



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 6 OF 2019

ABDUL HARUN KARIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Lamu Criminal

Case No. 266 of 2016 by Hon. T.A. Sitati (PM) dated 21st May 2019)

JUDGEMENT

1. The Appellant was charged with six counts of terrorism related charges. On the first count, he was charged with being a foreign terrorist fighter contrary to section 30D of the Prevention of Terrorism Act 2012. The particulars of the offence were that on the 9th May 2016 at Kiwayu village in Lamu East Sub-County within Lamu County, being a Tanzanian national was found to have entered Kenya for purposes of engaging in terrorist activities in contravention of the said Act.
2. On the second count, the Appellant was charged with presumption of travelling to a country for purposes of being trained as a terrorist contrary to section 30C of the Prevention of Terrorism Act 2012 in regard to legal notice No. 200/15. The particulars were that on the 9th May 2016 at Kiwayu village in Lamu East Sub-County within Lamu County was found travelling to Somalia, a country designated to be a terrorist training country without passing through designated immigration entry or exit points to receive training in terrorism in contravention of the said Act.
3. On the third to sixth counts, the Appellant was charged with collection of information contrary to section 29 of the Prevention of Terrorism Act 2012. The particulars were that on 9th May 2016 at Kiwayu Village in Lamu East Sub-County within Lamu County, in instigating the commission of a terrorist act he was found holding audio recordings namely 127.%20Ya%20Ayuha%20Shaheed; Ghuraba; OBrothers and; YaShaheedan which were in Huawei mobile phone model Y52C-U22 of IMEI (1)866729021588170 (2)866729021626806 with TIGO sim-card serial number 89255032094685168675 information for the use in commission of a terrorist act.
4. The prosecution called eight witnesses in support of its case. PW1, Superintendent William Ndirangu, formerly of County Criminal Investigation Office Lamu and was the officer who recorded the Appellant's confession. He stated that on 12th May 2016 Inspector Opagal (PW8) who was the officer in charge of the Anti-Terrorism Police Unit (ATPU) requested him to record the confession of a male suspect in custody. That he organised for Mr. Kenneth Njuguna, an advocate, to act for the suspect on pro-bono basis and to be present during the recording. That when the Appellant was brought before him, PW1 asked him to identify himself and the Appellant informed him that he was a Tanzanian national and was on his way to Somalia to join Al Shabaab. PW1 asked the Appellant whether he wished to record his statement to which the suspect agreed. PW1 further inquired if the Appellant wished to have anyone present during the recording of the statement but the Appellant did not have anyone and requested for a glass of water. PW1 testified that he cautioned the suspect that he would make a video recording of the suspect's statement and that the same would be used before him in a court of law. He further informed him of the charges preferable against him. PW1 stated that the Appellant was not under any duress, threat or promise.
5. PW1 informed the court that he recorded the confession in writing and in video. He then filled an out of court proforma for confession dated 12th May 2016 which he produced as P.Ex.1. He stated that he informed the Appellant of his rights during the exercise to which he had no objection and proceeded to sign the confession statement. Mr. Kenneth Njuguna advocate also signed the confession statement. PW1 also produced the confession as P-Exhibit 2.
6. In cross-examination, PW1 confirmed that he recorded the confession in the Appellant's presence and that his role was to record the Appellant's statement after which PW1 handed the confession to the investigating officer. In re-examination, PW1 stated that the Appellant voluntarily gave out the information which he recorded in writing. That Mr. Njuguna was present which was voluntary and that there were no complaints at the time of the recording.

7. PW2 was police constable Moses Kimansio F.No.72965 attached to ATPU at Kwale but was based at Kiungu. He stated that on 9th May 2016 at around 4:30pm he was informed by the DCIO that a suspect was being escorted to Kiunga Police Station from Kiwayu police Post. That he received the Appellant and interrogated him and learnt that his name was Abdul Harun Karim a Tanzanian citizen on his way to Somalia to join Al Shabaab militant group. That PW2 informed PW8 who in turn sent Cpl Atubwa (PW7) to pick the Appellant. That PW2 handed over the Appellant to PW7 together with his property under a handover note and thereafter recorded his statement.

8. In cross-examination PW2 stated that the Appellant did not have any travel documents and that it was the Appellant who informed him that he was on his way to join the Al Shabbab.

