



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 49 OF 2016

MOHAMMED HARO KARE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 787 of 2014 delivered by Hon. Daniel Ogembo, CM on 14th March 2016).

JUDGEMENT

BACKGROUND

The Appellant was charged with three counts of offences as follows:

Count I: Being a member of a terrorist group contrary to section 24 of the Prevention of Terrorism Act, 2012 the particulars of which were that on or before 15th March 2014 at Huruma Estate within Nairobi County, jointly with others not before court, the Appellant was found to be a member of a terrorist group, namely, the Al Shabaab, a terrorist organization outlawed by the Kenya Gazette Notice No. 12585 of 2010.

Count II: collection of information contrary to section 29 of the Prevention of Terrorism Act, 2012 whose particulars were that on or before 15th March 2014 at Huruma Estate within Nairobi County, jointly with others not before court, was found in possession of Samsung mobile phone model GT-S5303 of IMEI number 3555435052911426 which had a Safaricom serial number 89254029141004161556 with generated images from <http://thewasat.wordpress.com> which information relates to terrorism organization for the use in instigating the commission of a terrorist act.

Count III: Being in possession of an article contrary to section 30 of the Prevention of Terrorism Act, 2012 the particulars of which were that on 15th March 2014 at Huruma Estate within Nairobi County, knowingly had in his possession of a Samsung mobile phone model GT-S5303 of IMEI number 3555435052911426 which had a Safaricom serial number 89254029141004161556 which had articles for use in instigating the commission of a terrorist act.

The Appellant was acquitted in Counts II and III on ground of insufficient evidence but convicted in Count I. He was sentenced to 20 years imprisonment. He was dissatisfied with both the conviction and sentence and he preferred this appeal. He raised the following grounds of appeal;

- a. *The circumstantial evidence relied on did not conclusively point to the Appellant*
- b. *The prosecution did not prove the case beyond reasonable doubt*
- c. *The prosecution's case was inconsistent and contradictory*
- d. *The Appellant's defence was disregarded without any basis*
- e. *The trial court relied on extraneous considerations not supported by the evidence to reach a wrongful conclusion*
- f. *The trial court did not set out the issues for determination and that the sentence was excessive.*

APPELLANT'S SUBMISSIONS.

The Appellant relied on written submissions filed on his behalf by learned Counsel, Mr. Chacha Mwita. Counsel for the Appellant submitted that none of the prosecution witnesses had shown that the Appellant was a member of Al Shabaab. He observed that the Appellant was arrested initially on suspicion of being involved in the twin explosive attacks on commuter vehicles along the Thika Superhighway which information turned out to be false. He submitted that the circumstantial evidence relied on by the prosecution was not sufficient as a basis for a conviction. He cited the case of ***Solomon Kiri M'rukaia v Republic 2014 eKLR.***

It was further submitted that the conclusion by the trial court that the Appellant is a member of the outlawed group was not supported by any of the prosecution witnesses. Furthermore, the particulars of Count I were not linked to the mobile phone allegedly recovered from the Appellant. Counsel observed that the Appellant had denied being found with the mobile phone or being the registered owner of the Safaricom line which was in fact proved to be registered under another person's name. Counsel also pointed out that no evidence had shown that the Appellant was a member of Al Shabaab before or on 15th March 2014. He challenged the reliance by the court on the photographs, noting that there was no knowledge of the existence of the photos prior to sending the mobile phone for forensic analysis.

Regarding the alleged recovery of the phone, it was submitted that the allegation that the photos showed the Appellant holding the cover of the phone was unsubstantiated and had been refuted by the Appellant and that there was no confirmation as to whether or not the photos were taken using the mobile phone. Counsel noted that the compact discs produced by PW4 were not played in court nor supplied to the Appellant. Further, no reference was made to the said CDs by the trial court and neither was a certificate produced pursuant to Section 102(B)4) of the Evidence Act in relation to production of electronic evidence. The case of ***Republic v Barisa Wayu Mutaguda (2011) eKLR*** was cited.

Counsel also submitted that the prosecution did not link the military attire and the AK 47 firearm to the Al Shabaab which position contradicted the trial court's finding that the attire was generally associated with the group. Further, the prosecution failed to outline the characteristics of Al Shabaab membership. Counsel also observed that Al Shabaab was gazetted as an organised criminal group and not a terrorist group under the Prevention of Terrorism Act.

