Khamis v Republic (Criminal Appeal E018 of 2023)
[2024] KEHC 732 (KLR) (2 February 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E018 OF 2023

RN NYAKUNDI, J

FEBRUARY 2, 2024

BETWEEN

OMAR SEIF KHAMIS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. C.A. Mayamba in Kakuma law court Cr. Case No. E297 of 2022)

JUDGMENT

1. The appellant with two others were charged with being in possession of articles connected with the commission of a terrorist act contrary to section 30 of the *Prevention of Terrorism Act* 2012. The particulars of the offence were that on or before the 29th November, 2022 at the Kenya Coast Guard Turkana Station within Turkana County, within the republic of Kenya, were found in possession of a mobile phone make Infinix Hot 10i of IMEI no 354156361013826, fitted with Safaricom sim card which had information to wit audio which were articles for use in instigating the commission of terrorist act in contravention of the *said Act*.

2. On the second count, the appellant was charged with two others with collection of information contrary to section 29 of the *Prevention of Terrorism Act* 2012. The particulars of the offence are that on or before the 29th November, 2022 at the Kenya Coast Guard Turkana Station within Turkana County within the Republic of Kenya, jointly with others not before court, being a member of a terrorist group Al-shabaab collected and transmitted information to wit images, messages, through social media Platforms namely WhatsApp for the use in commission of terrorist act.

3. The appellant was convicted on the count I and sentenced to serve thirty (30) years' imprisonment.

4. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:

   i. That learned trial magistrate erred in both law and fact in finding that the prosecution proved count one (1) beyond reasonable doubt against the appellant herein, despite reliance on illegally acquired & inadmissible evidence

   ii. That the learned trial magistrate erred both law and fact in finding that the appellant had knowledge & control of the articles (audios) in forming the relevant Mens rea in the commission of a terrorist.

   iii. That the learned trial magistrate erred in both law and fact in dismissing the defence tendered by the appellant as an afterthought despite the same having been raised during the prosecution's case and corroborated by his co-accused persons hence shifting the burden of proof on the appellant.

   iv. That the learned trial magistrate erred in both law and fact by unjustifiability imposing the maximum sentence in disregard of the mitigation tendered and the appellant being a first-time offender, hence meting out a harsh & excessive sentence in disregard of Section 333(2) *CPC* in achieving the objectives of sentencing.

   The Case at Trial and Summary of Evidence.

   The prosecution in support of its case marshalled three witnesses.

5. PW1 stated that he was working as a coast guard. It was his testimony that there was some Turkana fisherman who went to their station and reported that there were 3 people who were foreigners who wanted to hire a boat to cross a place called Sericho and that they also wanted to be taken to a place Ari in Ethiopia which is an offshore town. It was his testimony that he was with his colleague inspector Gideon Kipsang and they called Corporal Renson Nyoka who was in the lake at the time. They agreed to meet at Lowaranyak beach to take the suspects to the station. They proceeded and brought them to the station. They found them with passports. The 1st person had a passport by the names Omar Mohammed Khamis aged 30 with passport number TAE 450535. The second has a passport bearing the names of Omar Seif Khamis aged 23 with passport no 502844. The third person had passport bearing the names of Ally Kombo Ally aged 25 with passport number TAE 502899. They admitted to have come from Zanzibar and had come to Kenya through Isbania and were headed to Ethiopia Addis Ababa. They claimed to have been going to work as cooks through the connection of their uncle in Ethiopia in an unnamed Hotel. It was his testimony that there was no gazette point of entry and exit around lake Turkana. They informed the Sub-County police commander and DCIO Turkana North. It was his testimony that they advised to take them to Lokitaung where he found Inspector Mokaya and handed him 3 foreigners *vide* OB number 9 & 10 of 29/11/2022 and went back to the camp. It was his testimony that the three accused persons were the ones he had arrested.

6. PW2 stated that he was attached to DCI Anti-terrorism investigate unit, digital forensic lab in Nairobi. He stated that his duties included cyber forensic investigation and digital analysis. It was his testimony that on the 5/12/2022, an exhibit was brought to the digital forensic lab in Nairobi in the company of exhibit memo by PC Collins Shikuku. The exhibit was a mobile phone marked M-1. It was an infinix hot 10 of IME No 354156361013826. That it was fitted with a Zentel Sim Card with no serial number. The investigation officer requested that he extracts all the data from the exhibit and establish if any of the data or files extracted had any link to terrorism activities and any other relevant information that may assist in investigations. He stated that he did confirm the details as contained in the exhibit memo with the one on the exhibit itself.

