



**Wangechi & another v Republic (Criminal Appeal E006 of 2022)
[2023] KEHC 2178 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E006 OF 2022
JM CHIGITI, J
MARCH 21, 2023**

BETWEEN

DAVID MWANGI WANGECHI 1ST APPELLANT

JAMES KAMAU MUNGARO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Brief Background;

1. The 1st Appellant David Munyutu Wangechi was charged with Count I; Traveling to a country designated to be a Terrorist Training country contrary to section 30(C) as read with section 30(B) of the [Prevention of Terrorism Act](#), 2012 and Count II Being a member of a terrorist group contrary to section 24 of the [Prevention of Terrorism Act](#), 2012.
2. The particulars of Count I were that the 1st Appellant on or before 4th February, 2021 at Doble within the Republic of Somalia was found to have travelled to a country designated to be a terrorist training country, Somalia as per Kenya Gazette Legal Notice No.200 dated 9th October,2015.
3. The particulars of Count II were that on or before 4th February,2021 at Doble within the Republic of Somalia the 1st Appellant was found to be a member of a terrorist group namely Al Shabab an outlawed Organisation as per Kenya Gazette Legal Notice No. 25 of 14th March,2016.
4. The 2nd Appellant herein was also charged with similar offences that is Count III Travelling to a country designated to be a Terrorist Training country contrary to Section 30(C) as read with Section 30(B) of the Prevention of Terrorism Act,2012 and Count IV Being a member of a terrorist group contrary to Section 24 of the [Prevention of Terrorism Act](#), 2012.



5. The particulars of Count III are that on or before 29th December, 2020 at Doble within the Republic of Somalia the 2nd Appellant was also found to have travelled to a country designated to be a terrorist training county Somalia. Similar to the 1st Appellant's particulars the particulars of COUNT IV were that on or before the 29th December, 2020 at Doble within the Republic of Somalia the 2nd Appellant was found to be a member of a terrorist group namely Al-Shabaab an outlawed Terrorist organization.
6. During plea taking the Appellants pleaded not guilty and the case was set down for hearing. The Prosecution called a total of three (3) witnesses and after close of the prosecution case the trial court acquitted the 1st and 2nd Appellants on Counts II and IV respectively and placed them on their defence on Counts I and III.
7. The trial court in its determination upon examining the evidence before it, and hearing the Accused person's defence found the 1st and 2nd Appellants guilty of counts I and III respectively. The Appellants were each fined the sum of Kshs. 100,000/= in default of which they would serve 1-year in prison.
8. Being dissatisfied with the judgment and sentencing by the Trial Court the Appellants have filed this Appeal vide a Petition of Appeal dated 7th February, 2022 which sets out the following grounds;
 - i. The Learned Hon. Trial Magistrate erred in both law and fact in finding that the prosecution had proved its case beyond reasonable doubt, while to the contrary the prosecution's evidence was insufficient, unsubstantiated and uncorroborated hence arriving at a wrong conclusion in law.
 - ii. The Learned Hon. Trial Magistrate erred in both law and fact by misapprehending the evidence on record and by denying the Appellant their right to fair trial and admitting hearsay evidence of material witnesses who were not called as witnesses and by relying on suspicions to enter a conviction.
 - iii. The Learned Hon. Trial Magistrate erred in both law and fact by convicting the Appellants for an offence that did not feature on the charge sheet and neither was their evidence in support of the same, which did prejudice the Appellants.
 - iv. The Learned Hon. Trial Magistrate erred in both law and fact by shifting the burden of proof on the Appellants disregarding their defence and preferring a harsh sentence under the circumstances although legal.
9. The Appellants pray that the court finds the Appeal to be merited and for it to proceed to quash their conviction and set aside the sentence with orders that liberty be reinstated forthwith.
10. The Appeal was canvassed by way of written submissions.

