Muhumed v Republic (Criminal Appeal E067 of 2022)
[2024] KEHC 4359 (KLR) (12 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E067 OF 2022

JN ONYIEGO, J

APRIL 12, 2024

BETWEEN

DAUD AHMED MUHUMED ..... APPELLANT

AND

REPUBLIC ..... PROSECUTION

(Being an appeal from Judgement in Garissa Chief Magistrate Court Criminal Case No.111 of 2020 delivered by Hon. T L ole Tanchu SRM)

JUDGMENT

1. The appellant was charged with seven counts relating to various offences outlined as hereunder.

2. Count I: Being in possession of ammunitions without holding a firearm certificate in force at the time contrary to section 4 (2) (a) as read with section 4 (3) (a) of the *Firearms Act*. Particulars were that on or before 27.12.2019 at Lafaley village, Wajir Township in Wajir East Sub County within Wajir County, jointly with others not before court, he was found in possession of eleven rounds of ammunitions of caliber 7.62 by 39mm in contravention of the said Act.

3. Count II: being in possession of explosives contrary to section 6(1) of the *Explosives Act* Cap 15 Laws of Kenya. Particulars were that on or before 27.12.2019 at Lafaley village, Wajir Township in Wajir East Sub County within Wajir County, jointly with others not before court, he was found in possession of one hand grenade make Arges M084 in contravention of the said Act.

4. Count III: Being in possession of property for the commission of Terrorist Acts contrary to section 6 of the *Prevention of Terrorism Act* No. 30 of 2012. Particulars were that on or before 27.12.2019 at Lafaley village, Wajir Township in Wajir East Sub County within Wajir County, jointly with others not before court he was found being in possession of property namely eleven rounds of ammunitions of caliber 7.62 by 39mm knowingly that the same shall be used whether directly or indirectly in facilitating the commission of a terrorist act in contravention of the said Act.

5. Count IV: Being in possession of property for the commission of terrorist acts contrary to section 6 of the *Prevention of Terrorism Act* No. 30 of 2012. The particulars were that on or before 27.12.2019 at Lafaley village, Wajir Township in Wajir East Sub County within Wajir County, jointly with others not before court he was found being in possession of property namely one hand grenade make Arges M-84 knowingly that the same shall be used whether directly or indirectly in facilitating the commission of a terrorist act in contravention of the said Act.

6. Count V: Soliciting support for the commission of a terrorist act contrary to section 9(1) of the *Prevention of Terrorism Act* No. 30 of 2012. Particulars were that on or before 27.12.2019 at Lafaley village, Wajir Township in Wajir East Sub County within Wajir County, jointly with others not before court, knowingly solicited support for the commission of a terrorist act by Al-Shabaab Terrorist group by assembling the following; one hand grenade make arges M-84 and eleven rounds of ammunitions caliber 7.62 x 39mm knowingly that the same shall be used whether directly or indirectly in facilitating the commission of a terrorist act in contravention of the said Act.

7. Count VI: Being a member of a terrorist group contrary to section 24 of the *Prevention of Terrorism Act* No. 30 of 2012. Particulars were that 10.12.2019, at Wajir Township are in Wajir East Sub-County within Wajir county, he was found being a member of a terrorist group namely Al-Shabaab which is an outlawed terrorist organization by the Kenyan gazette notice number 12585 of 2010 in contravention of the said Act.

8. Count VII: Escape from lawful custody contrary to section 123 as read with section 36 of the Penal Code. Particulars were that, on 01.01.2020 at Wajir Police Station, Wajir Township in Wajir East Sub-County within Wajir County, being in lawful custody at Wajir Police Station cells escaped from the said custody.

9. He pleaded not guilty to all the charges and the matter went to full trial. He was eventually convicted in respect of Count I and Count II. However, For Counts III – VII he was acquitted.

10. Having been aggrieved by both the conviction and sentence, he filed the instant appeal dated 20.12.2022 through the firm of Kakai Mugalo & Co. Advocates citing the following grounds.

    1. That the learned trial magistrate erred in both law and fact in believing the evidence of the arresting and investigating officers despite their credibility having been punctured owing to their inconsistent, contradictory and uncorroborated evidence, hence failure to have proven their case beyond reasonable doubt.

    2. That the learned trial magistrate erred in both law and fact in finding that the possession was proven despite the apparent and obvious inconsistencies and want of corroboration in the prosecution's case hence arriving at a wrong conclusion.

    3. That the learned trial magistrate erred in both law and fact by unjustifiably shifting the burden of proof to the appellant while ignoring his solid, corroborated, unrebutted and uncontroverted defence evidence.