7. It was his testimony that he signed and stamped the exhibit memo and gave it lab number 429/2022. He carried forensic extraction of the exhibit on the 5/12/2022 using Cellebrite UFE touch 2 version 7.18.0.199 the extraction took about 30 minutes and UFD file was generated then uploaded to the Cellebrite physical analyzer version 7.55.0.21 for analysis. The data uploaded and thoroughly analyzed together with a colleague P.C Iraki Benard. They established that the exhibit contained 3,045 data files, 697 call logs, 43 contacts, 534 instant messages, 2 activation locations, 4344 timelines, 164 audio files. He stated that further analysis was conducted on the said data files and also found 24 articles that had articles related to terrorist activities. The information had extreme beliefs that can be used to encourage the listeners to join the outlawed Al-shabaab terrorist group. The audios are of extreme belief teachings of Abud Rogo Makaburi which can be used recruitment and radicalization young people to join a terrorist group.

8. The witness went ahead to analyze every audio from Audio 1 through 15 and I have read through the record. The witness testified that the audios generally contained radicalization teachings and training in preparation of a terrorist act. The audios contained teaching such as "Christians are supposed to be killed even if they are your relatives since your only relative is a Muslim".

9. The witness testified that subsequent audios contained radicalization content which can be used for recruitment of young people to join the outlawed Al-shabaab group. It was his testimony that based on the analysis of the audios, the recommendations were as follows; suspects had a lot of interest in terrorists' activities, suspect is a radicalized person who can recruit youths to join terrorist groups. He stated that the prepared a printout certificate as per section 65(8) of the *evidence act* as read with Section 106B of the *same Act*. He further testified that the print showed different tools used, their conditions, how the report was made and where the report was made and qualification of the person who made the report. It was his testimony that the certificate was made on the 8/12/2022 vide the exhibit memo dated 5/12/2022.

10. PW3 stated that accused persons were arrested on the 29th November, 2022 in Turkana County at a place called Lokitaung while attempting to cross to Ethiopia while alleging to be headed to Addis Ababa by the coast guards. It was his testimony that they were unable to explain their presence. He interrogated them of which they stated that they hailed from Zanzibar Pemba and had passed through Isibania Kenya where they got Kenyan Visas using their passports. It raised eyebrows as they used a route which took them over 7 years instead of Namanga route which was shorter. They also indicated that they were going to their uncle who was funding them.

11. It was his testimony that when they checked the number, they found out the uncle was in South Africa and not Addis Ababa as they had earlier indicated which raised their suspicion. It was his testimony that they further checked and found that they were communicating with a person in Marsabit. They brought the accused persons to Kakuma and also found them with mobile phone which was in the possession of Seif, of which they were using to communicate with and also was being used to send money.

12. The phone was model type infinix hot 10(i) with IME1 no 354156361013826. He took the phone and prepared an inventory which was signed, of which he tendered as PEX6.

13. PW3 stated that he forwarded the mobile phone to their Nairobi laboratory of which the same was found with videos and audio recordings. The message in the video and Audio were used to instigate terror. It was his testimony that he worked together with experts who carried out exploitation in laying charges. He tendered the mobile phone as PEx2. He prepared the exhibit memo on the same day of arrest and took the same to ICT expert in Nairobi. He tendered the exhibit memo as PEX1. It was his testimony that the place where the accused persons were found is not the designated boarder point. It

was his testimony that he also managed to watch and hear the messages found in that phone instigating terrorism.

The defence case

14. DW1 stated that he was 31 years old a Tanzania national with I.D and passport. It was his testimony that he had his East African passport allowing him to be in Kenya together with a VISA. It was his testimony that the 2nd accused was his half-brother. He stated that there was a day, the 2nd accused informed him that he had communicated with their uncle who informed him that he had communicated with their uncle who informed him of a job opportunity in a hotel in Ethiopia requiring 3 people.

15. It was his testimony that he asked his brother how he was to work in a hotel whereas he did not have expertise in that field. It was his testimony that his brother informed him that they were going to be trained.

16. DW1 stated that there was a wedding nearby and another boy was playing with his phone and agreed to sell to the 2nd accused, who took and checked the same before agreeing to purchase the same. The phone was a black colored with red casing. It was his testimony that the boy was called Twaha Ibrahim who demanded Tshs 200,000 before agreeing to take Tshs. 180,000. He stated that they exchanged the mobile phone after the boy removing his things from the mobile phone. It was his testimony that he knew the boy wanted to delete somethings. He gave an account of what transpired and I have read through the same.