Material contradictions in the prosecution evidence were also cited. It was noted that the prosecution witnesses contradicted themselves regarding the recovery of the mobile phone; the phone IMEI number as cited in the charge, and the testimonies by the prosecution witnesses, the number of inventories that were prepared and the details of registration of the subject mobile phone number. Thus the trial court erred in finding that the prosecution case had been established and that the evidence of PW2 and PW5 had corroborated each other on the arrest and recoveries. Counsel faulted the trial court for shifting the burden of proof to the Appellant and making misrepresentation of facts. He also faulted the court for reliance on extraneous matters in reaching a conclusion that the Appellant was of Al Shabaab. The Appellant relied on the decision of the court in ***Joel Wilberforce Obuni v Republic 2006 eKLR.*** It was challenged that the photographs alone could not be conclusive evidence and needed corroboration. Lastly,

it was submitted that the sentence of 20 years was extremely excessive under the circumstances.

RESPONDENT'S SUBMISSIONS.

The appeal was opposed. The Respondent also relied on its written submissions filed on 24th October, 2016 by Prosecution Counsel, Ongige O. Noah. It was submitted that the circumstantial evidence was sufficient to convict the Appellant. The case of *Julius Kiunga M'Birithia v Republic 2012 eKLR* was cited in support. The respondent added that under Section 133 of the Evidence Act, the police were protected from disclosing the source of intelligence report upon which the police officers acted upon to arrest the Appellant. The Respondent maintained that the prosecution case was proved to the required standard. The Appellant's denial of having not been found with the phone was dismissed as a mere denial and that the fact that the phone SIM was not registered in the Appellant's name did not exonerate him from the charges as long as PW5's evidence remained unrebutted. The respondent recalled that the phone was recovered from the Appellant immediately he was arrested and an inventory made and that a further search of the Appellant's home revealed items including an identification card bearing the name Asaye Oda Chame. Thus, the Appellant knew the registered owner of the phone together with whom the members of the outlawed group were. The Respondent further submitted that the trial court had taken judicial notice of the proscribed Al Shabaab terrorist group and had rightly appreciated the content of the photos adding that the Appellant admitted in evidence that the photographs were his and had been taken from the phone and his album.

The respondent also maintained that the prosecution evidence was consistent, noting that the registration details of the SIM card were traced to the Appellant's roommate. The respondent denied that any evidence was obtained in violation of the Appellant's constitutional rights. Further, the respondent noted that the trial court had considered the Appellant's defence, adding that the Appellant could have demonstrated how he was not associated with the outlawed group. Further, the Appellant had failed to explain why he was in military uniform and holding a firearm. The prosecution denied that the trial court shifted the burden of proof to the Appellant since the court had relied on the prosecution evidence to convict the Appellant. Finally, the respondent denied the assertion that the court considered extraneous evidence, citing the report by PW2 from which the photos were extracted and the admission by the Appellant. The respondent maintained that the sentence was legal and appropriate in the circumstances and urged the court to dismiss the appeal.

EVIDENCE.

The prosecution called a total of 5 witnesses. **PW1, No. 85620 PC Peter Muki** who was then attached to the Anti-Terrorism Police Unit Headquarter testified that he participated in the arrest of the Appellant together with PW5 acting on information that the Appellant was suspected of being a member of the Al Shabaab. They arrested the Appellant and searched his house. They recovered a mobile phone, Samsung make from the Appellant and an inventory of the phone recovered was prepared and signed by PW1, PW5 and the Appellant. **PW2 No. 83198 PC Nicholas Waranga** carried out a forensic analysis of the mobile phone and Safaricom SIM card and extracted information from the phone. He produced a report of his findings. **PW3 Ochonda Wariomba** a registrar at the National Registration Bureau produced a letter done by his supervisor in respect of inquiries made by the investigating officer in this cases in respect of two national identification card numbers 24076565 and 29473178 and one serial no 2373602332 for a waiting card pending issuance of an identification card. **PW4 No. 69485 Cpl. Daniel Hamisi** of Safaricom Law and Enforcement Liaison Office at Safaricom Headquarters extracted details in respect of the registration of a mobile phone no. 0705 804426 and the list of handsets (IMEI numbers) that were linked to the said number. He also produced in court a report of his findings. **PW5, No. 74734 Cpl. Jackson Chacha** was the investigating officer in this case then attached to ATPU headquarters and was also one of the arresting officers.