    4. That the learned trial magistrate erred in both law and fact by failing to align with the objectives of sentencing and failure to meaningfully apply section 333(2) of CPC hence meting out an excessive sentence.

11. Parties agreed to canvass the appeal via written submissions.

12. The appellant through the firm of Chacha Mwita filed submissions dated 28th July 2023 thus submitting that the trial court erred both in law and fact in finding that the prosecution had proved

counts 1 and 2 beyond any reasonable doubt. Counsel contended that it was critical to note that the appellant was arrested on 10.12.2019 after presenting himself to the police in response to summons thus contradicting the evidence of PW6 that he is the one who arrested the appellant elsewhere within Wajir Township while he was coming from a homestead in Bulla Halale.

13. That the claim that the appellant volunteered important information admitting being found in possession of the said ammunitions and explosives (exhibits) is far-fetched and evidence in breach of the provisions of section 25, 25A (1) of the *Evidence Act* and the guidelines espoused in the case of Republic v Elly Waga Omondi (2015) eKLR regarding the procedure of taking evidence. It was contended that the trial magistrate erred in finding on one hand that the rules of admissions and confessions were not complied with but again on the hand, upheld the conviction of the appellant on the claim that the alleged claim of recovery of the exhibits on 27.12.2019 was consistent despite the overt errors in the evidence of the officers present.

14. It was contended that the appellant tendered his alibi well in time but the prosecution failed to prepare and possibly counter the same. It was urged that the planting of the evidence on the appellant by PW6 was raised during the investigations and the said PW6 did not give satisfactory responses. Counsel opined that given that the 11 ammunitions bore the Kenya Ordnance Factory Corporation mark at the bottom, the same buttressed the fact that the ammunitions and the arms were planted on the appellant.

15. On sentence, the appellant argued that he was arrested on 10.12.2019 and having been convicted and sentenced on 08.12.2022, it boiled down to three years that he was in custody. Counsel opined that to date, the appellant has been in custody for more than 4 years and having been declared as a first offender, he has since paid his dues thus should be set free. Nonetheless, the court was urged to quash the conviction and set aside the sentence meted out by the trial court.

16. Mr. Kihara, the learned prosecutor in his submissions dated 12.05.2023 submitted that the prosecution discharged its duty and that the trial court rightly convicted the appellant in both counts. That the sentence meted out therefore was legal and appropriate bearing in mind the circumstances of the case and therefore, the same ought to be upheld.

17. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of Selle & Anor v Associate Motor Boat Co. Ltd 1968 EA 123.

18. PW1, Jacob Omino testified that on 27.12.2019 at around 1630 hrs. he was informed by C.I Nicholas Waringa – Officer in Charge of detachment to join him in some ammunition recovery mission within Wajir area. That they went to the station where the suspect had been booked by C.I. Waringa. That they proceeded to Lafaley area where the suspect led them to a bush on the left side of the main road. It was his testimony that they saw an orange coloured bag hidden under a tree and the contents therein were a hand grenade make Ages M84 KV 01/17 and 11 rounds of ammunition. He listed the collected items as: the big orange bag marked as PMFI 1; 11 rounds of ammunition as PMFI 2; hand grenade as PMFI 3 and; Inventory as PMFI 4.

19. He proceeded to state that the appellant was present all through and given that he did not know how to sign, he placed his thumbprint on the recovery inventory voluntarily. On cross examination, he stated that his statement was in relation to the recovery of the listed items.

20. PW2, C. I Dickson Ibindi testified that he received an exhibit memo from Cpl. Mbogo on 09.01.2020 to ascertain whether exhibit B1 was an explosive. He produced the report positively confirming that the exhibit was indeed an explosive. He then produced the hand grenade as Pex 5 and 6.

21. PW3, Alex Mudindi Mwandawiro testified that he was a fire arm examiner. That he received an exhibit memo from Cpl. Mbogo forwarding exhibits A1-11 being ammunitions that were to be subjected to examination. He stated that he examined them and found that they were caliber 7.62 x 39 mm and could be used on the Russian AK 47 riffle. He further confirmed that each of them bore Kenya Ordnance Factory Corporation Mark at the bottom. He further stated that he randomly picked 3 rounds from A1 to A11. That A2, A6 and A10 were complete in their parts-primer, propellant powder, bullet and casing. That he formed an opinion that A1 to A11 were ammunitions capable of being fired. He produced the report as Pex 8.