9. PW3 was Clarkson Baya who was the caretaker at Yumbe Guest House. He testified that on the 5th May 2016 while at work the Appellant was brought by a beach boy called Musa. That the Appellant liked room no 5 which he agreed to take at Ksh.1,500/-. That at the office he handed the Appellant a client registration form but the Appellant only filled his name as Abdul Karim but failed to indicate his identification card number or his passport number claiming he could not recall them off head and that he had lost his luggage on the way from Malindi. That when PW3 inquired how the Appellant managed to pass the roadblocks, the Appellant told him that he had explained himself and was let through.

10. PW3 further stated that the Appellant informed him the next day that he would spend an extra night before heading to Kiungu. That later that evening, the Appellant borrowed PW3's phone loaded airtime worth Ksh. 50, bought data bundles and went to the rooftop as there was poor internet connectivity at the reception. The Appellant returned PW3's phone later and went to sleep. That the next day the Appellant left for Kiungu at around 2:00p.m.

11. In cross-examination, PW3 stated that the Appellant spent two nights at the guest house and he was the one who registered him. He added that he had issued the Appellant with a receipt while he remained with a duplicate, which he handed over to the police together with the registration form.

12. PW4 was FNo.87647 PC Hassan Bunnun Muntet based at ATPU Headquarters as a translator and an analyst. He stated that he spoke Arabic having been raised in a Muslim family and he also produced a certificate in Arabic language (P.Ex. 6). He produced audio evidence of three Arabic poems which he recorded on a CD (P.Ex.7). He stated that he listened and translated the poems in print which he signed and certified the translations. He produced both the translations and certificate as P.Ex.8. He told the court that the poems were encouraging the listeners to slaughter people under jihad. He stated that the poems were extracted from the Appellant's mobile phone by IP Waringa (PW5) a cybercrime expert

13. In cross-examination PW4 stated that in the first "*sahidi*" in the poem referred to a martyr and in the context of the poem referred to a suicide fighter ready to die for their cause which in Islamic law meant a person ready to die for his beliefs. He stated that holy blood referred to the martyr's bloodshed in a suicide mission. On the second poem, PW4 stated that line 5 and 6 spoke of service to God and reading the Koran which was not a crime. While *ndugu* in poem 3 referred to brother though PW4 did not know the brother being referred to. PW4 stated that the poems incited listeners to kill others in the name of Islamic religion. In re-examination PW4 stated that he only translated what was in the audio and that only an Islamic law teacher could interpret the meaning of some words used in the poem.

14. IP Nicolas Waringa PW5 of the ATPU forensic lab at Nairobi testified as PW5. He stated that on 20th May 2016 he received an exhibit memo from PW7 requesting him to examine a Huawei mobile phone model Y52C-U22, IMEI No. 86672902/588170 and IMEI 2 86672902626806 with a Tigo micro sim-card serial number 892550320946851686.75 and a Zantel micro sim-card and a micro S.D card of 128 MB. That he examined the exhibits with a Cellebrite machine No.592250 and generated reports. He then prepared a computer forensics investigation report dated 2nd August 2016 (P.Ex.9) which he signed. He also printed the forensic and extracted audios in a CD (P.Ex.10). That the audios of interest were Islamic poems, Shahid, Guraba and one for all the brothers, which were translated by PW4. PW5 highlighted extracted text messages of importance being a draft message on page 15 and, messages 18, 21, 24 and 28 on page 16. PW5 also highlighted a screenshot of a google map searching for Kisimayu which was on page 19 of the report. PW5 produced a Huawei mobile phone (P.Ex.3), two sim-cards, Tigo and Zantel respectively (P.Ex.4A & 4B) and a micro S.D card (P.Ex.5).

15. In cross-examination PW5 stated that the messages belonged to a terrorist sympathiser. He further stated that there were 8 audios and that the audios translated by PW4 encouraged suicide missions. PW5 said that the messages 120 to P8 on page 12 of the report were from Athu telling the Appellant not to follow the messages of Aboud Rogo. PW5 told the court that Aboud Rogo was an Islamic fundamentalist who incited East African youth to join terrorist activities against the Kenyan government. He stated that the screenshot on page 20 showed Kenya and Somalia and that the search entry showed Kisimayu.