The Appellant gave a sworn testimony in his defence. He denied the charges against him. He denied ownership of the mobile phone and SIM card, nor having taken any photos. He stated that he could not have taken any photos from a website since he was not conversant with English. He also stated that he saw the alleged photographs for the first time in court. He denied that the phone and SIM card were

recovered from him when he was arrested. He also denied ever signing any inventory as alleged and provided a specimen of his own signature in court.

DETERMINATION

The main issue for determination and upon which this appeal turns is whether the prosecution proved its case beyond reasonable doubt and if so, whether the sentence prescribed was appropriate in the circumstances. This issue takes into account the grounds cited by the Appellant in his Petition of Appeal.

The Appellant challenged the sufficiency of the prosecution evidence to support a conviction. It was submitted that the circumstantial evidence relied on did not meet the standard as a basis for a conviction. Several contradictions were also cited by the Appellant. The Appellant also challenged the evidence of photographs relied on, highlighting that the mobile phone in question was not registered in the name of the Appellant.

The Appellant was charged with the Count I of being a member of a terrorist group contrary to section 24 of the Prevention of Terrorism Act, 2012. It was alleged that the Appellant was a member of a terrorist group, namely, the Al Shabaab, a terrorist organization outlawed by the Kenya Gazette Notice No. 12585 of 2010.

Section 24 of the **Prevention of Terrorism Act** defines this offence in the following terms:

‘A person who is a member of, or professes to be a member of a terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years.

To prove this offence, the prosecution is therefore, under a duty to prove that an accused person belongs to or professes to be a member of a terrorist group under the Act. The terrorist group in this case is described to be Al Shabaab. In order to fall into this category, the group must fall within the category of a specified entity or one that is involved in the commission of a terrorist act as prescribed by the statute.

The prosecution case is that the Appellant was arrested in possession of a mobile phone which when subjected to forensic analysis, revealed various photographs of the accused in military uniform and holding an AK 47 rifle. The Appellant challenged the manner in which evidence was collected, and also distanced himself from ownership of the phone. He also denied ever signing an inventory in respect of the recovered phone.

The Appellant stated that the informer relied on in arresting him did not refer to a phone, thus there was no compliance with Article 49 since the evidence collected was in disregard of Article 50(4) of the Constitution. This argument was pursued on the basis that the Appellant’s initial arrest was on suspicion of his involvement in a terrorist attack on two commuter vehicles along Thika Road. Eventually, it was found that the Appellant had not been involved, nevertheless, the police proceeded to submit the recovered phone for analysis. The evidence that emerged as a result was the basis for the preference of the charges herein. The Appellant challenged both the evidence of the recovery and ownership of the phone and the number therein.

The recovery of the phone was testified to by PW1 and PW5. **PW1** stated that he accompanied PW5 to go arrest the Appellant, acting on an intelligence report. When they arrested him, a mobile phone was recovered. While PW1’s role ended upon the apprehension of the suspect, PW5 was charged with the investigations. PW5 submitted the phone for forensic analysis. **PW2** retrieved images from the phone, showing the Appellant holding an AK 47 rifle. The first question to determine regarding this evidence is whether the continuation with investigations in this respect violated the Appellant’s constitutional rights.

Article 50(4) of the Constitution provides that ***‘evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.’***

PW5 admitted that the suspicion that the Appellant was involved in the explosive attacks of commuter vehicles was found to be false. This appeared to be the basis of the Appellant's apprehension in the first place. In my view, this does not render the police actions illegal, as they acted on initial suspicion of involvement in criminal activities. The mobile phone was recovered upon arrest on suspicion of committing an offence. It is within the law, for a police officer to investigate any suspicion of commission of an offence even where such new information arises in the course of investigating an allegation that is later disproved.

The next issue was raised was in respect of the recovery and the ownership of the phone. The details of the registration of the SIM card found on the phone as well as the phone were confirmed by **PW4** who testified that the mobile phone number 0705 804426 was registered under **Hashim Mohammed Haro** of ID no. 29971539. He stated that the SIM card unit code was S/N 8925-4029141004161556. From the evidence of PW4, the physical SIM card and phone were not handed to him. He only received the details of the number and the phone from the investigating officer, PW5. PW5 on his part stated that the details were provided by the Appellant.

The registration details revealed a person other than the Appellant. PW5 stated that he presumed that the Appellant was the owner since he provided the details of the number. The Appellant's counsel challenged this piece of evidence on the ground that there was no confessionary statement taken from the Appellant. PW5's assertion that the Appellant was the owner for lacks basis, since mere knowledge of a mobile phone that is registered under another person is not proof of ownership by the person bearing such knowledge. For the same reason, if the Appellant shared the mobile phone number details, that would not by itself render such a statement an admission or confession to be subjected to the admissibility tests under the Evidence Act.