22. PW4, Cpl. Mbogo testified that on 10.12.2019, he was informed by C.I. Waringa that they were to perform some duties. That C.I. Waringa, P.C. Driver Felix and P.C. Owino went to the Police Station and booked one suspect, the appellant herein and thereafter went on investigation enquiries. That the appellant led them to Lafaley area where they recovered some 11 rounds of ammunition and one hand grenade. He stated that on 01.01.2020 at about 2.00 p.m., the officer in charge informed him through phone that the appellant herein had escaped.

23. PW5, Cpl. Joseph ole Saoli testified that on 01.01.2020, there was a signal circulating that ATPU had lost one suspect who had been charged for being in possession of explosives. That all officers were put on alert and there was indication that the suspect was heading to Garissa as he had a family there. He stated that they intensified their search and on 27.01.2020, their intelligence wing got information that the suspect was spotted heading towards Garissa and therefore, he was requested to accompany intelligence personnel to look for the appellant. That the appellant was traced and thereafter arrested while heading towards Tana Bridge. On cross examination, he stated that it was not true that the appellant was brought to the station by RDU officers.

24. PW6, C.I Nicholas Waringa testified that on 16.12.2019, a Medina Bus heading to Mandera from Wajir was attacked. That the attack happened at Dagut area where six police officers attached to anti stock theft unit in Mandera lost their lives. He stated that the bus was stopped by bandits who emerged from the bush thereby killing the victims.

25. It was his evidence that upon carrying out investigations, it was established that the appellant herein being a key Al-Shabaab strategist and planner, helped in identifying the place of attack. That the appellant was arrested and upon carrying out several interviews with him, he voluntarily offered to share more information regarding the incident.

26. That he led the team along the Wajir –Mandera road and at the outskirts, roughly 3 kilometers of the said road, they found a small packaged bag which was wrapped. In it, they found a hand grenade and 11 rounds of ammunition used in AK 47 rifle. They documented the scene and brought the suspect back to the station wherein an inventory was prepared and the suspect signed by appending his thumb print.

27. He further stated that on 01.01.2020, he was informed that the appellant had escaped from lawful custody thereby prompting the police to commence his search. On cross examination, he stated that the bus was not shot at but instead, the bandits separated the Muslims from non-Muslims then led the non-Muslims, including the officers to the bush where they shot them. He stated that Asha's statement indicated that the appellant had gone to her house on 06.12.2019 at around 2100hrs.

28. He also conceded that he did not read the appellant his rights nor invite his lawyer or relative during the time of the alleged admission. Further, that the appellant's phone was forwarded to Nairobi but there was no report from the ICT for the reason that the area is not covered by network grid.

29. The trial court via a ruling delivered on 17.06.2021 found that the prosecution had established a prima facie case against the appellant.

30. When placed on his defence, the appellant in his sworn testimony denied the charge. He stated that he was framed in this case. It was his assertion that on 10.12.2019 at about noon, he was called by Ismael Jillo Mohammud, the chief of Osmudule who informed him that he was required at the police station immediately. That on arrival, he called the chief who told him he was sending another chief by the name of Bishar who accompanied him to the Anti – Terror office where they found chief Ismael, assistant chiefs, Abdi Dubor and Bishar Abdi and three other people.

31. That he was placed under custody and later, on 11.12.2019, he was charged with the offence of being involved in the attack of Medina Bus. He argued that the charges in relation to recovery of the grenade and ammunitions were not true as he did not visit the site where he was allegedly taken. That he was forced to append his thumb print on the inventory whose content he did know.

32. He further told the court that on 01.01.2020 at about 11.00 a.m., he was called out by a Somali Police Officer whom he did not know his name and who asked him of the previous court happenings and thereafter told him that he had been released. That to his surprise, on 15.01.2020, he was informed that the KDF personnel were looking for him and therefore went to the KDF camp where he was locked inside a house. He denied escaping from lawful custody nor being arrested in Garissa.

33. DW2, Ali Jelle Abdi testified that he could remember a day when he went to the police station with Chief Ismael to see the appellant who had been arrested. That after sometime, PW6 called and asked him whether he had seen the appellant as he had escaped. That thereafter, they called all elders to look for the appellant and after 11 days, the appellant's wife informed them that the appellant had arrived and so he shared the same information with PW6. He stated that the appellant informed the wazee that he did not escape from lawful custody.

34. DW3, Mohamed Abdi Salat stated that on 10.12.2019 Asha Hussein Abdi was arrested by the ATPU officers and that together with others, they went to visit her. That PW6 informed them that Asha would only be released if the appellant were to avail himself. That the Chief called the appellant who promised to avail and thereafter availed himself thus leading to Asha's release. He stated that the appellant told him how he was blindfolded and shown some items which he did not know of and that he was threatened to open the same but he refused.

