



REPUBLIC OF KENYA



KENYA LAW
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**Githonga v Republic (Criminal Appeal E140 of 2022)
[2025] KEHC 4248 (KLR) (Crim) (1 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E140 OF 2022

CJ KENDAGOR, J

APRIL 1, 2025

BETWEEN

JOB KIMATHI GITHONGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against a Conviction, Sentence and judgment delivered
on 30th June, 2022 in Criminal Case No. 971 of 2019 by Hon. B.M. Ochoi
(Senior Principal Magistrate) at the Chief Magistrate's Court at Milimani)*

JUDGMENT

1. The Appellant was charged with six counts. In Count I, the Appellant was charged with the offence of membership of a terrorist group contrary to Section 24 of the *Prevention of Terrorism Act* 2012. The particulars of the offence are that on or before the 30th May, 2019 at Norwich Union building at Central Business District (CBD) within Nairobi County, was found being a member of a terrorist group namely Al shabaab and Islamic State of Iraq and the Levant (ISIL), which is an outlawed terrorist organization.
2. In Count II and III, the Appellant was charged with the offence of possession of articles connected with the commission of a terrorist act contrary to Section 30 of the *Prevention of Terrorism Act* 2012. The particulars in Count II are that on or before the 30th day of May, 2019 at Norwich union building at Central Business District within Nairobi County knowingly had in possession a laptop make HP S/No. CNU0246FTP with 320GB HDD S/NO. WX21A5002913 which had videos namely;
 1. Bay'an Of Mujahed Bro Iman
 2. Kolbiwyo ahmed imam



3. Operations AK. 47
4. Masimba mp4
5. Lengo JihadMP4
6. Sheikh Iman Ali.3gp
7. Fuata Njia.3gp
8. Iman.1 3pg
9. Hijra 4.mp4
10. Hijra2.3gp
11. Uganda Pow.MP4
12. Tribute to Awlaki.MP4.

Which are articles for use in the commission of a terrorist act.

3. The particulars in Count III are that on or before the 30th day of May 2019 at Norwich Union building at Central Business District (CBD) within Nairobi County knowingly had in possession a Samsung mobile phone make SM-N 910H Imei No. 356769060053469 fitted with a Safaricom simcard serial number 89254021074101174438 which had videos namely;

1. VID 2018 1228-WA0004.MP4
2. VID 2018 1228-WA0043.MP4
3. VID 2018 1124-WA0022.MP4
4. VID 2018 1124-WA0002.MP4
5. VID 2018 1124-WA0016.MP4

Which are articles for commission of a terrorist act.

4. In Count IV and V, the Appellant was charged with the offence of collection of information contrary to Section 29 of the *Prevention of Terrorism Act* 2012. The particulars of Count IV are that on or before the 30th May 2019 at Norwich Union building at Central Business District (CBD) within Nairobi county, had in possession a laptop make HP620S/No.CNU0246FTP with 320GB HDD S/NO.WX21A5002913 being a member of terrorist group namely al shabaab, Islamic State of Iraq and the Levant (ISIL) also known as the Islamic state of Iraq and sham (ISIS) collected information to wit videos namely;

1. Bay'an Of Mujahed Bro Iman
2. Kolbiwyo ahmed imam
3. Operations AK.47
4. Masimba mp4
5. Lengo JihadMP4
6. Sheikh Iman Ali.3gp
7. Fuata Njia.3gp



8. Iman.1 3pg
9. Hijra 4.mp4
10. Hijra2.3gp
11. Uganda Pow.MP4
12. Tribute to Awlaki.MP4.

Which are articles for the commission of a terrorist act.