17. DW2 stated that he was 24 years old and a Tanzanian national. He stated that he holds a passport number TAE502844 and also confirmed having been given VISA to be in Kenya. It was his testimony that he finished his 12th class schooling and was called by his uncle Musa Hamisi from Ethiopia over a hotel job. It was his testimony that he was asked to get two other people prompting him to inform his brother the 1st accused over the same. He stated that he informed him about the training in Ethiopia. It was his testimony that the 3rd accused was a friend and a neighbor whom he also informed. The latter asked him to allow him inform his parents. It was his testimony that he was able to inform his uncle about the recruits and was asked to get passports. The 1st accused had already gotten a passport so they went together with the 3rd accused to secure the same, which he tendered as DEX3. It was his testimony that he had money which he had saved and started the journey under the direction of his uncle.

18. It was his testimony that on the 23rd November, 2022, his phone Infinix hot 11 which had a problem as it was not holding to power for a long time. At their home there was a wedding and was with his brother playing with the phone when the same went off. It was his testimony that there was a boy who was playing with his mobile phone and he agreed to sell him at Tshs. 180,000. He stated that the boy asked to allow him remove his items from the phone from the internal memory into external memory. The mobile phone was model type Infinix hot 10 with a black red color.

19. DW3 stated that he was a Tanzanian national bearing passport No. TAE502899. It was his testimony that his passport was stamped to allow his entry to Kenya. It was his testimony that he knew the accused persons who were his friends and neighbors. It was his testimony that he had not heard of Musa Omar but had heard of Musa Hamisi who is the uncle to the accused. He stated that one day he was coming from training in football when he met his friend Seif who informed him that his uncle had asked for 2 other boys to work in Ethiopia in a hotel. It was his testimony that he informed him that he only knew how to make their home food of which he was promised training by the uncle, He asked to be allowed to consult his parents. He promised Seif that he would get fare and passport for travel. It was his testimony that Seif informed him that the travel date was at hand and they will be leaving on the 24.11.2022. He stated that he used to see Seif with a white phone. They left around 4 am and proceeded

to Isibania Kenya. Along the way, he saw the 2nd accused with another phone which was black with a red blend color. Their passports were stamped and they proceeded to Kitale and then Lodwar. They took a pro-box vehicle and headed to lower Reng with the driver hosting them for the night as per the testimony of his co-accused. In the morning, the driver gave them another person who was to help them cross over. They met marine officer and informed them that they were going to Ilaret to the uncle of seif before crossing to Ethiopia. It was his testimony that he gave all their documents prompting them to call their counterparts in Ilaret who gave them a greenlight to take them.

20. DW3 further stated that they did not intend to cross over without passing through the border. Police van came and took them to Lokitaung where they were put in a police cell before being transferred to Lodwar the following day. It was his testimony that they revealed that the mobile phone belonging to the 2nd accused had videos and audios. He stated that it was the 2nd accused who was directing them through the route courtesy of his uncle Hamisi.

21. He testified that he had known the 1st accused while using a techno phone with the 2nd accused having a white phone prior to travel but then changed to the black one. He denied having used the mobile phone belonging to Seif. It was his testimony that he came to listen to the audios in court.

Analysis And Determination

22. It is a settled principal of law that the first appellate court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not have the benefit of observing the demeanor of the witnesses, before making a determination of its own. See *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570 and *Okeno v R* [1972] EA. 32.

23. Before I proceed to single out the issues for determination, it is worth noting that the trial court discussed the various aspects relating to the offence at length and did a proper analysis of the evidence adduced and as such the court was right in finding that the second accused person, now the appellant was in possession of articles which were connected to commission of terrorist acts.

24. Having gone through the record, the relevant issues I find for determination are:

    i. Whether trial magistrate erred in both law and fact in finding that the prosecution proved count one (1) beyond reasonable doubt against the appellant herein, despite reliance on illegally acquired & inadmissible evidence.

    ii. Whether the provisions of section 333(2) of the *Criminal Procedure Code* were considered.

25. As to whether illegally obtained evidence is admissible, the trial court pronounced itself as follows:

> " I am drawn to the admission by the 2nd accused that he gave out his mobile phone willingly with no coercion. I am also drawn by the defence to the extent that he was not privy to the data retrieved from his handset. It therefore boils down to no prejudice occasioned since the defence will still be delved into on its merits"

26. The trial court proceeded to dismiss the preliminary objection raised during trial concerning the admission of illegally obtained evidence.

In *R vs Sang* (1979) 2 AER P1222 the House of Lords held that:-

> " ..A Judge in criminal trial always has discretion to refuse to admit evidence if its prejudicial effect outweighs its probative value..... Except in the case of admissions, confessions and evidence obtained from an accused after the commission of an offence, a Judge has no

discretion to refuse to admit relevant admissible evidence merely because it had been obtained by improper and unfair means.....".