16. PW6, PC Anthone Khaayo FNo. 100703, was based at Kiwayu Police Post which was under Kiunga Police Station. He testified that on 9th May 2016 at around 10am two young men brought the Appellant to the post because the Appellant had requested them to take him to Mwambore but they instead chose to hand him over to the police. That PW6 interviewed the Appellant who informed him that he was going to Mwambore to collect a precious cargo. The Appellant did not have any identification documents and when PW6 inquired how the Appellant had by passed the police roadblocks, the Appellant showed him a printed map which showed a route from Siyu to Kizingitini bypassing Ndau. PW6 stated that he was suspicious of the Appellant as he knew there were only four houses in Mwambore which were used by deep-sea fishermen. He arrested and booked the Appellant and escorted him to ATPU officers for processing.

17. In cross-examination, PW6 reiterated that he arrested the Appellant on 9th May 2016. He disputed that the two young men were vital witnesses as they only brought the Appellant to the police post. PW6 stated that the map the Appellant showed him was not on his phone and admitted that it was not a crime for a stranger to ask for directions from a police officer. In re-examination PW6 stated that the map he referred to was not printed and that he had deduced from the description of the route taken. He told the court that a new person at Kiwayu was required to pass through the police station if he was visiting the island.

18. PW7, Cpl Zablon Atubwa attached to the ATPU was based at Linda Boni Operation Centre at the KDF Military Camp in Boni Forest. He

told the court that on 10th May 2016 he received a call from IP Opagal who ordered him to escort a male suspect who had been arrested at Kiwayu from Kiungu Police Station to Lamu. The next day, 11th May 2016, PW7 took custody of the suspect (now Appellant) from PW2. He also received the Appellant's belongings and a handover note (P.Ex.12). He then escorted the Appellant to Lamu Police Station and handed him over to PW8. He subsequently prepared an exhibit memo (P.Ex.11) and forwarded the phone, sim-cards and micro SD card to the Cybercrime unit in Nairobi. In cross-examination PW7 stated that he interviewed the Appellant who informed him that he was heading to Somalia. PW7 stated that he could not record a confession as only an officer in the rank of an Inspector or above was permitted to record a confession.

19. PW8, IP Eric Opagal, the in-charge of the ATPU in Lamu was the investigating officer. He told the court that on 5th June 2016 PW2 informed him that a suspect had been arrested at Kiwayu with material suspected to be related to terrorism. He instructed PW2 and PW7 to escort the suspect to Lamu. That he questioned the Appellant at Lamu Police Station and when the Appellant started opening up about his role PW8 observed that the Appellant was actually giving a confession. PW8 alerted PW1 and informed the MUHURI organization (Muslims for Human Rights) to be part of the process. PW8 reiterated the Appellant's confession on the Appellant's movement and his background. PW8 further told the court that the Appellant's phone was analysed and various recordings and text messages, which showed that the Appellant had collected information related to terrorist activities. PW8 further testified that he contacted the Immigration Department and ascertained that there was no entry indicating that the Appellant had lawfully entered Kenya. That he subsequently preferred charges against the Appellant based on the evidence collected.

20. In cross-examination PW8 stated that PW2 alerted him that the Appellant was arrested at Kiwayu while inquiring on how to get to Somalia without valid travel papers. He stated that the two young men who took the Appellant to the police post were not called as witnesses as they were not important to the case. At the Appellant's request, PW4's translation of shairi No. 1 was read out to PW8. PW8 said that he could not tell the meaning of the shairi (poem) but only knew that the Shahidi was a suicide attacker who would get 72 virgins after suicide. PW8 further stated that PW4 did not know the meaning of some of the recordings and that he did not have evidence in support of count 6 as PW4 failed to produce evidence for the said count. PW8 told the court that he did not have evidence that the Appellant had communicated with a militant group or the Al Shabaab.

21. In re-examination PW8 said that the Appellant had freely confessed to PW1 and an activist from MUHURI. He stated that Somali was a terrorist trainer country and which country the Appellant confessed he was headed to contrary to section 30 of the POTA. He told the court that the Appellant did not pass through any designated immigration entry or exit points and that section 30 of the POTA presumed a person to be a terrorist if he travelled to Somalia through unauthorized boarder points. In regards to count 3, 4, 5, and 6, PW8 stated that the translated messages were information for radicalization and teachings of terrorist acts and that section 29 of the POTA had elements of holding, transmitting, generating and collecting information as ingredients of the offences.