5. The particulars of the offence in Count V are that on or before the 30th day of May 2019 at Norwich Union building at Central Business District (CBD) within Nairobi county knowingly had in possession a Samsung mobile phone make SM-N910H IMEI NO. 356769060053469 fitted with a Safaricom simcard serial number 89254021074101174438 being a member of a terrorist group namely Al Shabaab, Islamic state of Iraq and the Levant (ISIL) also known as the Islamic state of Iraq and sham (ISIS) collected information to with videos namely;

1. VID 2018 1228-WA0004.MP4
2. VID 2018 1228-WA0043.MP4
3. VID 2018 1124-WA0022.MP4
4. VID 2018 1124-WA0002.MP4
5. VID 2018 1124-WA0016.MP4

Which are articles for the commission of a terrorist act.

6. The Appellant was found guilty as charged in Counts II and III and convicted under Section 215 of the *Criminal Procedure Code*. He was sentenced to 10 years' imprisonment for each count, which was to run concurrently. The terms were to run from the time of taking the plea.

7. The Appellant was dissatisfied with the judgment and the sentence. He appealed to this Court vide a Petition of Appeal dated 12th August, 2022. He listed the following Grounds of Appeal;

1. The Learned Hon. Trial Magistrate erred in both law and fact in finding that the prosecution had proven its case beyond reasonable doubt;
 - a. Having made reliance on illegally obtained evidence.
 - b. Failure to demonstrate that the Appellant was possessed of the relevant Mens Rea & Actus Reus.
 - c. Failure to conclusively proof that the Appellant had possession of the offending articles while stored in electronic gadgets.
 - d. Failure to demonstrate or associate the offending articles with the use to commit a past, present or future terrorist act.
2. The Learned Hon. Trial Magistrate erred in both law and fact by ignoring the defence tendered by the Appellant and in shifting the burden of proof on the Appellant for no justifiable reason, hence arriving at a wrong conclusion in law.
3. The Learned Hon. Trial Magistrate erred in both law and fact in preferring a harsh and manifestly excessive sentence under the circumstances, despite the absence of any aggravating



factors and circumstances and despite detailed mitigation and confirmation that the Appellant was a first-time offender.

8. He asked this Court to allow the appeal, quash the conviction and set aside the sentence. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

9. The Appellant submitted that the trial Court should not have convicted him as it did. He argued that there was no proof that he owned the exhibits recovered from the business premises. He argued that the Samsung mobile phone and the HP laptop belonged to one Arkhan Joseph Wachira, who had left the gadgets as security for merchandise that he had collected. He argued that the partnership had an oral agreement with Arkhan Joseph Wachira, under which the Appellant was to retain the phone and the laptop until Mr. Wachira would account for Kshs.35,000/= for goods he had collected. He argued that it was wrong for the lower Court to fail to recognize the agreement.
10. The Appellant argued that the lower Court erred in finding that he possessed the prosecution exhibits. He argued that although the gadgets were recovered from shop No.5A, there was no evidence to link him to the possession of the gadgets because he was not the exclusive owner or occupant of the business stall from which they were recovered. He argued that he co-owned and co-managed the business with several other business partners and that the partnership agreement was verbal. He argued that it was wrong for the trial Court to fail to recognize the partnership for want of a written partnership agreement.
11. For these reasons, he argued that the prosecution did not prove that he was in possession of the said articles. He argued that there was no conclusive or circumstantial evidence to directly link him to the videos in question (both from the Samsung mobile phone and the HP laptop).
12. Lastly, the Appellant argued that the lower Court should not have relied on the evidence of PW4. He argued that PW4's evidence was inadmissible because it did not comply with the strict provision of Section 106B (4) of the *Evidence Act*. He argued that the electronic certificate was not signed by a person holding senior managerial positions with the manufacturers of Samsung mobile phones and HP laptops and the service providers (Safaricom & Airtel). He argued that in law, the electronic evidence must be signed by a person who occupied a responsible position relating to the operation of the said device or the management or the relevant activities. He relied on the case of Abdul Mohamed Abdulrahman vs Republic, Criminal Appeal No. 9 of 2016.
13. Lastly, the Appellant submitted that the trial magistrate preferred a harsh and manifestly excessive sentence under the circumstances. He argued that the Court should order that the duration he had been in custody is enough sentence for the offence and set him free. He asked the Court to consider that he was a first offender. Lastly, he argued that lower Court should have considered the period he was in custody upto his conviction. He argued that the sentence should run from 30th May 2019 when he was arrested. He relied on the Court of Appeal decision in Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR.

