REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 98 OF 2014

THOMAS MWANZIA KOMO.....APPELLANT

VERSUS

REPUBLIC.……..…...RESPONDENT

(*From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 191 of 2012 – H. N. Ndungu CM*)

JUDGMENT

The appellant was charged in the subordinate court with engaging in criminal activity contrary to section 3 (a) as read with section 4 (1) of the Organized Crimes Act of 2010. The particulars of the offence were that on or before 20th January 2012 in Liboi Township within Garissa County knowingly engaged in criminal activity by being a member of Al-Shabaab a prohibited group as per Kenya Gazette Notice 12585 dated 18th October 2010. He pleaded not guilty to the charge. After a full trial, he was convicted on the offence. He was sentenced to serve 12 years custodial sentence. Dissatisfied with the decision of the trial court, the appellant has appealed to this court. His grounds of appeal are as follows:-

1. The trial magistrate erred in law and fact to convict him without considering that the prosecution failed to prove their case beyond reasonable doubt contrary to section 109 and 110 of the Evidence Act.

2. The trial magistrate erred in law and fact to convict him with the offence of engaging in criminal activities without considering that there was no tangible evidence tendered before the court in support of the prosecution case.

3. The trial magistrate erred in law and fact to convict him without considering that the prosecution's evidence was contradictory and inconsistent contrary to section 163 of the Evidence Act.

4. The trial magistrate erred in law and fact to convict him without considering that some crucial prosecution witnesses were not brought to court to ascertain the truth contrary to section 150 of the Criminal Procedure Code.

5. The trial magistrate erred in law and fact to convict him without considering that the confession document was not genuine as it was not produced in court as an exhibit.

6. The trial magistrate erred in law and fact to convict him without considering that his arrest was poorly instituted hence putting him to great disadvantage.

7. The trial magistrate erred in law and fact in convicting him when the investigation was shoddy as there was no first report made to the police to connect him with the alleged offence.

8. The trial magistrate who executed the judgment and sentence did not comply with section 200 of the Criminal Procedure Code.

9. The trial magistrate erred in law and fact to ignore his mitigation thus denying him a lesser sentence even after he was remorseful and faithful to the court throughout the trial process.

The appellant filed written submissions to the appeal. He cited several authorities. I have perused the written submissions of the appellant.

The learned Prosecuting Counsel Mr. Orwa submitted that with regard to the confession, the police officer who recorded the statement tried to produce the document but the appellant objected to the production. That a trial within a trial was conducted and the court ruled that the confession was properly taken voluntarily. No force was used to obtain the confession. The appellant then moved to the high court to challenge the ruling of the trial court and this court upheld the production of the confession. The appellant therefore cannot challenge the confession in this court again.

Counsel submitted further that the charges were lawful and the proceedings were conducted in accordance with the Constitution and law. Counsel observed that the appellant dwelt so much on the confession in this appeal. However he did not demonstrate any threats carried out against him. The burden was on him to do so under section 26 and 29 of the Evidence Act.

On the mode of arrest, counsel submitted that the appellant went on his own to the police station. The police therefore had no reason to have a grudge against him.

On the issue of crucial witnesses, counsel urged this court to be guided by the provisions of section 143 of the Evidence Act. Counsel stated that the appellant had not indicated the crucial witnesses if any that would be required to testify. In any case counsel argued calling additional witnesses would amount to repetition of the evidence already tendered in court.

On compliance with section 200 of the Criminal Procedure Code, counsel submitted that the matter was merely mentioned before Hon. Ndeda and Hon. Yator. The magistrate who handled the matter was Hon. Ndungu. According to counsel the complaint by the appellant had no basis.

With regard to sentence, counsel submitted that the learned magistrate took into account the mitigating factors before sentencing. Counsel urged this court to uphold both the conviction and the sentence.

During the trial in the subordinate court the prosecution called 4 witnesses. PW1 was Sgt. Joseph Okoth Ananga. It was his evidence that on 22nd January 2012 a report was made at Garissa Anti Terrorist Police Unit and a suspect brought from Liboi. That a panel of officers was converged who investigated the matter. The appellant then disclosed that he was involved in Alshabaab activities. He stated that he was a member and made a self confession. He was thus charged with the offence in court.