22. At the close of the prosecution case, the trial court found that the Appellant had a case to answer and put him on his defence.

23. The Appellant gave a sworn statement and stated that he was a Tanzanian from Pongwe village in Tanga, Tanzania and that he had completed his studies in laboratory technology at St. John's University at Dodoma. He stated that he entered Kenya on the 5th May 2016 with the aim of going to Lamu for religious studies and arrived in Lamu on the 6th May 2016. That on the 7th May 2016 he met with one Faruk who gave him a tour of the schools in which he could get religious training. That on the 8th May 2016 he went to Faza for a tour and lodged there. That the next day, 9th May 2016, he took a fishing boat to Lamu but the boat headed to Mkokoni on a fishing trip and they dropped him at Kiwayu Island. That at Kiwayu he met two youngmen to whom he explained that he wished to go Lamu. That they took him to Kiwayu Police Post to get assistance at which point he realised that he had left his bag on the fishing boat but unfortunately the fishing boat had already left.

24. The Appellant further testified that he explained his situation to the police. That the police officers interviewed and searched him and told him that they could not handle his situation and then took him to Kiungu Police Station where he was questioned by PW2 and thereafter taken to Lamu Police Station and handed over to PW1 and PW8. The Appellant stated that PW1 and PW8 told him that he was lying about his true mission and that they had handled many young men like him headed to Somalia only to be arrested. The Appellant claimed that PW1 and PW8 threatened to make him disappear and told him that he could not be saved.

25. In cross-examination, the Appellant admitted that he had left Tanzania without a valid immigration permit and stated that it was normal for villagers to cross over to Kenya as they lived close to the border. He stated that he planned to be in Kenya for a maximum of one week to seek for religious studies for which Lamu was famous. He explained that the application process for religious studies was that an applicant met with the religious teacher, he admitted that he never met with any religious teachers. The Appellant said that before boarding the fishing boat, he was informed that the boat was heading to Mkokoni. He said that when passing through the military roadblocks he had a chief's letter and his Tanzanian I.D. card, which he lost on the boat to Mkokoni.

26. On the issue of the confession, the Appellant stated that PW1 and PW8 interviewed him and that he had voluntarily signed. He stated that he was not beaten to reveal his family background and that he had voluntarily gave information about his brothers Yassin and Halfan. He stated that his older brother, Yassin, went to Somalia around 2010/2011 for an unknown mission but denied ever communicating with him. He further stated that he informed his brother Halfan through Facebook that he was headed to Somalia.

27. On the messages adduced by PW5, the Appellant admitted that the messages were from his phone and that the police saw the messages when he turned on his phone. That he had sent messages to his friend Athu speaking on jihadist fighters and non-believers. He further said that he had read messages of Sheikh Kassim Mafuta and Aboud Rogo but denied Aboud Rogo was a terrorist supporter. The Appellant admitted that he had tried sending a message to his father informing him that he was arrested on his way to Mwambore. However, he told the court that the message was meant to deceive his father about his mission in the hope that his father would save him from the police. He denied knowing Mwambore or speaking of any cargo but admitted that Mwambore appeared on the map found on his phone as well as Kisimayu and Ras Kambino.

28. At the end of the trial, the Appellant was found guilty on all six counts and was convicted and sentenced to imprisonment for 30 years on

count one, 20 years on the second count and 15 years each on count three to six. Count one and two were to be served concurrently while count three to six were to be served concurrently but consecutive to count one and two.