The Respondent's Written Submissions

14. The Respondent submitted that the lower Court's judgment and sentencing should be upheld. It argued that PW4, PW5, and PW6 gave a consistent and corroborated account of how the Appellant was found in actual possession of a laptop and mobile phone that had videos connected with the commission of a terrorism act. The prosecution witnesses also managed to demonstrate how the said possession prejudiced national security and public safety as provided in the *Prevention of Terrorism*



Act. It argued that PW1 and DW2 placed the Appellant in the scene that the investigators perceived as a crime scene. It also argued that the Appellant's defence did not dislodge the testimony of the prosecution witnesses.

15. Concerning the sentence, it submitted that the sentence is justified and lenient in the circumstances and thus should not be interfered with. It argued that the Appellant was a beneficiary of the doctrine of the least severe sentence because the trial magistrate indicated that the prison term would run from the time of taking a plea. It reasoned that this is indicative of the fact that the trial magistrate considered the provisions of Section 332 of the Criminal Procedure Code and took into account the period the Appellant had stayed in remand during the pendency of his trial. It also pointed out that the trial magistrate was very lenient because he ordered that the sentence run concurrently.

Issues for Determination

16. Upon consideration of the facts of this case, the Grounds of Appeal and the submissions made by the Appellant, I find that there are 2 issues for determination;

- a. Whether the conviction was safe.
- b. Whether the Sentence should be disturbed.

17. The role of this Court as the first appellate Court is well settled. In *Okeno v Republic* [1972] EA 32, the East Africa Court of Appeal gave an authoritative observation on the duty of the first Appellate court. It stated as follows;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] E. A. 424.”

18. The above authority was recently affirmed by the Court of Appeal in *Peter Kifue Kiilu & another v Republic* [2005] eKLR, where the Court held that the role of the first Appellate court is not merely to scrutinize the evidence to see whether there was some evidence in support of the trial Court's decision.
19. Based on these authorities, this Court shall undertake a wholesome review of the evidence with a view to reaching its own conclusion. As I undertake this cause, I appreciate that the trial Court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that. I have reviewed the testimonies of all the witnesses, and I have summarized them as follows;
20. PW1 was the caretaker of Parosp Limited, where the Appellant was a tenant. He stated that he was not present when the Appellant's house was being searched.
21. PW2 was a police officer stationed at DCI Nairobi Region Headquarters. He stated that he was among the group of officers who went to conduct a search at the Appellant's residence in Mbotela Estate on 7th June, 2019. He said they did the search in the presence of the Appellant and recovered a mobile phone make Samsung model SM/N9104, and a carrier bag green in color. He stated that they did not