Analysis And Determination

11. This being a first appeal, it is this court's duty to examine, analyze and re-evaluate the evidence afresh in order to arrive at its own conclusion. See the case of Okeno v Republic [1972] EA 32.
12. The Appellants before this court challenge the Judgment and sentencing by the trial court on grounds that in reaching the said decision the learned Magistrate failed to consider that the prosecution had not provided any corroborative evidence or even substantiated its claims that the Appellants were arrested in Doble in the Federal Republic of Somalia. The Appellants also argued that the fine of Kshs. 100,000/= or one (1) year imprisonment in default was and more so against the 1st Appellant who was all through in custody, from his time of arrest in Liboi on 13th November, 2020 to his conviction on the 21st October, 2021.



13. In the trial court the Prosecution called three witnesses while the Appellants testified as sole witnesses in their defence.
14. PW1 PC Kennedy Guantai from Liboi Police Station in his testimony testified that on 4th February,2021 at around 11.30 hrs. they received 2 persons namely one James Kamau Mungaru and David Manyutu Wangechi from a KDF person in Somalia. He stated that he booked them vide OB No.07/04/02/2021 under the instructions of OCS CI Ruto further that he placed them in custody vide OB No.08/04/02/2021.
15. He stated that they had been informed by the KDF that the said persons had been arrested by Jubaland Special Forces at different times and places within Doblely town in Somalia. A letter from Doblely Police Station had been attached confirming that the two had been held before being brought to Kenya.
16. The two who were the 1st and 2nd Appellants herein had with them luggage that contained mobile phones, electronic materials, several small bottle tubes containing perfumes and cash amounting to Ksh.5,000/= .There was also an ID Card in the name of James Kamau Mungaru. PW1 also produced letters received from Jubaland Special Forces. The letters indicated that James Kamau Mugaru and David Munyutu Wangechi were suspected of being members of the Al Shabab. The 2nd Appellant is said to have been caught using a route that was formerly used by the said terrorist group. The letters were signed by Major Omar of Doblely Command.
17. PW2 PC Fredrick Letai attached to ATPU Dadaab testified that on 6th February,2021 ATPU Dadaab received 2 suspects namely James Kamau Mugaru and David Munyutu Wangechi from Liboi Police Station. The two were booked vide OB No.04/06/02/2021. The Police Officers from Libon are also said to have handed over assorted mobile phones and accessories belonging to Accused.
18. On 8th February,2021 the 2 suspects were escorted to ATPU headquarters in Nairobi for further investigations and on arrival in Nairobi, the officers handed over the case to ATPU headquarters to CPL Ouma who took over the case. The exhibits were also handed over.
19. PW3 CPC Fredrick Ouma the Investigating Officer testified that indeed on 8th February,2021 he received the Appellants herein and that he also got a letter from Jubaland that the 1st Appellant was arrested on 13th January,2020, while the 2nd Appellant was arrested on 29th December,2020. The two are said to have been brought together to Liboi on 4th February,2021 by Amisom officers who received them from Somali officers.
20. PW3 further testified that the 2nd Appellant had in his possession 57 small bottles of perfumes,2 syringes, a speaker and other items as per their inventory. CPC Ouma testified that they had information that the Accused went to Somalia for something other than business and that they had no passport or travel document.
21. The Appellants are said to have hailed from Nakuru Town East and Mathioya area in Muranga respectively. It is PW3's testimony that the Accused persons were arrested a distance of about 1000km from their home areas.
22. The Prosecution in its closing remarks submitted that it was evident that the Appellants herein had travelled to a terrorist designated area and that they did not use known entry points. Further that the OB's showed that they were presented to Kenya Security Forces. It was further stated that the Prosecution had presented evidence that Appellants had no travel documents and that they had used undesignated exit points.



