



REPUBLIC OF KENYA



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**Haji v Republic (Criminal Appeal E044 of 2022)  
[2024] KEHC 8738 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8738 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E044 OF 2022**

**JN ONYIEGO, J**

**JULY 22, 2024**

**BETWEEN**

**MOHAMED OMAR HAJI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of  
Hon. P.W. Wasike (S.R.M.) delivered on 17.06.2024)*

**JUDGMENT**

1. The appellant herein was charged with the following counts:
2. Count I: Travelling to terrorist designated country without passing through designated immigration exit points contrary to section 30B (1) (a) and 30(B)(2) (a) as read with section 30C (1) of the [Prevention of Terrorism Act](#) 2012. Particulars of the offence were that on diverse dates between the years 2020 and 2021 at Border point three(BPIII) along Kenya – Somali border in Mandera East Sub County within Mandera County of the Republic of Kenya he was found having travelled to Garbaharey – Somalia, a terrorist training country as per Kenya Gazette Legal Notice No. 200 of 09.10.2015 without passing through designated immigration exit point contrary to section 30b(1)(a) and 30b(2)(a) as read with section 30c(1) of the [Prevention of Terrorism Act](#) 2012.
3. Count II: Exiting through a place not designated as a place of exit contrary to section 15(2) as read with section 57 of the Kenya Citizenship and Immigration Regulations, 2012 Legal Notice No. 64. Particulars were that on diverse dates in the year 2020 at Border Point Three (BP III) along Kenya-Somali border in Mandera East Sub County within Mandera County of the Republic of Kenya he exited to Bulla Hawa Somalia through a place not designated as exit point.
4. Count III: Failing to report departure to the Immigration Office contrary to Regulation 17(1)(a) as read with section 57 of the Kenya Citizenship and Immigration Regulations, 2012 Legal Notice No.



64. The particulars were that on diverse dates in the year 2020 at Border Point Three (BP III) along Kenya- Somali border in Mandera East Sub County within Mandera County of the Republic of Kenya he failed to report departure while crossing to Bulla Hawa Somalia to the nearest Immigration Office as required by the law.
5. Count IV: Entering Kenya through a place not designated as a place of entry contrary to section 15(2) (a) as read with sections 57 of the Kenyan citizenship and Immigration Regulations, 2012 Legal Notice No. 64. Particulars were that on 17.08.2021 at Border Point Three (PBIII) along Kenya – Somali border in Bulla Hawa Somalia he entered Kenya through a place not designated as entry point.
  6. Upon conclusion of the trial, appellant was found guilty of all counts and sentenced to serve 10 years imprisonment in respect to count I and; 6 months in each of the Counts II, III and IV. The appellant was aggrieved by the conviction and the sentence meted out against him thus precipitating the filing of the appeal herein.
  7. He filed together with his submissions, an amended petition of appeal dated 23.06.2022 setting out the grounds summarized as hereunder.
    - i. The learned magistrate erred in law and fact by convicting the appellant yet the case was not proved to the required standard.
    - ii. The learned magistrate erred in law and fact by misdirecting himself in accepting circumstantial evidence without applying the principle(s) governing acceptance of such evidence.
    - iii. The learned magistrate erred in law and fact by meting out harsh and excessive sentence.
  8. The court directed that the appeal be canvassed by way of written submissions which order the parties complied with.

### **The appellant's submissions**

9. The appellant in his submissions dated 16.11.2023 contended that the prosecution did not prove its case to the required standard. That the prosecution did not state the mission which the appellant had in Somalia. He contended that prosecution's case was shoddy as PW2's evidence even after carrying out the investigations, could not determine whether the sim cards were registered in his names.
10. He contended that he was not linked to the offences herein and that the proof was short of the required standard. He reiterated that the charges herein were motivated by the land disputes emanating from their large family. He urged that the larger family members were out to kill him just as they had previously killed his father.
11. Additionally, he contested the sentence meted out as being severe and discriminative. He stated that the trial magistrate did not consider his mitigation as the sentence pronounced was mandatory in nature. Reliance was placed on the case of Julius Kitsao *Manyeso vs Republic Cr. Appeal No. 12 of 2021* at Malindi where the court held that a sentence that renders mitigation to be of no probative value is unjustifiably discriminative, unfair and repugnant to the principle of equity before the law under article 27 of *the constitution*.
12. This court was therefore urged to exercise its powers as provided for under article 165 to set aside the sentence by the trial court and substitute the same with an appropriate one. While relying on section 333(2) of the CPC, he urged that his sentence ought to run from the time when he was arrested and the entire period of time spent in lawful custody considered. In conclusion, he urged that his conviction be quashed and the sentence set aside.