That said, it is observable that PW4's report shows that the registered number bore a serial number 8925-4029141004161556 which was similar to the number in the SIM card that was shown to PW4 in court. Thus, even if the initial information allegedly given by the Appellant was wrong, the tallying of the code from PW4's report with that in the physical SIM card removes any doubt that reference was being made to the same mobile phone number.

From the above, it is clear that the mobile phone number was registered under a different person, other than the Appellant. Thus, there is no sound basis for sustaining PW5's allegation that the Appellant, used his roommate's details to have the number registered on his behalf since the Appellant had not then been issued with an ID card, which is required at the time of registering a mobile phone SIM card. This is because, the alleged Appellant's roommate was referred to as Asaye Odi Chami. PW5 recovered from the Appellant's house a scanned copy of the ID card no. 30450609 for one Asaye Oda Chami. The details of the phone number registration revealed a different person, Hashim Mohammed Haro of ID no. 29971539.

The Appellant challenged the second inventory that was allegedly prepared by the investigating office in respect of the recoveries made at the house. I find however, despite the denial of the inventory, there is support for the recovered items. Firstly, the Appellant led the police officers to the house. Secondly, a waiting card in the Appellant's names was confirmed as legitimate by the office of the registrar of persons. PW5 produced details of inquiries in respect of this serial number. A report produced by **PW3**, a registrar at the National Registration Bureau showed that the waiting card bearing this serial number 2373602332 was issued at Moyale Sub County but had not been returned at the time of the making of the report, for the issuance of an ID card. This validates the recovery made at the Appellant's house.

Back to the issue of the photographs that were produced in court. Even though the registration details of the mobile phone do not relate to the Appellant, there is the aspect of the photographs that were recovered from the phone. PW2 testified that he retrieved images from the phone, showing the Appellant holding an AK 47 rifle. He also showed another photo with the Appellant holding the cover of the mobile phone. His findings are documented in a report supported by a production certificate. PW2 also produced compact discs containing the extractions from the phone. Even though the said compact discs were not played in court, PW4 indicated that they contained the details in the report. Thus, the report produced in court and cited by the trial court suffices as evidence of the contents retrieved from the mobile phone. PW2 also

stated that the subject phone could hold two SIM cards, each slot bearing a distinct IMEI number: 355435052591426 and 3554360525A1424. PW4 pointed to the Appellant in some of the photographs. The Appellant denied ownership of the mobile phone and SIM card, nor having taken any photos. However, he did not deny that the photos were his.

The question that needs to be determined is whether the evidence concerning the photographs is sufficient to link the Appellant to be a member of or one who professes to be a member of the terrorist group, Al Shabaab. **Section 2** of the Prevention of Terrorism Act defines a terrorist group as:

a. an entity that has as one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act; or

b. a specified entity;

The Act defines a terrorist act under **section 2** as any an act or threat of action:

(a) which: (i) involves the use of violence against a person;

(ii) endangers the life of a person, other than the person committing the action; creates a serious risk to the health or safety of the public or a section of the public;

(iv) results in serious damage to property;

(v) involves the use of firearms or explosives;

(vi) involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;

(vii) interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;

(viii) interferes or disrupts the provision of essential or emergency services;

(ix) prejudices national security or public safety; and

(b) which is carried out with the aim of:

(i) intimidating or causing fear amongst members of the public or a section of the public; or

(ii) intimidating or compelling the Government or international organization to do, or refrain from any act; or

(iii) destabilizing the religious, political, constitutional, economic or social institutions of a country, or an international organization:

Provided that an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm referred to in paragraph (a)(i) to (iv).'

The question of what qualifies one to be a member of Al Shabaab was raised. The Appellant faulted the trial court for relying on extraneous evidence to reach a conclusion that the Appellant was a member of the proscribed group. The particulars of the charge cited **Kenya Gazette Notice No. 12585 Of 2010** under which Al Shabaab was proscribed among other entities. The declaration by the then *Minister of State for Provincial Administration and Internal Security* in the **Kenya Gazette Notice No. 12585 of 2010** dated 18th October 2010 cited various groups as organised criminal groups pursuant to powers provided under

section 22 of the Prevention of Organised Crime Act. As rightly submitted by counsel for the Appellant, this declaration was not made under the Prevention of Terrorism Act.