27. In Kenya, illegally obtained evidence is admissible so long as it is relevant to the fact in issue or its admission would not affect the fairness of the trial. This is the position at common law and which was upheld in *Karuma S/O Kaniu vs R*. Article 50(4) of the Kenyan *Constitution* states as follows: -

> " 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".

28. In upholding the findings of the trial court, it is my considered view that the primary duty of this Court is to do justice. If justice will be done using available documents and evidence not obtained in breach of the *Constitution* and the law then this Court would admit such evidence in order to have the right resources before it to enable determination of the issues in a just matter. As the trial court noted, there was no prejudice occasioned by seizure of the mobile phone from the 2nd accused for exploitation purposes.

29. Have reviewed the evidence by PW1, PW2 and PW3 in discharging the burden of proof on existence of facts implicating the appellant with the commission of the offence as preferred by the state and tried before the learned trial magistrate at Kakuma Law Courts. The rejoinder statement of defence by the appellant has been weighed against the chronology of events as demonstrated by the prosecution witnesses. In addition the prosecution placed reliance on various aspects of the exhibits as identified in exhibit memo form dated 2nd December, 2022. Similarly, the mobile forensic examiners report dated 8th December, 2022 formed part of the key elements of the facts to be proven by the prosecution in support of the charge beyond reasonable doubt. In essence I am of the considered view that the conditions precedent on circumstantial evidence to prove existence or non-existence of facts in issue as stipulated under section 107(1), 108 and 109 of the *evidence Act* was discharged by the prosecution. I bear in mind the guidelines given by the Court of Appeal in *Ahmad Abolfathi Mohammed and Another v Republic* [2018]eKLR in which the court had this to say on circumstantial evidence;

> However it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor*, Weaver and Donovan[1928] Cr. App R 21
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> > " It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial"
> >
> > " Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the subject person, and to no other person, as the perpetrator of the

offence. In A*banga alias Onyango – v – Republic* Cr. App. No.32 of 1990 this court set out the conditions as follows:

> "it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

30. From the testimonies of PW1 to PW3 it is clear that the subject matter of the criminal proceedings before the trial court demonstrated that the appellant was placed at the scene in connection with the charge of being in possession of Articles connected with the commission of a terrorist Act Contrary to Section 30 of the *prevention of terrorism Act* 2012. It is the state's case that the entire transactions of being in possession of the physical devices the appellant objective was to collect information contrary to section 29 of the *prevention of terrorism Act*. I am convinced that the trial court addressed the issue of the standard and burden of proof of beyond reasonable doubt as a pertinent part of the prosecution case. It is that proof of beyond reasonable doubt that produced an abiding conviction in the mind of the learned trial magistrate that the facts existed and has claimed to exist by the prosecution to give rise to certainty of guilty and conviction against accused person. To me this was not a case of a balance of proof but the evidence sufficient enough for one to feel safe to act upon it to secure judgment for the prosecution. I find no error of fact or law to interfere with the decision on conviction. I affirm it for I am unable to reconcile the defence narrative that the innocence of the appellant was not disapproved by the prosecution beyond reasonable doubt.

31. The upshot is that the appeal is found without merit and the findings of the trial court are hereby upheld.

On sentencing

32. An Appeal's Court jurisdiction on sentencing is governed by the settled principles in *Benard Kimani Gacheru v R* [2002]eKLR in which the court of Appeal restated as follows;

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, he appellant court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist"

33. So, the point is if the sentence imposed is so far removed from a sentence that would reflect a proper evaluation and balancing of the competing and inconsistent incommensurable objectives which underlie the sentencing process as to impute error because the sentence is unreasonable or unjust, the ground will be made out. In such cases I am of the strong view that both aggravating and mitigation

factors have got to count for something in so far as sentencing metrics are concerned. The primary ground in support of the Appellant's case is mainly that of pretrial detention before final judgment delivered by the learned trial magistrate.

34. It is in this respect any mitigation by the appellant ought to be taken into account in sentencing. The objectives of sentencing should also be considered in totality. The appellant contended that the provisions of section 333(2) of the *CPC* were not considered. The section provides as follows:

    (2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

35. The Judiciary *Sentencing Policy Guidelines* are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

36. In compliance with Section 333(2) *Criminal Procedure Code*; computation of the sentence ought to include the period the Accused person was in custody during hearing and determination of the case before sentence was meted out. I will therefore not interfere with the sentence imposed by the trial court. The appellant shall only benefit from the provisions of section 333(2) and as such, the 30 years' imprisonment with effect from 29th November, 2022.

It is so ordered.

DATED AND SIGNED AT LODWAR THIS 2nd DAY OF FEBRUARY, 2024

In presence of;

Yusuf for the state

Appellant

.....

R. NYAKUNDI

JUDGE