- have a search warrant, the Appellant did not object to the search, and that the Appellant signed the inventory voluntarily.
22. PW3 is a friend of the Appellant and a neighbour at Mbotela. He was shown a picture of a bag and asked whether he had seen it.
 23. PW4 is a police officer from the DCI cybercrime unit, then based at ATPU, undertaking a cybercrime investigation and being in charge. He stated that on 31st May, 2019, Sergeant Joseph Mwiti submitted a number of exhibits to him for analysis. He stated that he analyzed a mobile phone model Samsung note 4 IMEI No. 356769060053469 fitted with a Safaricom Sim Card serial number 89254021074101174438. He stated that the phone has a memory card namely San Disk 16GB. He also analyzed a HP laptop serial No. CNU0246FTP model 620. He stated that he found 5 videos of interest in the mobile phone and 13 videos from the HP laptop.
 24. Upon playing and listening to the videos, he stated that he made two findings. One, that the videos from the Samsung phone and the laptop can be used to radicalize others to join the terror network. Two, that the videos can be used to encourage and motivate others to join the outlawed terrorism group. He stated that his recommendations were that the owner of the mobile phone was a radicalized person and an actual member of the Al-Shabaab terrorist group. He also produced his certificate in accordance with Section 106 (b) of the *Evidence Act*, confirming that the computer output and drive he used to generate the report were in good working condition.
 25. PW5 was a police officer attached at ATPU headquarters performing general investigations as well as crime scene investigations. He stated he was requested to take pictures of come exhibits that had been recovered. He stated that he took 58 photographs at the ATPU headquarters. In cross-examination, he stated that the laptop and the mobile phone were not among the exhibits he took pictures. In re-examination, he stated that by the time he was taking photos, the mobile phone and laptops were at the ICT lab.
 26. PW6 was a police officer stationed at ATPU headquarters and the investigating officer in this case. He stated that he went to the Appellant's business stall at Norwich Union building on 30th May, 2019 in the company of his fellow police officers. He stated that they found the Appellant in the stall and conducted a search. He stated that they recovered a Samsung mobile phone galaxy IMEI No. 356769060053469 which was fitted with a Safaricom Sim Card serial number 89254021074101174438 and a Sandisk 16GB memory card. He said they also recovered a laptop make HP serial No.CNU0246FTP model 620.
 27. He said they later that day searched the Appellant's residence in Mbotela, where they recovered other items, including a military pouch, jungle trousers, jungle jumper, and cash Kshs.253,000/=. He stated that an inventory was prepared and was signed by him, the Appellant, PC Eric Mwenda, and PC Saina. He said that he wrote to the Director General Financial Reporting Centre requesting for Bank account details of the Appellant, and the Director confirmed that the Appellant did not have an account. He also wrote to the In Charge stores Vigilance House, forwarding the jungle trousers, the jungle t-shirt, and the jungle military pouch, asking the in charge to confirm whether these were police, military or government uniforms.
 28. He stated that the In-Charge wrote back to him indicating that the items did not match any government uniforms. He stated that the In-Charge, however, advised that the said clothes be treated as military uniforms and accessories. He produced the written responses/reports from the Director General Financial Reporting Centre and the In-charge stores Vigilance House. In cross-examination, he stated that he did not obtain a search warrant for the stall and the house of the Appellant. He stated that the Appellant opened the mobile phone using his address.



29. DW1 was the Appellant. He stated that he was in a business partnership with Victor Okello, Noah Oketch, and Hesbon Opiyo. He stated that the partnership had two shops, one at Norwich Union Towers, where he was assigned and another shop at Sunbeam. He stated that on 30th May, 2019, three police officers came to his business stall at Norwich Union building and conducted a search. He stated that the police officers recovered a phone-Samsung note 4 and a HP laptop. He stated that the HP laptop belonged to their client one Arkhan Joseph Wachira, who was a broker. He said they would give Arkhan Joseph Wachira shoes to go and sell them and that the laptop and the phone were a security because Arkhan owed the partnership Kshs.35,000/=.
30. He stated that he later led the police officers to his residence in Mbotela, where they confiscated more personal belongings. He stated that he was later taken to ATPU headquarters, where an inventory of the recovered items was prepared. In cross-examination, he stated that he did not produce any agreement between the said Arkhan Joseph Wachira and the partnership concerning the debt. He also stated that the exhibits were recovered within the shop. He also stated that he signed the inventory willingly.
31. DW2 introduced himself as a friend of the Appellant and a business partner. He stated that the partnership had comprised him, the Appellant, Victor Okello, and Hesbon Opiyo. He also stated that the partnership had two shops, one at Sunbeam and another one at Norwich Union building. He stated that the Appellant was in charge of the shop at Norwich Union building while the others were in charge of the other shop at Sunbeam. He stated that Arkhan Joseph Wachira owed the partnership Kshs.35,000/= and he had given them a laptop and a phone as security for the loan. On cross-examination, he stated that there was no written agreement between them and Arkhan Joseph Wachira regarding the deposit of goods. In addition, he stated that he did not know much about the agreement because he was located at Sunbeam.