29. The Appellant was aggrieved by the conviction and sentence and lodged his appeal on 30th May 2019 on six grounds. However, on the 7th February 2020 when the matter came up for hearing, the firm of Kaikai Mugalo & Co. Advocates through learned counsel Chacha Mwita, came on record as pro-bono advocates for the Appellant and filed an amended Petition and grounds of appeal together with written submissions. The amended appeal listed eight grounds reproduced as follows:-

- i. The Hon. Magistrate erred in both law and fact by convicting the Appellant on the basis of contradictory and inconsistent evidence that lacked corroboration.
- ii. The learned Hon. Magistrate erred in both law and fact by convicting the Appellant on cooked up and fabricated evidence by the prosecution.
- iii. The learned Hon. Magistrate erred in both law and fact by convicting the Appellant by relying on an illegal confession which was never corroborated by independent evidence.
- iv. The learned Hon. Magistrate erred in both law and fact by convicting the Appellant without establishing mens rea and actus reus in relation to the offences as charged.
- v. The learned Hon. Magistrate erred in both law and fact by convicting the Appellant while the prosecution had failed to prove their case beyond reasonable doubt.
- vi. The learned Hon. Magistrate erred in both law and fact by failing to make a finding that the prosecution failed to call material witnesses whose evidence were not availed which was detrimental to the prosecution's case; that
- vii. The learned Hon. Magistrate erred in both law and fact by convicting the Appellant without considering the strong, unrebutted and unshaken defence put forth by the Appellant, hence arriving at a wrong conclusion in law.

30. When the appeal came up for hearing on 6th July 2020 both parties elected to rely on their submissions. In summary, the Appellant's submissions were to the effect that the prosecution failed to prove its case and that the case was purely premised on suspicion since the Appellant a Tanzanian national, was unlawfully in Kenya when he was arrested in Lamu. That there was no evidence of military training nor was there a direct link established between the Appellant and Al Shabaab. He argued that the evidence by PW6 that information on his phone was deleted took away the credibility of PW5 and PW8. It was his contention that that the prosecution failed to prove mens rea and actus reus, and further failed to prove all the ingredients of the offence thereby failing to discharge the burden of proof. He placed reliance on **Kevin Kiswiki Kyongi vs Republic (2018) eKLR**.

31. The Appellant faulted the prosecution for failing to call the persons who took the Appellant to the police station as they were crucial witnesses. He urged that the failure to call the said witnesses led to an adverse inference against the prosecution.

32. It was the Appellant's submission that the confession he allegedly made was inadmissible as it was stage managed and in contravention of sections 24, 25 and 25A of the Evidence Act, (Out of Court Confessions Rules) and Articles 49 and 50 of the Constitution of Kenya. It was submitted that the recording officer called a lawyer of his choice to be present but the said lawyer was never called as a witness. Further, the Appellant contended that the confession was retracted when he pleaded not guilty and even if the confession was to be deemed admissible, there was need for independent corroborative evidence as was held in **Ogero Omurwa vs R [1979] eKLR**.

33. The Appellant further submitted that there was variance between the evidence of the witnesses before and after the hearing started de novo under section 200 of the CPC, which amounted to a major contradiction thereby weakening the prosecution's case. He relied on **Stanley Wainaina Mwaura v R [2016] eKLR**.

34. The Respondent filed its submissions on the 21st May,

2019 opposing the appeal in its entirety. It was the Respondent's submission that the charges were properly laid and any issue arising from the charges ought to have been raised by the Appellant once the charges were read to him in line with section 275(1) of the CPC. Further, it was submitted that under section 90(1) of the CPC the validity of the proceedings shall not be affected unless it occasioned a failure of justice or prejudice against the Appellant which was not the case in this appeal.

35. Secondly, it was submitted that the Appellant pleaded guilty to being in Kenya illegally and therefore no appeal can lie from an accused's own plea of guilty. That the procedure for recording a plea was adhered to as set out in the case of **Adan versus Republic (1973) E.A.445**.

36. On the age of the Appellant, it was submitted that there was no evidence that he was a minor and failure to raise the issue of age during sentencing must be construed as an afterthought. Lastly, the Respondent submitted that the right to legal representation was not absolute. It was contended that due to the circumstances of the Appellant's case at the trial court, the prevalence of security threats at the time and the Appellant's own plea of guilt, no failure of justice was occasioned by lack of legal representation. The court was urged to uphold the conviction and dismiss the Appeal.

37. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and 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**.

38. I have considered the grounds of appeal, the respective submissions, and the record. The issues for determination are whether the confession allegedly made by the Appellant was admissible; whether the prosecution proved its case beyond reasonable doubt, and; whether the sentence was manifestly harsh.

