Bonaya v Republic (Criminal Appeal E153 of 2022)
[2023] KEHC 528 (KLR) (2 February 2023) (Judgment)

Neutral citation: [2023] KEHC 528 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E153 OF 2022

TW CHERERE, J

FEBRUARY 2, 2023

BETWEEN

RAMADHAN WARIO BONAYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against both conviction and sentence in Isiolo criminal case No. 246 of 2017, by Hon. L. Mutai on the 28th day of October, 2022)

JUDGMENT

1. Appellant was charged with 4 counts under the provisions of the *Prevention of Terrorism Act*, 2012 (the Act). In Count 1, A Appellant was charged with being a member of a terrorist group contrary to section 24 of the *Act*. Count 2: Being in possession of an article for the use in instigating the commission of, preparing to commit or committing a terrorist act commitscontrary to section 30 of the *Act*. Count 3: Collection of information for the use in the commission of a terrorist act contrary to section 29 of the *Act* and Count 4 he was charged with giving support to terrorists group for commission of a terrorist act contrary to section 9(1) of the *Act*.

2. The prosecution case was that on June 2, 2017, the Anti-Terrorism Police Unit received information that Appellant had facilitated some youths to travel to Somalia to join Al-Shabaab. On June 4, 2017, Appellant was arrested and from him was recovered a Techno mobile phone which had a safaricom sim card and a 2 GB SD card. An inventory prepared upon recovery indicates that the following were recovered from the Appellant:

    1. Techno mobile phone IMEI 355212081492409 and IMEI 355212081492417
    2. Safaricom Sim Card number 892540210329586527
    3. 2 GB Memory Card make Advance

3. CIP Korum a cybercrime expert received the two phones for analysis vide a memo form PEXH. 2. He stated that he subjected the memory card to analysis and found that 2GB memory card which had videos namely ISI. New Al-shabaab. 1part and Mujahidin Moment 3 High.Mp4 which are articles for the use in the commission of a terrorists acts.

4. Accused denied the charges and more specifically that the memory card that was alleged to have contained information connected with terrorism was recovered from him.

5. The trial court after hearing and considering both the prosecution and defence cases found the prosecution case proved, convicted Appellant and sentenced him as follows:Count 1: 20 years' imprisonmentCount 2: 15 years' imprisonmentCount 3: 20 years' imprisonmentCount 4: Acquitted under Section 215 of the *C.P.C*The sentences were ordered to run concurrently.

6. Dissatisfied with the conviction and sentence, Appellant appealed vide a petition of appeal filed on the 31st October, 2022 on the following eight grounds: -

    i. That the learned trial magistrate erred in law and fact by convicting the Appellant based on a defective charge sheet.

    ii. That the trial magistrate erred in matters of law and fact by failing to note that the charges leveled against the appellant were bad for duplicity.

    iii. That the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubt.

    iv. That the trial magistrate erred in matters of law and fact by failing to note that the conviction was against the weight of evidence.

    v. That the trial magistrate flouted in matters of law and fact by failing to note that the prosecution case was inconsistent and contradictory in nature.

    vi. That the trial magistrate erred in matters of law by relying on extraneous consideration not supported by evidence.

    vii. That the learned trial magistrate erred in law and in fact by rejecting the Appellants defence without giving cogent reasons.

    viii. That the Learned trial magistrate erred in both matters of law and fact by failing to note that the sentence is harsh and excessive.

7. The appeal was canvassed by way of written submissions. By his submissions dated 8th December, 2022, Appellant submits that the trial magistrate shifted the burden of proof to the Appellant, that his defence that weakened and destroyed the inference of guilt on his part and that the circumstantial evidence was fabricated.

8. Appellant additionally submits that there was no evidence that he facilitated the disappearance of Dido Hussein Adan alias ETO Ramadhan Wario Bonaya or that he was a member of Al-Shabaab on or before 04th June, 2017 and further that there was no evidence that he belongs to or professes to be a member of a terrorist group and more specifically Al- Shabaab. In support of his submission, that Prosecution failed to prove the ingredients of the offences, he placed reliance on the case of *Kevin Kiswiki Kyongi v Republic* (2018) eKLR and *Mohammed Abdi Adan v Republic* [2017] eKLR.

9. Appellant also submits that the charge sheet was bad for duplicity in count 2 and 3 in that the particulars are similar. He urged the court to find that the charge was defective for being duplex and in

support thereof relied on *Makupe v Republic*, Criminal Appeal No. 98 of 1983, the court of Appeal at Mombasa on July,18, 1984 (Kneller J.A, Chesoni & Nyarangi Ag. JJ A) held that in general a retrial will be ordered when the original trial was illegal or defective and it will not be ordered where the conviction is set aside because of insufficient evidence.

10. Appellant likewise challenged the manner in which evidence was collected and more particularly denied signing the inventory in respect of the recovered memory card and in support thereof relied on *R v Lifchus* (1997) 3 SCR 320.

11. The Respondent on their part filed their submissions dated 13th December, 2022 and submitted that the prosecution case proved beyond reasonable doubt on all counts except count 1.

Analysis and Determination

12. I have considered the appeal in the light of submissions filed by the Appellant and the state and the cited authorities and the issues for determination are as follows: -

    i. Whether the charge sheet was defective.

    ii. Whether the prosecution proved the charges against the accused beyond reasonable doubt.

    iii. Whether the trial court took into consideration the accused defense.

13. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 *Okeno v Republic* [1972] E.A 32, *Pandya v Republic* [1957] E.A. 336), *Shantilal M. Rulwala v Republic* [1957] E.A. 570 and *Mark Oiruri Mose v Republic* [2013] eKLR).

14. Concerning the ground of duplicity, a charge is duplex where in one charge there is more than one offence. section 134 of the *Criminal Procedure Code* provides: -

> " Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offences or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

15. In the case of *Sigilani v R* (2004) 2 KLR 480 it was held that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".

16. I have read through the charge sheet herein and find that there is no duplicity. The charge and particulars are specific and only refer to one offence in each count.

17. The charges against the Appellant are grounded on two videos that the witnesses testified were recovered from a 2GB memory card that was recovered from the Appellant which videos the Prosecution stated were articles for the use in the commission of a terrorist act.

18. The issue of recovery of the exhibits upon which Appellant was charged and convicted therefore becomes a crucial issue for determination. In *Stephen Kimani Robe and Others v Republic* [2013] eKLR, the court stated that:

> "The purpose of an inventory is to keep a record of exhibits recovered during the investigation ….. "

19. Whereas there is no dispute that an inventory of exhibits allegedly recovered from Appellant was tendered as an exhibit, it is apparent that although the phone and sim card were properly described by their numbers, the inventory and indeed the charge sheet and the cyber-crime report only refers to a 2 GB Memory Card make Advance. Whereas Appellant conceded that the phone was his, he denied that the memory card was recovered from him.

20. Since the prosecution case depended on the physical evidence, the recovery, preservation and safety of exhibits became an integral part of securing justice and fair play. To this end, from the time of seizure to the moment the exhibit was presented in court, there was an obligation on the prosecution to ensure that the exhibits were properly identified at the point of recovery to guarantee that the exhibits in support of the prosecution case are the same ones as the ones that were recovered, analyzed and produced in court.

21. In this case, the inventory refers to a 2 GB memory card make Advance and so does the charge sheet. I have had a chance to have a closer look at the memory card being one of the exhibits produced in the trial court and I note that the same bears a serial Number A0BY1703TEN.

22. The question that begs an answer is whether that was the Memory card recovered from the Appellant and if so, why all the prosecution witnesses do not refer to it by its identification number. And if the one recovered from the Appellant did not have an identification number, why was it (swapped) with one that is identifiable with a serial number and produced in court? Accused having denied that any memory card was recovered from him, his defence raised a reasonable doubt whether the analyzed memory card allegedly containing information for the use in the commission of a terrorist acts which was produced before the court was the same one that was alleged to have been recovered from the Appellant.

23. The foregoing notwithstanding, I have a duty to consider whether, but for the fault in the identity of the memory card, the charges were proved.

24. The degree of proof in criminal cases was properly established in the classicus English case of *Woolmington v DP*P 1935 A C 462. Similarly, in *Bakare v State* 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

> "Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".

25. In Count 1 of being a member of a terrorists group contrary to section 24 of the *Act*, 2012, it was alleged the Appellant was a member of a terrorists group namely the Al-Shabaab, a terrorists' organization outlawed by the Kenya Gazette Notice No. 12585 of 2010.

26. Section 24 of the *Prevention of Terrorism Act*, defines this offence in the following terms:

> " Any person who is a member of, or professes to be a member of a terrorists group commits an offence and is liable, on conviction to imprisonment for a term not exceeding thirty years".

27. The Respondent conceded that the charge was not proved and cited a persuasive decision in the case of *Mohammed Haro Kare v Republic* [2016] eKLR where Ngeye Macharia J (as she then was) stated that:

> To prove this offence, the prosecution is therefore under a duty to prove that an accused person belongs to or professes to be a member of a terrorists group under the Act. The terrorist group in this case is described to be Al-Shabaab. In order to fall into this category, the group must fall within the category of a specified entity or one that is involved in the commission of a terrorist act as prescribed by the statute.
>
> The question that needs to be determined is whether the evidence concerning the photographs is sufficient to link the Appellant to be a member of or one who professes to be a member of the terrorists group, Al Shabaab.
>
> Section 2 of the *Prevention of Terrorism Act* defines a terrorist group as:
>
> a. An entity that has as one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act; or
>
> b. A specified entity.

28. The evidence on record reveals that the prosecution did not take any steps to demonstrate a clear linkage between actions of the Appellant and those of the outlawed group. The possession of the videos and recordings alone do not suffice.

29. In count 1, Appellant seems to have been convicted merely on suspicion. But suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt. (See *Sawe v Republic* [2003] KLR 364 and *Kelvin Kiswiki Kyongi v Republic* [2018] eKLR). It therefore follows that even if the integral exhibit had been properly identified as having been recovered from Appellant, count 1 could still not have been sustained.

30. Had the prosecution properly handled the exhibits and proved that the one containing materials related to terrorism was recovered from Appellant, this court would not have hesitated to uphold the conviction in counts 2 and 3.

31. From the foregoing analysis, I find that the defence raised a reasonable doubt that ought to have been given to the Appellant.

32. In the end, I find and hold that the conviction and sentences imposed on Appellant were unsafe. Accordingly, the conviction is quashed and sentences set aside. Unless otherwise lawfully held, it is hereby ordered that Appellant shall be set at liberty forthwith.

DATED AT MERU THIS 02ND DAY OF FEBRUARY 2023

T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

Appellant - Present

For Appellant - Mr. Otieno for Otieno C & Co. Advocates

For Respondent - Ms. Kitoto (PPC)