



REPUBLIC OF KENYA



**KENYA LAW**  
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**Galle v Republic (Criminal Appeal E127 of 2022)  
[2023] KEHC 516 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 516 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E127 OF 2022  
TW CHERERE, J  
FEBRUARY 2, 2023**

**BETWEEN**

**OSMAN GADO GALLE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the conviction and sentence in Isiolo Criminal  
Case Number 131 of 2017 by Hon. L.K.Mutai (CM) on 16.09.2022)*

**JUDGMENT**

1. Osman Lado Galle (Appellant) was charged in counts 1, 3, 4, 5, 6, 7, 8, 9 and 12 with being in possession of an article for the use in instigating the commission of, preparing to commit or committing a terrorist act contrary to section 30 of *Prevention of Terrorism Act* No 30 of 2012 (the Act), Count 2 of being a member of a terrorist group contrary to section 24 of the *Act*, and counts 10 and 11 with collecting information for the use in the commission of a terrorist act contrary to section 29 of the *Act*.
2. The prosecution case was that on March 28, 2017, Appellant went to Isiolo Police Station to visit a suspect arrested in a case associated with terrorism. That police suspect him to be an associate of the suspect and arrested him and from him recovered an Infinix mobile phone IMEI 35988xxxxxxxx and 359838xxxxxxxx and safaricom sim number 8925402xxxxxxxx with a 1 GB micro SD card and Itel phone IMEI 3526500xxxxxx and IMEI 35265xxxxxx which had some teachings suspected to be related with terrorism. The inventory of the recovered exhibits was prepared on 28<sup>th</sup> march, 2017 and was marked Pexh. 1.
3. CIP Korum a cybercrime expert received the two phones for analysis vide a memo form PEXH. 2. He stated that he subjected the phone memory to analysis and found that it contains 72 audios. Out of the 72, he stated he extracted two which were also played in court. The first one titled Kikao Cha Kupinga Jihad in which Sheikh Abdul Rogo was calling upon his followers to rejects Sheikhs who were



cowards. In the second video titled Hakuna Hifadhi Kwa Imani, the author was calling on people to fight for their land taken by non-Muslims using the sword and the Koran. The witness played videos and audios which encourage people to join Al-Shabaab and that by possessing them, Appellant must have been a member of Al-Shabaab.

4. Upon being called to give his defence, confirmed his arrest and recovery of his phones but denied that they contained terrorism related audios and videos.
5. The trial magistrate having listened to the prosecution and defence cases found the prosecution case proved and proceeded to convict Appellant of each of the counts. In counts 1, Appellant was sentenced to serve 15 years' imprisonment, 30 years' imprisonment for count 2; 15 years for counts 3, 4, 5, 6, 7, 8 and 9; 25 years for count 10 and 11 and 15 years in count 12.
6. The Appellant was aggrieved by the conviction and sentences and lodged his appeal on October 31, 2022 raising eight grounds. By his submission, filed on November 15, 2022, he cites seven which I have summarized as follows:
  - i. The charges were bad on account of duplicity
  - ii. The prosecution case was not proved
7. I have considered the appeal in the light of submissions filed by the Appellant and the state and the cited authorities.
8. 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.
9. 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”.
10. 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.
11. Before I delve into analysis of the specific counts, I find that it would be of utmost importance to determine the issue of recovery of the exhibits upon which Appellant was charged is convicted.
12. 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.....”
13. The inventory marked PEXH. 1 reveals that the following were recovered from Appellant on March 28, 2017.
  - a. Infinix mobile phone IMEI 3598830xxxxxxx and 3598380xxxxxxx



- b. Safaricom sim number 8925402xxxxxxxx
  - c. 1 GB micro SD card
  - d. Itel phone IMEI 352650085013106 and IMEI 352650085013114
14. As much as Appellant denies signing the inventory, he does not deny possession of an Infinix mobile phone IMEI 3598830xxxxxx that evidence demonstrates contained material related to terrorism. The trial magistrate having listened to the audios and vides came to a conclusion that Appellant had interest in terrorism as most of the videos and audios related to terrorism. I therefore find that the charges of possession and collection of information for the use in instigating the commission of a terrorist act were proved.
15. 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”.
16. 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.
17. 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.
18. In count 2, 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 Kiswiri 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.
19. Concerning sentence, Section 354(3) of the *Criminal Procedure Code*, provides as follows;
- “ The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -in an appeal from a conviction -reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or



- (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
- (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;
- (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;
- (c) ...
- (6) Nothing in Sub-section (1) shall empower the High Court to impose a greater sentence than might have been imposed by the court which tried the case.”

20. The provision has severally been affirmed by courts as was held in the case of *Kinyanjui v Republic* [2004] 2 KLR, that;

“Under Section 354(3) of the Criminal Procedure Code, the Court had the jurisdiction to impose an appropriate sentence on appeal, including enhancing the sentence imposed by the magistrate’s court.”

21. In the instance case, the sentences meted against the Appellant by the magistrate court is within the law as provided for by *Prevention of Terrorism Act*. Nevertheless, Appellant having been a first offender was entitled to the least available sentences.

22. Under the powers granted by this court under Section 354(3) of the *Criminal Procedure Code*, it is hereby ordered:

- 1. The conviction on count 2 is quashed and the sentence thereof set aside
- 2. The conviction on counts 1, 3, 4, 5, 6, 7, 8, 9,10, 11 and 12 are upheld but the sentences are set aside and substituted with 8 years’ imprisonment term in each count which shall run concurrently from March 28, 2017 when Appellant was arrested.

**DATED AT MERU THIS 02<sup>ND</sup> DAY OF FEBRUARY 2023**

**T. W. CHERERE**

**JUDGE**

**Appearances**

Court Assistant - Morris Kinoti

Appellant - Present

For Respondent - Ms. Kitoto (PPC)

