Mwangi v Republic (Criminal Appeal E016 of 2022)
[2023] KEHC 24718 (KLR) (9 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24718 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E016 OF 2022

JN ONYIEGO, J

OCTOBER 9, 2023

BETWEEN

NELSON GITHIGA MWANGI ..... APPELLANT

AND

REPUBLIC ..... PROSECUTION

(Being an Appeal against the Conviction and Sentence of Hon. Tanchu (SRM) delivered on 7-4-2022 in Criminal Case No.463 of 2019 Garissa Chief Magistrate's Court)

JUDGMENT

1. The appellant herein was charged with the offence of presumption of travelling to a country for the purposes of being trained as a terrorist contrary to section 30C of the *Prevention of Terrorism Act*. The particulars of the offence were that on or before 27.05.2019 at unknown place, jointly with others not before court, knowingly received instructions to attend terrorism training in Somalia, a country designated to be a terrorism training country as per Gazette Notice No. 200 of 200 of 2015 in preparation for commission of a terrorist act within the Republic of Kenya in contravention of the said Act.

2. Having returned a plea of not guilty, the matter proceeded to full trial. Upon conclusion of the hearing, the trial court found him guilty and sentenced him to serve 5 years imprisonment. Being dissatisfied with both the conviction and sentence, he preferred the instant appeal through Mr. Chacha Mwita from the firm of Kakai Mugalo Advocates who filed a petition of appeal dated 14.04.2022 citing the following grounds:

    i. That the trial magistrate erred in law and fact in admitting and proceeding with the trial on a faulty charge which did not reveal any known offence in law hence infringing the rights to fair trial of the appellant.

ii. That the learned trial magistrate erred in law and fact in failing to conduct an inquiry to ascertain the need for legal representation despite the seriousness of the alleged suspicions.

iii. That the learned trial magistrate erred in law and fact by entertaining extraneous and fanciful thoughts to justify the erroneous conviction, hence prejudicing the appellant having been denied bond in the first place.

iv. That the learned trial magistrate erred in law and fact by shifting the burden of proof on the appellant and by ignoring his defence.

v. That the learned trial magistrate erred in law and fact in preferring an illegal sentence not premised in law in associating terrorism to a religion that the appellant doesn't profess.

3. The court directed that the appeal be canvassed by way of written submissions. Learned counsel for the appellant while relying on the holding in the case of *Richard Baraza Wakachala v Republic* [2016] submitted that Section 30 of the *Prevention of Terrorism Act* does not create an offence neither does it provide for any punitive measures. It was argued that given that the appellant was not arrested in the soil of the Federal Republic of Somalia but in a guest house in Kenya, the said section as indicated on the charge sheet could not apply. He argued that the prosecution did not prove the allegation that the appellant was headed for Somali and even if the same were to be true, there is no way through which the appellant could be charged, convicted and thereafter sentenced for an offence that was yet to happen.

4. Counsel submitted that the fact that the trial magistrate disregarded the appellant's defence, the same led to him being condemned unheard. That the trial magistrate erred in interpreting the said section of the law and as consequence, reached an illegal determination. In conclusion, the appellant urged this court to allow the appeal, quash his conviction and set aside the sentence meted out by the trial magistrate.

5. The respondent represented by the learned counsel, Mr. Kihara submitted that the evidence by the prosecution was cogent and reliable in that the same demonstrated that the appellant had committed the offence herein. That the appellant was arrested in Masalani near Somali and he had admitted that he was heading there.

6. The respondent argued that the sentence invoked by the trial court was legal and appropriate bearing in mind the circumstances of the case and therefore, this court was urged to uphold the same. The respondent argued that the appeal herein was devoid of any merit and therefore ought to be dismissed.

7. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and re-analyse it and come to its own conclusions. Further, the court has to caution itself that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See *Okeno v R* (1972) EA 32; See also *Eric Onyango Odeng' v R* [2014] eKLR.

8. Brief facts of this case were that, PW1, IP Benard Cheruiyot a document examiner testified that he received the following documents from CPR Karani from Anti-Terror Unit: My map to where I will reach dated 28.05.2019; specimen handwriting marked B1-B4 belonging to the appellant and C1 and C2 as handwritings of the appellant. That he examined the same and reached a conclusion that the same had been made by the same person in this case the appellant. He produced the said report as Pex2.

9. PW2, IP Nathaniel Ambasa testified that on the material day, he received a call from the area chief Korisa Loc.to the effect that there was a suspicious person who was looking for directions to Hulugho. That after apprehending the appellant for interrogation, some particular items in his possession aroused his attention. He stated that the appellant had a sketch map- written 'my map to where I will

reach'; start of my journey will start at date 28.05.2019; a sketch map started from Muranga to Nairobi to Garissa to Hola to Masalani to Mapakani to Seidu to Sahara Desert and then to a place initialed as TW all the way to a camp of JJDSFA which is a circled place within a forest. That the appellant could not account why he was there and where he was going to.