This begs the question whether this declaration under a different piece of statute(legislation) meets the requirement of a specified entity under the Prevention of Organised Crime Act. If the answer is in the affirmative, would Al Shabaab still qualify as a terrorist group under Section 2 of Prevention of Organised Crime Act. The latter would call for the court to determine if the group is associated with any of the terrorist attacks listed under section 2.

This court takes notice of the subsequent **Kenya Gazette Vol. CXVIII—No. 25 of 14th March, 2016, Gazette Notice No. 1618** by the Minister for Interior and Coordination of National Government which declares the following to be *specified entities* pursuant to **section 3 (3)** of the Prevention of Terrorism Act (1) **Al-Shabaab, (2) Al-Qaeda, (3). Boko Haram, 4. Islamic State of Iraq and Syria (ISIS), 5. Mombasa Republican Council (MRC)** among others.

This declaration was published on 14th March, 2016, after the alleged offence had been committed. A question may then be raised regarding extending membership to an entity that had not been proscribed at the time the alleged offence was committed.

The Al Shabaab group and its associated operations are not new to this country. Kenya has suffered several terrorist attacks for the last few years, which have been reported in the media nationally and globally. In some of these instances, the Al Shabaab has claimed responsibility. Are these matters that this court can take judicial of? I am of the view that they qualify to be matters which the court can take judicial notice of. Under **section 60(1)(o)** of the Evidence Act the court can take judicial notice of ***all matters of general or local notoriety***. This position had been taken by courts in several cases: In the case of ***Abuod Rogo Mohamed & Another v Republic Criminal Case No. 793 of 2010 92011*** eKLR the court addressed itself thus:

‘Although the applicants submitted that the court cannot take judicial notice of the alleged suicide bomber, I believe that the court is entitled to do so. I say so because, by dint of the provisions of section 60 (1) (o) of the Evidence Act;

“The courts shall take judicial notice of the following facts

(o) all matters of general or local notoriety.”

To my mind, it is definitely a matter of general notoriety in Kenya, that on 20th December 2010 there was a blast in a bus belonging to Kampala Coach Bus Service. The blast occurred at the Nairobi offices of the bus company, and it was generally attributed to the group known as Al-Shabaab.

Of course, I do not know whether or not the state will lead sufficient evidence at the trial, to prove the nexus, if any, between Al-Shabaab and the said blast, or the connection, if any, between the applicants and the alleged suicide bomber.

But I can and do take judicial notice of the blast.

I also take judicial notice of the existence of a group called Al-Shabaab. Once again, I take judicial notice of the said group’s existence because that is a matter of general notoriety.’

Another court in the case of ***Muslims for Human Rights (Muhuri) & another v Inspector-General of Police & 4 others Petition No. 19 of 2015 [2015] eKLR*** took a similar view, stating, ***‘There is, and there can be no debate, and it is a matter of which this court takes judicial notice on the grounds of their notoriety, the callousness and viciousness of the actions of the designated entities, Al Qaida, Al Shabaab, ISIS, Boko Haram, are terrorist organizations. This is however very far from saying that the Applicants have been or have acted on behalf of, at the direction of, or in association with any of***

the designated entities...'

In *Oluseye Oledaji Shittu v Republic Misc. Criminal Application No. 130 of 2016 (2016) eKLR* the court took judicial notice of the fact that *acts of terrorism have wreaked havoc in Kenya in the recent past.*

Having taken judicial notice of the existence of Al Shabaab and its associated terrorist acts, I am satisfied that even without the declaration of the specified entity under the Prevention of Terrorism Act at the period of the alleged offence, the group qualified then, as is today, to be a terrorist group under the Act.

The next and final issue for determination whether the prosecution has managed to prove the Appellant's membership to the Al Shaabab group. **Section 2** of the Prevention of Terrorism Act identifies two elements of a person's actions: to be a member or to profess to be a member. The word 'profess' is defined under the **Black's Law Dictionary 9th Edition at page 1328, as: 'to declare openly and freely; to confess.**

Has the Appellant professed being a member of the proscribed group? None of the witnesses testified to this fact, the Appellant himself denied this allegation. The investigating officer admitted that he relied on the photos extracted from the phone to prefer the charges. This in my view, does not meet the element of professing to be a member of the group; to profess involves a positive acclamation, a confession to something. This has not been revealed.

Does the evidence however, show that the Appellant is a member of Al Shabaab? The evidence being relied on are the photographs showing the Appellant wearing military attire and is holding a firearm in different positions. The Appellant challenged this evidence and faulted the trial court for making unfounded conclusions in convicting the Appellant.