Whether the conviction was safe

32. The Appellant was convicted of two counts, Count II and Count III. In both counts, he was charged under Section 30 of the [Prevention of Terrorism Act](#) which provides:

"A person who knowingly possesses an article or any information held on behalf of a person for the use in instigating the commission of, preparing to commit or committing a terrorist act commits an offence, and is liable, on conviction, to imprisonment for a term not exceeding twenty years."
33. The [Prevention of Terrorism Act](#) defines a terrorist act as an act or a 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;
 - iii. 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:
34. One of the key ingredients into proving the above charges is demonstrating that the contents of the subject articles fall squarely within the definition of Section 30 of the *Prevention of Terrorism Act*. This position was stated by the court in *Osman Mohamed Balagha v Republic* [2018] eKLR, H.C at Garissa Criminal Appeal No. 30 of 2017, where the court observed as follows;
- 16. What are the contents of the two videos? The contents were seen and heard by the court as the videos were played at the trial. The first video lasted two minutes and eleven seconds. It was in Kiswahili talking about others joining the group and encouraging them to join Al-Shabaab. The second video was for a shorter period of thirty-six seconds which was slightly more than half a minute and portrayed a man being beheaded by a group professing it to be an act of terrorism from an unknown place. It was in Arabic but of course the pictures were seen by the magistrate.
 - 17. From the Face-book chats, it was also clear that the Appellant Balagha was communicating with somebody called Tatu Bila just after the Garissa University attack. All this was not denied by the Appellant or disputed at the trial.
 - 18. The prosecution was required to prove that the information contained in the video was for use in instigating commission of or preparation to commit a terrorist act. In my view, the content of the first video which called or encouraged others to join Al-Shabaab was clearly meant to facilitate commission of a terrorist act or acts. The Appellant himself said that he went to Mombasa to teach people whom he did not identify using that video among others.
 - 19. The second video was meant to demonstrate how terrorist acts can be executed.
 - 20. In my view, the sum total of the contents of the videos and the teaching of the Appellant to others relating to those videos, which he admitted, fell squarely within the definition of Section 30 of the *Prevention of Terrorism Act*. Both possession and intended use were proved. In my view therefore, the learned magistrate was right in convicting the Appellant. The sentence was lawful.
35. Thus, this Court should first make a determination on the contents of the videos retrieved from the HP laptop and the Samsung phone.



36. In this case, the videos were played before the lower court, and the magistrate had the opportunity to watch, listen, and comment on their contents. He stated as follows;

“As to the contents of the videos some were seen and heard by the court as the videos were played at the trial ... In the five videos from the phone, the message of violence against non-Muslims was again loud and clear. In my view, the contents of the videos recovered in particular “Bayan of Mujahed” and the others demonstrate how terrorism activities are carried out and executed, the videos called for and encouraged others to join the terror groups in the so called jihad against non-believers and thus facilitated commission of a terrorist act or acts. In my view, the sum total of the contents of the videos which included teachings of Iman Ali in Bayan of Mujahed, fall squarely within the definition of Section 30 of the *Prevention of Terrorism Act*. Both possession and intended use which is to facilitate commission of terrorist acts have been proved.”

37. This Court did not have an opportunity to watch and listen to the same videos. Thus, it shall rely on the factual observation of the trial magistrate on the same. I find that the videos’ contents were intended to instigate the commission of, preparation to commit, or committing a terrorist act.