23. In their defence the Appellants gave sworn testimonies as follows; DW1 the 1st Appellant herein testified that he was born in Nakuru but resided in Mombasa, and that before his arrest he used to wash buses in Mombasa that ply Liboi and Garissa. He also testified that he also collected scrap metal. Further that when Covid 19 struck he spoke to the owner of said buses where he used to work seeking for any job. He claimed that he was looking for buses to go Liboi and that he had no fare and that he was allowed to travel to Liboi on credit.
24. He testified that he travelled to Liboi on 2nd April, 2020 and that he slept in a Kibanda while collecting scrap metal. He claimed to have been arrested in a Kibanda in Liboi and that upon arrest the Police accused him of being a terrorist even though he gave them his Identity Card. He testified that he had never been to Doble.
25. DW2 that is the 2nd Appellant herein also gave a sworn testimony where he testified that he was arrested in Liboi while doing business. He testified that in June 2018 there was a fire break out at Gikomba Market where he was doing mitumba business where all his stock was destroyed. He claimed that his father advised him to go to Matuu where his paternal uncle was selling phones and phone accessories. He testified further that his uncle trained him and that in November 2018 they travelled to Garissa severally to look for stock at cheaper prices. He claimed to have gotten a loan from his father of Ksh. 27,000/= and together with his savings of Ksh. 23,000/= he went to Garissa in January 2019.
26. He claimed to have known several traders at Garissa dealing in the phone business one of whom was named Munyao. He claimed that he continued doing business until 2020 when many hawkers emerged and the prices dropped and this affected business. He claimed to have talked to Munyao who advised him to go to Dadaab. He testified that he went to Kagadere and Dahagah where he met many Kenyans doing business there and that he got to know Karanja who also hailed from Murang'a County.
27. Further the 2nd Appellant testified that he later learnt that there was less competition in Liboi and on 30th January, 2021 he proceeded to Liboi to continue with his business. He claims to have been staying at Msafiri Lodge and that he used to leave the lodge at 9.000 a.m. to go do hawking and return later at around 4.00pm.
28. He further testified that on 4th February, 2021 three men in civilian clothes came to his residence claiming they were askaris handcuffed him and covered his face with a cloth and took him to a police station where he found the 1st Appellant. He claims that the officers accused him of being a terrorist.
29. The Appellants herein were convicted of the Offence of failure to report departure as required by Regulation 17(1) of the Citizenship and Immigration Regulations, 2012.
30. The Court in the case of Pius Wambua & 5 Others v Republic [2017] eKLR examined Section 30C of the *Prevention of Terrorism Act* and stated as follows: -

“Mr. Okemwa, counsel for the State mentioned this matter in court the day before yesterday which is 11th of January 2017, conceded to the 5 appeals on the ground that in previous similar matters brought on appeal, this court had found that the sections of the law cited under the *Prevention of Terrorism Act*, did not create an offence termed traveling to a terrorist designated country without passing through a designated immigration exit point.”



31. Similarly, in Garissa Criminal Appeal No. 109 of 2015 Richard Baraza Wakachara Vs. Republic the court went ahead to state as follows: -

“The charge sheet does not give the legal notice which declares Somalia a designated terrorist country. In addition, there is no offence under section 30B (1) (a), 30B (2) (a) and 30C (1) of the Prevention of Terrorism Act 2012 called travelling to a terrorist designated country without passing through designated immigration point.....”

“.....I still hold that the above is the position. The Cabinet Secretary has to designate Somalia as a terrorist country before such an offence can arise. The prosecution has neither referred to nor produced a copy of the Notice in the Kenya Gazette published by the Cabinet Secretary designating Somalia to be a terrorist country. Therefore, in my view, the charge sheet is defective as it does not disclose an offence known in law.”

32. This position was further reiterated by Dulu J in Unknown alias Julius Yohana Mbunguni v Republic [2018] eKLR where he stated as follows: -

“

“9. It is clear from the above provisions of the statute for an offence to be committed under section 30C (1), the Cabinet Secretary has first to designate the country as a terrorist training country....

“.... In my view, if the Kenyan authorities want to operationalize the section, they need to formally designate Somalia as a terrorist training country through the Cabinet Secretary. It is only by doing so that the offence presumed to be created under the section can be operational. However, before the designation by the Cabinet Secretary is done, the presumption of training in terrorism in Somalia will not arise.”