13. Mr. Kihara, counsel for the respondent filed submissions dated 16.11.2023 opposing the appeal citing grounds that the prosecution case was proved beyond reasonable doubt and therefore, the appeal is devoid of merit. That the sentence invoked by the trial court was legal and appropriate considering the nature of the case. In conclusion, this court was urged to dismiss the appeal and uphold the finding of the trial magistrate.

### **Analysis.**

14. I have considered the appellant's grounds of appeal and the submissions by both parties. Issues that germinate for determination are:

- i. Whether the prosecution proved its case beyond any reasonable doubt; and
- ii. Whether the sentence meted out was appropriate in the given circumstances.

15. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated that: -

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

16. Briefly, PW1, No. 92527 Cpl. Elias Korir testified that on 19.08.2021, they received intelligence report that the appellant who had allegedly left for Somalia was back into the country. That upon traveling to Kalalio where the appellant lived, together with Police Officers from Kalalio, they arrested the appellant and thereafter escorted him to Mandera Police Station. It was his testimony that at the time of the arrest, the appellant was found to be in possession of a Tecno RD IMEI 35478119xxxx fitted with a Safaricom sim card SR No. 892540212247xxxx – 784 and Sominet Telecom 4G LTE white in colour. Techno T30 (twin sim) IMEI No. 357552 – 2325670105, IMEI 357552 – 2356xxxx which had Hormud sim cards SR No. 892521120xxxxF and 8925211200xxxx – xxxxxF.
17. That the said phone was fitted with a memory card in the name Sara Micro SDHC 2 GB black in colour and of SR No. MMQT 02GK72xxx – E2ASHY01xxxR made in Taiwan. In regards to the third mobile phone of Ruman model A230, the same was fitted with four sim cards of IMES No. 3552411108xxxx,355241110xxxx,355241110xxxx and 35524111xxxx. The sim cards were of SR Nos. 89252xxxx – 2590xxxxF, 89252xxxx – 1224xxxxF (Hormud sim card), 8925263xxxx – 209xxxx (Somtel sim card) and 8935xxxx – 4221xxxx (Safaricom sim card).
18. It was his evidence that the phone also had a 2GB memory card RECO 2 GB Micro SDHC black in colour with unclear serial number. That the majority of the sim cards were from Somalia where the appellant came from and it was not easy to find network. Upon gaining entry to the contents of the sim cards, pictures of the appellant taken from undisclosed locations while dressed in Somali National Army uniforms were found. Upon further investigations, it was discovered that the appellant stayed in Garbahare, a place mostly inhabited by Alshabaab.
19. That the appellant's claim that he was a casual worker in Somalia did not add up as he did not produce any document to support his claim. According to the officer, the appellant spent 19 months in Somalia



and that he used BPIII as a place of exit instead of reporting his departure or entry at any immigration office in Kenya.