38. I have also relooked at the evidence to ascertain whether the subject videos were contained/ retrieved from the two gadgets. PW4 testified that the videos in question were retrieved from a Samsung mobile phone Galaxy IMEI No. 356769060053469 and a laptop with HP serial No. CNU0246FTP model 620. He is the officer who exploited the phone and the laptop and produced an exploration report. He played some videos and explained to the court the process of exploring the two gadgets. In my view, this was sufficient proof that the subject videos were contained/retrieved from the two gadgets.

39. The prosecution witnesses also testified that the two gadgets were recovered from the Appellant’s stall in Norwich Union Building. This was the testimony of PW4 and PW6. PW4 and PW6 were among the group of police officers who arrested the Appellant. The Appellant admitted that the two gadgets were recovered from a drawer in the stall. He stated that the police searched the stall and recovered a phone-Samsung note 4 and a HP laptop. Based on these testimonies, there is no dispute that the two gadgets were recovered from the Appellant’s business stall at Norwich Union Building.

40. The central issue for determination is whether the Appellant can be said to have been in possession of the laptop and the phone within the meaning of Section 30 of the *Prevention of Terrorism Act*.

41. The Court in Mohamed Abdi Adan v Republic [2017] eKLR interpreted the concept of possession in the context of *Prevention of Terrorism Act*, and gave some guidance on what the prosecution ought to prove to establish that a person was in possession of a particular article. The Court said:

“I now delve into the issue of possession. The items that were used as exhibits in this matter were found in a house that was rented under the Appellant’s name. The trial magistrate relied on the doctrine of constructive possession as set out under Section 4 of the *Penal Code*. The Appellant has however submitted that this definition could not be applied under POTA as it was strictly applicable for offences charged under the *Penal Code*. In the case of Kamau s/o Njeroge & Mwangi s/o Kanywa v Reginam[1954] EACA 257 it was held, inter alia, that the definition of possession under Section 4 of the *Penal Code* is far wider than the common law definition of possession and is therefore only applicable where the term definition appears in wording in the *Penal Code*. The court further held that:

“Under the Common Law, possession can, of course, be joint or several but to establish constructive possession there must be evidence that the person not in actual possession



has a power of control over the person in actual possession. In the Penal Code definition the doctrine of constructive possession has been made wider by omitting the element of control.”

In view of the above holding, the application of the doctrine of constructive possession could not apply with regard to the offences the Appellant was charged with. The prosecution had to thus prove that the Appellant had control over the house where the items were recovered and was therefore the owner of the items found therein.”

42. I have relooked at the evidence on this issue to determine whether the Appellant had control over stall 5A at Norwich Building. The Appellant argued that he was not the exclusive/only occupant of stall 5A Norwich Union building. He argued that the stall was a partnership property and that the other partners also had access to the stall. He argued that he co-owned and co-managed the stall with the other business partners. For these reasons, the Appellant seemed to argue that there was no evidence to single him out of the other business partners and link him to the possession of the articles.
43. However, the evidence tendered before the Court shows otherwise. DW2 testified that the Appellant was in charge of the shop at Norwich Union while the other partners were in charge of the other shop at Sunbeam. This testimony points that the Appellant was in actual control and management of the stall at Norwich Union. This observation is in line with DW2’s testimony, in which he stated that he was not fully conversant with the agreement between the Appellant and Arkhan Joseph Wachira concerning the debt. DW2 stated that he did not know much about the agreement because he was located at Sunbeam. The totality of this evidence leads to the conclusion that the Appellant was in full actual control and management of stall 5A at Norwich.
44. Lastly, the prosecution ought to prove that the Appellant knowingly had possession of the said articles. I have reevaluated the evidence to ascertain whether the Appellant knew that he had possession of the said articles.
45. In his testimony, the Appellant stated that he knew that the Samsung mobile phone and the HP laptop were in the drawer. He testified that he directed the police officers to the drawer. The Appellant, however, explained the circumstances under which he took possession of the two gadgets. He stated that the HP laptop and the Samsung phone belonged to their client, Arkhan Joseph Wachira, who owed the partnership 35,000/= and had left the laptop and the phone as security for the debt.
46. His claim of the existence of one Arkhan Joseph Wachira and the debt was corroborated by DW2. DW2 also corroborated the Appellant’s claim that Arkhan Joseph Wachira had left the laptop and the phone as security for the debt. The question before this Court is whether this evidence was enough to dislodge the prosecution’s case. During his cross-examination, the Appellant admitted that he did not produce any agreement between the said Arkhan Joseph Wachira and the partnership concerning the debt. The absence of a written agreement was also confirmed by DW2, which stated that there was no written agreement between them and Arkhan Joseph Wachira regarding the deposit of goods.
47. I note that the alleged agreement between Arkhan Joseph Wachira and the Appellant involved significant valuables. Specifically, the transaction included a debt amounting to Kshs.35,000/=, an HP laptop and a Samsung mobile phone. This was not a casual business transaction but an arrangement that warranted documentation and verification. There is no credible evidence to establish the existence of Arkhan Joseph Wachira. There was a conspicuous lack of information regarding his identity, and the Appellant could not present a copy of the national ID or any other form of identification for Arkhan Joseph Wachira. For these reasons, I find no compelling justification to believe the Appellant’s claims regarding this alleged agreement. It was an afterthought and did not cast doubt on the prosecution case that was overwhelming.