Determining membership to an outlawed criminal group would involve a consideration of several sets of circumstances. In ordinary circumstances, membership in an organization is easily determinable due to existence of well-known formal structures or by the person's direct actions of professing to be a member. However, membership to a terrorist group may not be so easily determinable, thus, use of circumstantial evidence that points to a person's association with such a group. Several considerations would come into play and supported by relevant evidence that would point to such a conclusion. Terrorist organisations, expectedly, operate underground, and use covert means to recruit persons as members and to advance their operations. Thus, it is upon the prosecution to set out clearly acts that point clearly of a person's membership to in this case, the Al Shabaab. This may vary from one case to another. It must be shown that the actions alleged against the accused show a nexus with operations associated with the outlawed group as to enable the court reach a conclusion to his membership. Due to the nature of the group's operations, there is not yet standard test that would apply as a checklist to a person's membership to Al Shabaab. However, certain actions may provide a useful guide, such as a person being trained by the group on the use of weapons, possession of weapons and articles associated with the group, travelling to the known operations of the group, and being associated with members of the group, or being together with members of the group or taking part in activities of the group. These are by no means exhaustive considerations, and each element must be applied to the circumstances of the case.

The prosecution in this case relied on photographs extracted from a mobile phone that was allegedly recovered from the Appellant. This is clear from the testimony of PW5 who stated that:

'..I preferred the three charges against the accused because initial report indicated that the accused was suspected to have been involved in the twin blasts along Thika Highway. And when the forensic report showed him in military uniform and with an AK 47 rifle I was convinced. To date I do now know where the firearms are. Some of the pictures extracted from accused phone also showed Al Shabaab on training ground....Some of the pictures also had some articles or symbols used by Al Shabaab at page 30.'

In finding the Appellant guilty of the offence under count I, the trial court observed in part that:

‘...various photographs of known Al Shabaab and Al Qaeda operatives are also captured in the photographs, some also hooded in the same manner. ...This court is convinced in fact that the man in the photographs is the accused before court.

....

the photographs produced herein shows accused dressed in military uniform (jacket and hood) generally associated with Al Shabaab operations he is also photographed while carrying an AK 47 rifle also generally associated with the group. Worth noting also is the other photographs downloaded from the said phone i.e. photographs of known Al Shabaab and Al Qaeda operations. To me the answer to all this is one. That the accused is a member of the outlawed terror group. There is no better evidence that the court would expect more than the photographs show to court of accused in uniform, hood and holding the weapon. One who is not a member and who detests or has nothing to do with the outlawed group would really not have been photographed in the group’s uniform and armed. Or even kept in his phone the photographs of those known Al Shabaab or Al Qaeda operatives....’

There is no proof of ownership of the phone to the Appellant nor was any association created between the Appellant and the registered owner of the phone. While some of the photographs bore the image of the Appellant in military attire, and bearing a weapon, it was not alone sufficient to implicate the Appellant as a member of the Al Shabaab. PW5 stated during cross-examination as follows:

‘I relied on forensic report to link accused with Al Shabaab. At page 30 the Al Shabaab symbol is shown. I cannot read the language. I cannot identify the persons whose faces are hooded in the photos. I have no evidence that accused was distributing the photographs or any of contacts with terrorist.’

The prosecution ought to have taken a step to show a clear linkage between actions of the Appellant and those of the outlawed group. Photographs alone do not suffice. No attempt was made to even demonstrate to the court operatives, elements and other articles of the Al Shabaab and link the same to the Appellant. PW5 made general reference to photos showing Al Shabaab members on the training ground and articles or symbols used by Al Shabaab, without providing a description of those references. Neither was further evidence produced to prove the allegation that the Appellant travelled to Somalia and trained and associated with the Al Shabaab before returning back to Kenya.

Without such a demonstrated linkage, I find it difficult to agree with the findings of the trial court. The references to known operatives of the outlawed group are, in my view, unsupported by the evidence that was produced in court. I am persuaded that the prosecution in this case did not discharge its burden to prove beyond reasonable doubt that the Appellant is a member of the terrorist group, Al Shabaab. This appeal therefore, succeeds. I hereby quash the conviction and set aside the sentence. The Appellant shall be set free unless otherwise lawfully held. It is so ordered.

DATED and SIGNED this 29th day of NOVEMBER, 2016.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of;

- 1. Mr. Chacha for the Appellant.**
- 2. Mr. Ongige for the Respondent.**