20. PW2, No. 110102 PC Gordon Aluko Tindi testified that he is attached to ATPU Cyber Forensic Lab in Nairobi. He stated that on 03.09.2021, exhibits were received at ATPU cyber forensic lab and in company of the memo exhibit, were mobile phone Tecno T30 marked as Exh.B of IMEI 357552235xxxxx fitted with Hormud sim cards of SR Nos. 89252112002709xxxxxF.
21. That the other sim card was defaced and the SR Number could not be read. The memory card SR No. Man QT02GZKZ 2011 of make Sara 2. Mobile phone of make Ruman mode A230 of IMEI 35524111xxxxx and IMEI 355241110xxxxx with sim card SR No. 89254021224221xxxxx, Hormud sim card SR no. 89252112002284xxxxxF which also had a Somtel sim card SR No. 89052 – 63782082xxxxx. That a Reco memory card was not clear. Also with him was found a third mobile phone of make Techno RB8S IMEI No. 354758110xxxxx fitted with a safaricom sim card of SR No. 89254 – 021224277xxxxx. The same also had a Hormud sim card SR No. 8925211xxxxx – 9049xxxxF and Sommel Telecom card number as indicated in the exhibit memo. According to him, the investigating officer had requested the following:
  - i. Recovery of any telephone number that could link the phone user to terrorism members in the list of wanted terror suspects.
  - ii. Recovery of evidence material of assistance to the case ranging from message videos and images.
  - iii. Recovery of any information that will help in the investigation.
22. He told the court that, after carrying out the said exercise, he established that the mobile phone marked 'D' had a total of 26 call logs, 10 contacts and 5 inbox messages, 42 timelines, 93 images and 254 videos. Out of the images, he established 8 images namely 1629230xxxxx.jpg created on 17.08.2021 with coordinates 1283562.36.xxxxx5 which was an image of an individual in Somali National Army. The image was captured by the same phone and the shot was taken in Somalia at 2302hrs.
23. The 2<sup>nd</sup> image 16292305xxxxx.jpg created on 17.08.2021 at around 23.02 hours with coordinates 1.283392.36.xxxxx, was the image of an individual dressed in Somali National Army attire; image 2, 1629230xxxxx.jpg printed on 17.08.2021 at 23.02 hrs was an individual in the Somali National Army attire; image 4, coordinates 1629230xxxxx.jpg created on 17.08.2021 at 2302hrs represented the image of an individual dressed in Somali national army attire taken around Somalia. The photo was taken by a different phone of make Samsung SR- A107F which was shared to the exhibit B phone via Bluetooth.
24. Image 6 20210330225xxxxx.jpg created 16.08.2021 at 1712hrs coordinates 1.2862033xxxxx, was captured by a different phone of Samsung model; SR A107F captured on 30.03.2021 at 2559hrs; image 7 20210333020xxxxx.jpg created 16.08.2021 at 1711hrs with coordinates 1.283784.36xxxxx showed it was taken in Somalia. The same was of an individual in Somali national army attire taken on phone make Samsung model SR 8107F captured on 30.03.2021 at 2259hrs and the same was shared via Bluetooth.
25. Image 8 20210333020xxxxx.jpg created on 16.08.2021 at 1711hrs with coordinate 1.250414.3689.xxxx showed the same was taken in Somalia. The image was of an individual dressed in Somalia national army attire and the image was taken by Samsung SR – A107F captured on 30.03.2021 at 2300hrs shared the exhibit B through Bluetooth. That the person in the images produced before the court was the appellant herein. On cross examination, he reiterated that the images in the phone were taken in Somalia.



26. By a ruling delivered on 22.03.2022, the appellant was found to have case to answer and thereby put on his defence.
27. DW1, Mohamed Omar Haji in his sworn testimony stated that he came from Darika Kalalio but denied being involved in the commission of the offences herein. He stated that he was arrested while at their farm and the charges herein were precipitated by the people who killed his father and now are after him as they want to kill him too. He urged that he was simply framed. On cross examination, he argued that the said photos were not his as he had never been to Somalia.
28. DW2, Rukia Sif Khalif, the mother of the appellant in her sworn statement said that the charges were far-fetched as his son did not travel to Somalia. That the appellant had never been to Somalia as he was the sole bread winner to their family. On cross examination by the court, the witness upon being shown the photos stated that she could not see well and further, the said photos did not belong to his son. She urged that the appellant was a mason and therefore the offences herein were simply a frame up.

### **Analysis**

29. I have considered the evidence on record, grounds of appeal and submissions by both parties. The appellant's main contention is that prosecution did not prove its case to the required degree or standard and that the sentence imposed was harsh.
30. It is trite that the burden of proof in any criminal case always lies with the prosecution and it does not shift to an accused person. In *Stephen Nguli Mulili vs Republic* [2014] eKLR the court had this to say,  