PW2 was PC Nicholas Omondi. It was his evidence that on 20th January 2012 he was on patrol at Liboi. A Muhsin Bus to Nairobi arrived at 6pm and the appellant alighted and asked for a hotel. They interrogated him and he produced an abstract of an identity card in the name Thomas Mwanzia Komo. On further search he was found in possession of a Coptic Hospital Card in the name of Bilal Ibrahim Mohamed and he claimed that it was also his name. On further questioning he stated that he would tell the truth about what brought him to Liboi. He then disclosed his involvement in Alshabab activities in Somalia. He was thus taken to Garissa for further interrogation.

PW3 was PC Victor Muturi. He testified that on 20th January 2012 at 6.30pm while at Liboi, a bus arrived. The appellant alighted from the bus and was interrogated and searched. According to this witness also the appellant disclosed that he had joined Alshabaab and was trying to go to Somalia. The appellant

was thus taken to Garissa Antiterrorist Police Unit where after interrogation he was charged in court.

PW4 was C.I. Julius Mbati. It was his evidence that on 26th January 2012 he took a confession on oath from the appellant. The appellant gave an account of his membership with the Alshabaab, his life story, education as well as friends. That confession was made in the presence of the appellant's relative or friend called Saluli. The appellant gave an account of how he was recruited and how he was in a mission to recruit others. He was thus charged with the offence.

A trial in a trial was held in respect of this confession statement, as the appellant objection to its production. The trial court admitted the same. The appellant appealed the production of the statement to the High Court. In its ruling the high court admitted the statement.

When put on his defence the appellant gave sworn testimony. He stated that on 20th January 2012 he travelled to Liboi in search of camel milk and urine because he was advised that it would cure aids. When he was inquiring about the products at Liboi, Kenya Police told him to identify himself and asked what he was doing at Liboi. When they found him with a Coptic medical card and a police identity card abstract, they arrested him and charged him before the court. He stated that his presence in Liboi had nothing to do with engaging in criminal activities.

Faced with the above evidence, the trial court found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court thus convicted him and sentenced him. There from arose the present appeal.

This is a first appeal. As a first appellate court I am duty bound to reexamine all the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno Vs. Republic [1972] EA 32***.

The appellant has stated that the charge was defective. I have perused the charge sheet and I find no defect with the charge. The appellant also fully participated in the trial. As such he cannot now come to complain on appeal that the charge was defective.

The appellant has submitted that the prosecution failed to prove its case beyond any reasonable doubt. That the evidence against him from the prosecution witnesses was inconsistent and contradictory. I have perused the evidence on record. I find that the evidence of the prosecution witnesses is straight forward and clear. There are no contradictions and inconsistencies in the evidence of the prosecution. I dismiss that ground of appeal.

The appellant has also complained that crucial witnesses were not called at the trial to testify in order to establish the truth. Indeed where crucial witnesses are not called to testify, and where the prosecution evidence is weak, the court is entitled to infer that the evidence of witnesses who are not called would tend to be against the prosecution case, and give the benefit of doubt to an accused person. See the case of ***Bukenya Vs. Uganda [1972] EA 549.*** In the present case however there are no other witnesses who could have been called by the prosecution to testify in the matter. The appellant has not stated or given the identity of those crucial witnesses. I dismiss that ground.

The appellant has also complained that section 200 of the Criminal Procedure Code was not complied with. That section requires that when evidence has been taken by a magistrate or Judge, and another magistrate/judge takes over the case, the court is required to explain to the accused his rights to demand the recall of any witnesses who has already testified to be re-examined. In the present case however the entire case was heard by Hon. Hannah Ndungu. Other magistrates merely mentioned the case. Therefore in my view section 200 of the Criminal Procedure Code does not apply.

The major ground of appeal herein is in relation to the admission of the confession. The appellant has relied on English cases that relate to the admission of a confession. He emphasizes that he was HIV Positive and that he was implicated merely because he had changed his religion from Christianity to Islam.

Indeed a confession in order to be acted upon has to be free and voluntary. The appellant gave a detailed statement the particulars of which would only be within his knowledge and nobody else. The statement was recorded in the presence of his friend or relative and he did not deny this. He objected to the production of the statement during trial within a trial. The trial court admitted the statement. He challenged the decision of the trial court to the High Court and the High Court still admitted the statements. He did not make a further appeal to the Court of Appeal from the decision of the High Court. In my view challenging the statement in the High Court on appeal is reviving the same matter in the same court. This court cannot revise its own decision which was made on 6th August 2013. The High Court in its ruling found that there were neither legal nor Constitutional violations of the rights of the appellant in the way the statement was obtained. I thus dismiss that ground.

To conclude I find that this appeal has no merits. I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

Dated and delivered at Garissa this 19th day of May, 2015

GEORGE DULU

JUDGE