35. That they threatened to kill him thereby forcing him to open the said bag. He reiterated that the wazees were the ones who got involved in presenting the appellant to the police and that it was not true that he was arrested by the police.

36. After going through the submissions and evidence on record, the followings issues stand out for determination. Whether there was admission by the appellant that he was found in possession of any ammunitions and explosives; Whether the prosecution proved its case beyond reasonable doubt; Whether the sentence meted out was commensurate to the circumstances of the case.

37. There is no dispute that the 11 rounds of ammunition allegedly recovered at Lafaley through the effort of the appellant were live and capable of being shot using an AK rifle as defined under the *firearms Act*. This was confirmed by the Barristic expert pw3. Equally, there is no dispute that the grenade found together with the 11 rounds of ammunition was an explosive as defined under the *explosives Act*. This fact was confirmed by pw2 an expert in that field. It is however worth noting that there was no direct evidence connecting the appellant with being found in possession of the said ammunitions or hand grenade. The appellant was only connected with possession of the said ammunitions and grenade circumstantially.

38. It was the prosecution's case that the information leading to the recovery of the hand grenade make Ages M84 KV 01/17, AK 47 rifle and 11 rounds of ammunition was voluntarily offered by the

appellant while in custody. The appellant on the other hand contended that they were planted on him hence had no knowledge of the same.

39. The appellant argued that the trial magistrate did not conduct a trial within a trial as required by the relevant rules and Section 25A of the *evidence Act*. The issue is whether the failure of the investigation officer to record the alleged confession by the appellant was prejudicial to the prosecution's case and to what extent. Was there a confession in the first place? The answer is no. There was no formal confession extracted hence there was no need to apply the judges' rules or confession rules 2009 nor Section 25 and 25A of the *evidence Act*.

40. The appellant in his evidence stated that on 27.12.2019 at about 4.00 p.m., he was removed from the cells by ATPU officers, handcuffed and then forced into a motor vehicle. That he was blindfolded with a cloth material, and then led to a place he did not know.

41. On his part, PW6, a Chief Inspector of police was categorical that after several interviews with the appellant, the appellant disclosed to him that he was willing to share some very important information. That it was the same information which led to the recovery of a hand grenade make Ages M84 KV 01/17, AK 47 rifle and 11 rounds of ammunition hence the contested confession herein.

42. From the record, there is no evidence to suggest that a confession was ever formally extracted from the appellant pursuant to Section 25A of the *Evidence Act*. Mere disclosure of information leading to recovery of suspected stolen goods or of hidden illegal goods does not qualify or amount to a confession. In the circumstances of this case, pw6, pw4 and pw1 testified that the recovery of the grenade and 11 rounds of ammunition were made through the effort of the suspect in this case the appellant. The information is not tantamount to a confession but more of an admission. Their evidence is well corroborated thus leaving no iota of doubt in the recovery process.

43. In Petition No.39 of 2018, Republic vs Mohammed Abolfathi and Another the Supreme Court of Kenya in dealing with an issue similar to the one currently before this court was of the view that a confession is a direct acknowledgement of guilt on the part of the accused while an admission is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction.

44. These distinctions can therefore be summarized as follows:

    i. A confession untainted by any legal disqualification may be accepted as conclusive in itself of the matters confessed. An admission however, pursuant to section 24 of the *Evidence Act*, is not conclusive proof of the matters admitted though it may operate as an estoppel.

    ii. A confession is a direct admission of guilt while an admission amounts to inference about the liability of the person making the admission in the cause.

    iii. A confession always goes against the person making it. An admission may sometimes be proved by or on behalf of the person making the admission as stated in Section 21 of the *Evidence Act*.

    iv. Confessions are made in criminal cases while admissions are made in both criminal and civil cases.

    v. Confessions must be voluntary but admissions need not be voluntary.

    vi. Confessions can only be made by the accused; admissions can be made by any person.

45. From the foregoing, it is one thing to make a statement giving rise to an inference of guilt and another thing to confess to a crime. It is therefore evident that the distinction between a confession and an

admission as applied in criminal law is not a technical refinement but one based on a substantive difference of the character of the evidence deduced from each. This is also buttressed by the fact that the law relating to admissions is distinctly set out in Part II (Sections 17-24) of the *Evidence Act* and that on confessions is outlined separately in Part III (Sections 25-32) of the same Act.