“...it is not in doubt that the burden of proof lies with the prosecution”.
31. The prosecution's case is mainly anchored on alleged recovered photographs extracted from a mobile phone that was allegedly recovered from the appellant. This is clear from the testimony of PW1 who stated that; on 19.08.2021, they received intelligence report that the appellant was back from to the country after traveling to Somalia. That upon traveling to Kalalio where the appellant lived, together with Police Officers from Kalalio, they arrested the appellant and thereafter escorted him to Mandera Police Station.
32. He further stated that at the time of the arrest, the appellant was found to be in possession of several phones inter alia a Tecno RD IMEI 3547811xxxx fitted with a Safaricom sim card SR No. 8925402122xxxx - 784 and Sominet Telecom 4G LTE white in colour. Techno T30 (twin sim) IMEI No. 357552 - 2325xxxx, IMEI 357552 - 235xxxx which had Hormud sim cards SR No. 892521120xxxxF and 892521120xxxx - xxxxF.
33. From the evidence adduced before the trial court more so that of PW1, it was his evidence that the appellant having allegedly travelled to Somalia, he had gone there to receive Al Shabbab training. That he stayed there for a period of 19 months and that his point of exit and or entry was Border Point 3 which is not a designated area. This was a presumption inferred from the information allegedly extracted from the phones recovered from him.
34. No evidence was produced in court to support the averment that the appellant exited and or entered the country through border point 3 without proper authority. The trial court simply relied on the presumption of PW1 and the mere fact that the appellant was placed in Somalia as was enumerated by PW1. In my view, the same was insufficient to support counties two -four.



35. The above notwithstanding, in finding the appellant guilty of the offence under count I, the trial court observed in part that:

“The location coordinates having proved beyond reasonable doubt that the photo images of the accused were taken by the phone while in Somalia and the phone was found in accused possession while in Kenyan territory; all these point to one conclusion. The accused was in Somalia territory on 16.08.2021 and 17.08.2021 when the photo images were taken by or shared to the phone ‘D’. The photos also show the accused in Somalia National Army Uniform. This can’t be just a coincidence”.

I also note that he was found with three phones and with multiple sim cards majority of them being Somali telephone operator’s sim cards. Why? If he was not using them in pursuit of criminal or unlawful activities in Somali, it still remains unchallenged that he may have been using them in Somalia. A sim card is not just an aesthetic tool but a tool of technological use in telecommunication. The fact that he was found even with many Somali telephone operator sim cards while he is in Kenya where there is no, or has poor network for the Somali telephone operator networks all show that the accused had quite some interest, links or connections and activities in Somalia before he was arrested in Kenya.

36. There is no proof of ownership of the phone to the appellant nor was any association created between the appellant and the registered owner of the phone. While some of the photographs bore the image of the appellant in Somali military attire, it was not alone conclusive to implicate the appellant as having been in Somalia receiving training from the Al Shabaab. PW2 stated during cross-examination as follows:

I did not check to see if the sim cards were registered in your names.

37. From the above, it is my humble view that the prosecution ought to have taken a step to show a clear linkage between actions of the appellant and those of the outlawed group. Photographs alone do not suffice. PW2 made general reference to photos showing the appellant in Somali National Army attire and further stated that he presumed that the appellant was receiving training from Al Shabaab as he was in an area inhabited by the Al Shabaab.
38. Without any demonstrable linkage, I find it difficult to agree with the findings of the trial court as the finding of the trial court was not supported by the evidence on record. In any event, there was no explanation given by pw1 as to whether they were looking for the accused before receiving intelligence connecting him with Alshabaab.
39. Most importantly, prosecution relied on the evidence of pw1 alone to convict. There was no corroboration. The appellant denied the offence. He claimed that he was framed. Nobody came forward to confirm the testimony of pw1 that the phones in question were found in possession of the appellant despite saying that he was in company of some officers.
40. Although an inventory was allegedly signed to show that the appellant was found in possession of the phones in question, none of those officers who purportedly signed the inventory as witnesses ever testified to corroborate the testimony of pw1. The only reasonable inference is that the withdrawn evidence would have been adverse to the prosecution’s case.
41. Between the appellant and pw1, whom does the court believe? Without proof that the phones in question were recovered from the appellant, the rest of the evidence based on circumstantial evidence can not suffice hence the four counts fails.



42. The learned trial magistrate did not caution himself on the dangers of relying on the evidence of a single witness to convict. See *Abdallah Bin Wendo and another v Republic* 1953 page 20
43. In a nutshell, I am persuaded that the prosecution in this case did not discharge its burden to prove beyond reasonable doubt that the appellant committed the offences the subject of this appeal. To that extent, the appeal herein succeeds. Accordingly, I am inclined to quash the conviction and set aside the sentence. The appellant shall be set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF JULY 2024**

**J. N. ONYIEGO**

**JUDGE**