33. In the instant case before this court, Count I and III charges against the Appellants referred to Legal Notice 200/15 which provides that: -

THE PREVENTION OF TERROSRISM ACT

(No.3 of 2012)

DECLARATION OF DESIGNATED COUNTRIES

IN EXERCISE of the powers conferred by section 30 C (3) of the Prevention of Terrorism Act, the Cabinet Secretary for Interior and Coordination of National Government declared the following countries to be designated countries-

- (a) Somalia
- (b) Syria
- (c) Yemen
- (d) Libya
- (e) Iraq
- (f) Afghanistan

Dated the 14th September, 2015.



JOSEPH NKAISSERRY.

Cabinet Secretary for Interior and Co-ordination of National Government.

34. The legal notice above includes Somalia as a designated terrorist training country and therefore operationalizes Section 30C of *Prevention of Terrorism Act*.
35. The Appellants before this Court both deny having been arrested in Somalia and they both claim that they were conducting business in the town of Liboi prior to their arrest. However, no witnesses were called by either of the Appellants to confirm this despite there being several people who they had claimed to interact with before travelling to the said town and even in other towns such as Garissa and Dadaab where the 2nd Appellant had claimed to have met several Kenyans doing business there. There is also no evidence adduced before this Court evidencing that either of the Appellants were engaged in business or that they were indeed residing at Liboi town prior to their arrest.
36. The Prosecution produced before the trial Court two letters written by Jubaland Forces stating that the two Appellants had been arrested on diverse dates by the Jubaland Security Forces while at a known Al Shabab crossing route which was formerly used by the said group. No evidence was produced before the trial court evidencing that the said letters were forged. The letters as was observed by the trial court were written on letter heads and signed by the Dhobley Security Commander one Mohamed Abdi Omar. The letters also contained a stamp that belonged to the security agency.
37. According to the three Prosecution witness the Appellants were handed over to Liboi Police Station by Amisom forces who also presented the two letters from the Jubaland Security Forces. This is evidenced by the OB Numbers issued by PW1 upon receiving the two Appellants. This Court also notes that a signal was sent out on 4th February, 2021 by C.I. Kevin Rutto to VIGOPS NRI(R) REGPOL NER(R) REGCRIME NER (R) COUNTYPOL/CCIO GARISSA(R) OC-DADAAB (R) SCPC/SCCIO DADAAB. The subject of the signal was “Arrest of Terror Suspects”. CI Rutto indicated as follows;

“SUBJECT: ARREST OF TERROR SUSPECTS (.) REF MY 0B.NO.07/04/022021
BE INFORMED THAT TODAY 04/02/2021 AT AROUND 1130HRS THE
FOLLOWING SUSPECTS WERE HANDED OVER TO LIBOI POLICE STATION
BY AMISOM OFFICERS BASED IN DHOBLEY SOMALIA (1) JAMES KAMAU
MUGARU ID NO.33558005 K/M/A AGED 25 YEARS (2) DAVID MUNYUTU
WANGECH ID NO.36447638 K/M/A AGED 25YEARS(.) MULTY AGENCY
TEAM AT LIBOI CONDUCTED INTERROGATION OF THE SUSPECTS AND
RECOMMENDED THAT THE SUSPECTS BE FURTHER INTERROGATED BY
DADAAB SUB-COUNTY MULTI AGENCY TEAM (.) CURRENTLY THEY ARE
BEING HELD AT THE STATION AS ARRANGEMENTS ARE BEING MADE
TO TRANSFER THEM TO DADAAB, CASE P.U.I ATPU DADAAB DEALING,
PROGRESS REPORT TO FOLLOW(.)”

38. Section 30C of the *Prevention of Terrorism Act*, No. 15 of 2012 provides as follows; -

“ 30C. Presumption of travelling to a country for purposes of being trained as a terrorist

A person who travels to a country designated by the Cabinet Secretary to be a terrorist training country without passing through designated immigration entry or exit points shall be presumed to have travelled to that country to receive training in terrorism.