48. Furthermore, a comprehensive analysis of all available evidence strongly indicates that the Appellant had full knowledge of the contents stored on both the laptop and the phone. This inference is drawn not only from the physical items seized from his residence in Mbotela but also from a detailed comparison with the digital data retrieved from the laptop and the phone discovered at the stall located in the Norwich Building. The alignment of the materials found in his home with the information on these devices suggests a conscious awareness of their contents on the part of the Appellant. This correlation adds a layer of credibility to the conclusion that he was not only aware of but likely engaged with the information contained within these electronic devices.

49. This Court did not have the benefit of seeing the items recovered from Mbotela, the heading and the cover of the books, and the writings on the cloths. However, the lower Court saw the items recovered from the Appellant's residence in Mbotela and the contents of the HP laptop. The Court made the following observation:

“The accused contends that the laptop and phone were not his and he had no knowledge of what was inside but I do not agree with him and this is simply because what was recovered in his house at Mbotela had a resemblance or similarities in terms of the message albeit in a different way. Some of the material recovered in the Accused's house included books and videos which included 33 strategies of war, 6 days if war, 3rd Jihad and Democracy is a system of Kufr among others. Apart from the books and videos, some clothing's with the words 'Fikira Ngumu' with a picture if a sword and rifle were also recovered and complimented with jungle green military like attire. The message from all these items is that of violence and war and is related to the messages found in the videos that were recovered at the accused's stall at Norwich Union building and the same was not by coincidence but were in both places at the convenience of the accused depending on the location he was.”

50. The above observation is a factual observation made by the trial magistrate, who had the benefit of seeing the complete set of evidence at trial. This Court did not have that benefit, and I have no reason to doubt the lower Court's factual observation about the semblance between the contents of the HP laptop and that of the items recovered from the Appellant's house. In my view, it cannot be said that they were a mere coincidence. I find that he knew that he had possession of the said articles and their contents and their implications.

51. In the end, I find that the prosecution proved the charges in Count II and Count III beyond reasonable doubt and that the Conviction was safe. The same is hereby upheld.

52. I have considered the sentence imposed on the Appellant and concluded that it was both lenient and reasonable. Therefore, I uphold the original sentence as appropriate.

53. The Appeal is hereby dismissed.

54. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 1ST DAY OF APRIL, 2025.

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C. KENDAGOR

JUDGE

In the presence of:



Court Assistant;:Beryl

Appellant present

Mr. Chacha Mwita Advocate for the Appellant

Mr. Omondi, ODPP for Respondent

