and be killed by them.

He was convicted in respect of count 1, but the magistrate rejected count 2 as, according to the court, it was brought wrongly under section 89 (5) of the repealed Act. The appellant was subsequently sentenced to serve 10 years imprisonment on count 1.

Dissatisfied with the decision of the trial court, he has now come to this court on appeal on the following grounds:-

1. That he pleaded not guilty at the trial.
2. That he had been denied his right by the prosecution and was tortured and mistreated.
3. There was no proper investigation carried out by the team handling the case as they gathered irrelevant information with intention of putting him in prison.

4. That he was from Trans Nzoia County and was looking for a job like teaching and had started teaching at Salama Academy.

5. That the sentence of 10 years imprisonment is excessive and oppressive.

At the hearing of the appeal the appellant submitted that he did not plead of guilty since he did not travel to a terrorist country. He stated also that he had worked in Mandera and as Somalia was an adjacent country, he must have crossed the border unknowingly without intention. He also submitted that he could not recall the exact place where he was found. However his conscience told him that he was in Kenya. He stated that he suffered from cerebral malaria and pleaded guilty not because he committed the offence, but because he had been told to plead guilty only to be sentenced to serve 10 years imprisonment. He stated lastly, that those who arrested him tortured and mistreated him.

Mr. Okemwa the learned prosecuting counsel, opposed the appeal. Counsel submitted that the charge was read and the particulars also explained to the appellant before he pleaded to the offence. He admitted the charge and the prosecutor gave the detailed sequence of the appellant's travels and activities up to the date he was arrested inside Somalia by the Somali local administration due to his handicap in the language. According to counsel, the appellant knew what he was doing and committed the offence under the Prevention of Terrorism Act. Counsel concluded by stating that the appellant needed to be kept away from society, and that there was no evidence that the appellant was tortured.

I have considered the submissions on both sides.

The appellant has come on appeal and stated that he did not plead guilty to the offence. I have perused the charge sheet and the record of the proceedings.

The charge sheet does not give the Legal Notice which declared Somalia a designated terrorist country.

In addition, there is no offence under section 30 (B) (1) (a), 30 B (2) (a) and 30 C (1) of the Prevention of Terrorism Act 2012 called traveling to a terrorist designated country without passing through designated immigration exit point. All the above three sections which appear in the charge refer to training or instructions for the purposes of terrorism whether in Kenya or outside the country. Section 30 C only creates a presumption that a person who travels to a country designated by the Cabinet Secretary without passing through designated immigration entry or exit point be deemed to have travelled to that country to receive training in terrorism. The travel is not the offence but creates a presumption of training.

The learned magistrate was correct in finding that count 2 for failure to report departure in accordance to section 172 of the Immigration Act was defective, as the Immigration Act had been appealed.

However, the magistrate was wrong in convicting on count 1, as all the sections cited in the charge sheet do not create the offence alleged. I find that count 1 was defective, and not backed by the law. The consequence is that the conviction cannot stand. A person cannot plead guilty and be convicted for a non existent offence.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Garissa this 17th day of August 2016**

**GEORGE DULU**

**JUDGE**