- (2) Despite subsection (1), a person who ordinarily resides in Kenya within an area bordering a designated country is exempt from the provisions of subsection (1).
- (3) For the purposes of this section, the Cabinet Secretary may, through regulations, designate any country to be a terrorist training country.”

39. The Law is clear that if one travels to a country such as Somalia which according to Legal Notice 200/15 has been designated as a terrorist training country without passing through a designated area then such person is presumed to have travelled to that country to receive training in terrorism. The evidence adduced before the trial court by the prosecution indicated that the Appellants were arrested using a route that was formerly used by the Al Shabab which is obviously considered an illegal departure point and the presumption referred to in Section 30C therefore sets in. The two had a duty therefore, to negate that presumption but they failed to do so at interrogation or before the court. This court therefore does not find any fault with the trial court’s judgement.

40. On the issue of sentencing I note that Mr. Chacha counsel for the Accused persons during mitigation had indicated to the court that the 1st Appellant had been in custody since his arrest and in reaching its determination to sentence the Accused persons the trial court considered the said mitigation. I find no reason to interfere with the Court’s determination on the issue of sentencing.

41. On the issue of the Court convicting the Appellants for an offence that did not feature on the charge sheet I note that the trial court in it’s a Judgement referred to Section 179 of the Criminal Procedure Code which states as follows;

“When offence proved is included in offence charged

1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

42. The Court of Appeal in the case of Robert Mutungi Muumbi vs. Republic [2015] eKLR held as follows on this issue;

“Section 179 of the Criminal Procedure Code provides as follows:

“179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can



be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171 and WACHIRA S/O NJENGA V. REGINA (1954) EA 398). Spry, J. explained the essence of the first consideration as follows in ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

“Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.”

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.”

43. The Court went ahead to state thus;

“The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See REPUBLIC V. CHEYA & ANOTHER [1973] EA 500).”

44. This Court is convinced that the offence of failure to report departure as required by Regulation 17(1) of the Kenya Citizenship and Immigration Regulations, 2012 is cognate to the main offence in the Charge sheet and therefore the trial Court in convicting the Accused persons of the said offence was well within the Law.

45. The Appellants argument that the sentencing by the Trial Court was excessive is also unfounded as the *Kenya Citizenship and Immigration Act* pursuant to which the Appellants were sentenced under section 57 provides as follows;

“Penalty

Any person convicted of an offence under these Regulations for which no penalty is specifically provided shall be liable to a fine not exceeding to hundred thousand shillings or to imprisonment for a term not exceeding one year or both.”



46. The Court in the case of Haji Hamadi Haji & 4 others v Republic [2018] eKLR where the Appellants had been charged under Count II with the offence of failure to report departure to an Immigration Officer contrary to regulation 17(1)(A) and 17(4) as read with regulation 57 of the Citizenship and Immigration Regulations, 2012 held as follows on sentencing by the trial court;

“In Count 2, the Hon. Magistrate imposed a fine of Kshs. 30,000/= and in default 3 months imprisonment. The sentence provided for in Count 2 is a fine not exceeding Two Hundred Thousand Shillings or to imprisonment for a term not exceeding one year or to both.”

47. Similarly, the court in Joseph Juma Odhiambo v Republic [2022] eKLR upheld the trial court’s decision to sentence the Appellants who under Count II were charged with failing to report departure to the Immigration Office contrary to Regulation 17 (1) (a) and Regulation 17 (4) of the Immigration Regulations, 2012 as read with Section 60 of the [Kenya Citizenship and Immigration Act](#) No. 12 of 2011 to one year in prison.

Order:

48. In light of the foregoing I find that the instant Appeal lacks merit and the same is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT KIAMBU THIS 21ST DAY OF MARCH, 2023.

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J. CHIGITI (SC)

JUDGE