10. PW3, PC Julius Muthama stated that he was the investigating officer in the matter and that on 25.05.2019, IP Naibei informed him of a suspect who had been arrested at Masalani. That he recorded statements from the officers who had brought in the suspect and amongst the items received were; a map of Africa and a map of where the suspect was coming from up to a destination known as JJDSFA which according to the map was in the bush. He stated that a multi-agency team was established which interrogated the suspect who had stated that he was heading for Somalia to look for work. On cross examination, he stated that the appellant did not have a passport to enable him travel to Somalia.

11. The trial court after having evaluated the evidence by the prosecution, placed the appellant on his defence.

12. DW1, the appellant herein stated that he was a businessman and that he had planned his trip sometime back to go to Tana River and so he noted down the places that he would go get the said goods from. That on arrival at Hola, a colleague informed him that he would get cereals from Masalani area. He further testified that on the very day that he was supposed to go to Masalani ya juu, it rained so heavily such that he decided to lodge at sunset Guest House and while there, he was arrested. He denied the charges herein and instead reiterated that he was simply a business man who was on his way to pick stock.

13. I have considered the grounds of appeal, the respective submissions, and the record of appeal. Issues that germinate for determination are; whether the prosecution proved its case beyond reasonable doubt, and; whether the sentence was manifestly harsh.

14. The appellant was charged with the offence of presumption of travelling to a country for purposes of being trained as a terrorist. Section 30C of the *prevention of Terrorism Act* provides that;

> " Presumption of travelling to a country for purposes of being trained as a terrorist
>
> 1. 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.

15. From the above provision, the discernable elements of the subject offence which the prosecution must prove are; that the accused must have travelled to a country designated as a terrorist training country; that the said country must be designated as such by the relevant cabinet secretary; that the travelling to that designated country must be through appoint of entry not designated as an entry or exit point by the immigration department; and that the purpose for travelling is presumed to be for training as a terrorist.

16. While interpreting Section 30C of the *POTA* Dulu J expressed himself in the case of *Pius Wambua & 5 others v Republic* [2017] eKLR 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.

17. Similarly, in Garissa Criminal Appeal No. 109 of 2015 *Richard Baraza Wakachara v Republic* it was stated 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."

18. Dulu J further reiterated this position in *Unknown alias Julius Yohana Mbunguni v Republic* [2018] eKLR where he stated held: -

> " 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."

19. In the instant case, the charges against the appellant may be inferred from Legal Notice 200/15 which provides that: -

> THE *PREVENTION OF TERRORISM 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 Secretory for Interior and Co-ordination of National Government.

20. The legal notice above includes Somalia as a designated terrorist training country and therefore operationalizes section 30C of *POTA*.

21. The evidence adduced by the prosecution was that the appellant was arrested on his way to Somalia. PW2 gave evidence of information that was extracted from the appellant to wit a sketch map- written 'my map to where I will reach' start of my journey will start at date 28.05.2019; a sketch map started from Muranga to Nairobi to Garissa to Hola to Masalani to Mapakani to Seidu to Sahara Desert and then to a place initialed as TW all the way to a camp of JJDSFA which is a circled place within a forest.

22. Further, that the appellant was asking for Hulugho and it turned out that there is no border point authorized by the government through Hulugho. That Hulugho is a government operation security area. The same was supported by the evidence of PW3 who stated that a multi-agency team was established to interrogate the appellant and wherein the appellant stated that he was going to Somalia to look for work; that he stated that he did not know anyone in Somalia. Further, that he was found with a leaflet of Holy Quran and the Bible which formed part of the paraphernalia terrorists normally use to spread their message.

23. From the onset, the onerous duty imposed upon the prosecution was to prove that the appellant had travelled to Somalia which had been designated by the cabinet secretary interior as a terrorist training country. The key ingredient of having travelled(crossed) to Somalia through an undesignated entry point was not proved to the required degree. The appellant was arrested within the Kenyan borders implying that the commission of the offence had not matured hence his premature arrest and therefore premature prosecution. There is no proof that the appellant had travelled to Somalia or at all.

24. In my view, Section 30C seems to target people who might travel to a country designated as a terrorist training country for training and then returned back to Kenya. Be that as it may, it is my finding that the elements under section 30C have not been established to the required degree. Had the trial court considered the said elements critically, he would have most probably arrived at a different conclusion.

25. As regards being found in possession of suspect materials associated with those of terrorism, prosecution produced some materials among them; a bible, Quran, map of Africa and some literature which the appellant did not dispute. Being in possession of a bible, a quran or map of Africa perse is not an offence. The same must have a nexus with terrorist activities. In the instant case, although some materials like the directional map drawn by the appellant was questionable, that alone can not stand in proving the offence at hand. It is common and normal for somebody to carry a bible or quran hence not culpable.

26. Regarding the question that the appellant was condemned unheard and that he was denied legal representation, the same is unfounded. The appellant had a choice to appoint counsel of his own choice to represent him hence the court was not to blame for not having an advocate. As to being condemned unheard, the record is clear that the appellant fully participated in the proceedings including giving a detailed defence. That ground is therefore untenable. On the question of being denied bond, it is not unusual as bail is not absolute.

27. In view of the above finding, it is my holding that the appeal herein has merit and the same is hereby upheld. Accordingly, the conviction herein is squashed and the sentence thereof set aside. Consequently, the appellant is set free unless otherwise lawfully held.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF OCTOBER 2023

J. N. ONYIEGO

JUDGE