46. The supreme court in the case of Republic v Ahmad Abolfathi Mohammed and another (supra) further expressed itself in regards to recovery of explosives through the effort of the suspects(appellants) as follows;

> " Para.(51)-The respondents vehemently dismissed the alleged admission as a fairy tale concocted by the Police to incriminate them. However, upon consideration of the record, and particularly the trial court's finding that there was no evidence on record to support the accused claim that after his arrest he was drugged and that he only came to his senses while in Court, as well as the statement by the 2nd respondent that the Police treated them well, we concur with the trial Court and the first appellate court that the 1st respondent indeed led the Police to the discovery of the RDX explosive in the Mombasa Golf Club golf course along Mama Ngina Drive. That act of the 1st respondent leading the Police to the Mombasa Golf Club where the RDX explosive was discovered was an admission of the respondents' possession of that explosive. That being our view, it follows therefore, and we find that the Court of Appeal erred in holding that the respondents' conviction was based solely on circumstantial evidence. It was partly based on that admission and the circumstantial evidence on record corroborates that admission as we shall shortly demonstrate".

47. In the same breadth, in the case of Ram vs State, AIR 1959 All. 518, the Indian Supreme Court was even more succinct on the distinction between an admission and a confession:

> " 19. The acid test which distinguishes a confession from an admission is that where conviction can be based on the statement alone, it is a confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission."

48. The recovery of the ammunitions and the grenade through the information voluntarily given by the appellant will lead to a reasonable conclusion in the absence of any explanation to the contrary, that the appellant knew how those items found their way there and therefore circumstantially an inference can be made that he was the one in possession of the same. In making this conclusion, am a live to the rules governing reliance on circumstantial evidence to convict. See Sawe v Republic (2003)KLR and Musili v Republic CR.A.No.30 of 2013(UR) where the court stated that;

> " to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt." The chain must never be broken at any stage.[16] In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on"[17] and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused.[18] "Suspicion however strong, cannot provide a basis for inferring guilt."[19]"

49. From the record, on the date of plea taking, the appellant did not complain of having been assaulted or coerced in any way towards admission of the offence. I am in agreement with the trial court that the appellant's admission did not amount to a confession but rather giving information which assisted in the recovery of the said ammunitions and grenade. Circumstantially, reasonable inference can be drawn

to connect the appellant with having knowledge over their existence hence the subsequent recovery. Accordingly, am satisfied that the appellant was properly convicted of count one and two on account of his own admission and therefore concrete circumstantial evidence sufficient enough to convict.

50. On the question of contradictory evidence especially on the process of arrest of the appellant, nothing substantial to dislodge the otherwise strong prosecution evidence. The appellant is confusing the two arrests. It was alleged by the defence that after the escape of the appellant from custody, his wife Asha was arrested to serve as a bait for his surrender which according to the defence worked out well after the elders persuaded him to surrender which he did through them. In this situation he was not arrested but surrendered.

51. However, pw5 gave a different story that they re-arrested the appellant in Garissa town. It is worth nothing that, the original arrest was done by the officers within Wajir town. I do not see any material contradiction to warrant acquittal of the appellant hence the alibi defence is misplaced as it does not affect the date of recovery of the weapons which is the subject of the appeal herein in respect of count one and two.

52. On the question of sentence which the appellant claimed the court did not take into account, the period spent in remand custody, the trial court stated that it had considered the mitigation of the appellant and the period the appellant had spent in remand custody. However, it is trite law that a trial court ought to take into account such period pursuant to section 333(2) of the CPC. In doing so, the court is duty bound to state specifically such period to eliminate any ambiguity in computing the same. Having failed to do so, I am inclined to hold that the court did not take into consideration the period spent in remand custody.

53. Am aware that sentencing is at the discretion of the trial court and this court can only interfere in exceptional circumstances such as; the sentence is excessive; the trail court applied wrong legal principles and or took into-account irrelevant factors. This Court finds that the sentences meted out were justifiable in the circumstances of the case. However, am duty bound to consider the question whether the trial court took into account Section 333(2) of the CPC.

54. From the charge sheet, it was noted that the appellant was arrested on 10.12.2019 and that he was not released under any bond/bail terms. It is my view therefore that, the sentence- imposed ought to run from that date up to 8 -12-22 translating to 2 years, 8 months and 10 days. Accordingly, the appellant shall serve the sentence imposed less the period spent in remand custody.

55. In conclusion therefore, the appeal against conviction is dismissed and the conviction and sentence upheld with the rider that the sentence shall be served less the period spent in remand custody.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 12TH DAY OF APRIL 2024

J. N.ONYIEGO

JUDGE