The Confession

39. The prosecution relied on a confession allegedly made by the Appellant. **Section 25** of the Evidence Act defines a confession thus:-

“25. A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

40. In **Sango Mohamed Sango & Anor V. Republic, (2015) eKLR**, the court of appeal clarified section 25 of the Evidence Act as follows: -

“Broad as section 25 appears to be, a confession must still be sufficiently clear that the accused person admits all the elements of the offence charged. As the former Court of Appeal for Eastern Africa stated in REX V. KITUYAN S/O SWANDETTI (1941) 8 EACA 56, a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence.”

41. On the admissibility of the confession, the Appellant's counsel submitted that the confession stood repudiated and or retracted when the Appellant pleaded not guilty. He contended further that the confession did not adhere to the Evidence Out of Court Confession Rules, 2009.

42. In this case, there is no evidence that the Appellant repudiated or retracted his confession during the trial. He belatedly in his defence stated that PW1 and PW8 had told him that they could make him disappear without trace. However I must re-look the confession to confirm whether or not it was taken in compliance with the law. As stated by the court of appeal in **Sango Mohamed Sango (supra)** ***“the trial court must be convinced first about the voluntary nature of the confession and secondly that the confession has the ring of truth.”***

43. The confession statement was taken by SP William Ndirangu then C.C.I.O, Lamu. In his evidence he stated that he requested an advocate one Mr. Njuguna and an official of MUHURI to be present. This evidence was not contradicted or challenged. I find that the recording officer was of the required rank and that there was 3rd Party presence as required by the law.

44. Further PW1 produced the proforma confession (P-Exhibit No.1) which gives the personal data of the Appellant, details of when the confession was taken, the caution and the certificate signed by all the parties. My scrutiny of P-Exhibit 1 shows substantial compliance with the law. The confession statement (P-exhibit No. 2) is 5 pages and bears two signatures on every page, indicated as that of the recording officer and the suspect, as well as the mandatory certificate which is duly signed as required.

45. I have come to the conclusion that the confession was admissible and that the trial court was not in error when it admitted it. I must dismiss the Appellant's allegation during his defence that PW1 and PW8 had threatened him as an afterthought. He did not make any such insinuation in the course of the prosecution case and particularly when cross-examining the two witnesses. The trial court was therefore not obligated to hold a trial within trial. It must be observed that the Appellant had legal representation during his trial.

46. It would however be unsafe to make a finding of guilt on the basis of a confession alone. There must be other corroborative evidence. In **Patrick Mwangi Weru Vs. Republic HCCRA No. 103 of 2004, (2013)eKLR**, the court of appeal stated that a court must exercise great caution before proceeding to convict on a retracted confession. Stating that a trial court must look for independent corroborative evidence, the court went on to cite the case of **Tuwamoi – v- Uganda (1967) EA 84,91**, where it was stated:-

“A trial court should accept any confessions which has been retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all material points and surrounding circumstances that the confession cannot be but true.”

47. I will now analyse the evidence to see if the various charges are supported and proved beyond reasonable doubt.

48. On the first count of the amended charge sheet, the Appellant was charged with being a foreign terrorist fighter contrary to section 30D of the Prevention of Terrorism Act 2012 which provides that:-

A person who is not a Kenyan citizen who enters or passes through Kenya for purposes of engaging in terrorist activities in Kenya or elsewhere commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding thirty years.

49. From the section the elements of the offence are that, firstly, the accused is not a Kenya citizen, and; secondly that the accused person either entered Kenya to engage in terrorist activities or, is passing through Kenya for purposes of engaging in terrorist activities in another country.

50. In this case the prosecution proved that the Appellant was a Tanzanian national who was arrested in Kiwayu in Lamu County, Kenya.

Indeed the Appellant himself admitted in his defence that he was a Tanzanian national. The only issue in this charge is to determine whether he was engaging in terrorist activities within Kenya or intending to engage in terrorist activities in another country.

51. Section 2 of the POTA defines terrorist acts as:-

an act or threat of action—

(a) which—

(i) involves the use of violence against a person;

(ii) endangers the life of a person, other than the person committing the action;

(iii) creates a serious risk to the health or safety of the public or a section of the public;

(iv) results in serious damage to property;

(v) involves the use of firearms or explosives;

(vi) involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;

(vii) interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;

(viii) interferes or disrupts the provision of essential or emergency services;

(ix) prejudices national security or public safety; and

(b) which is carried out with the aim of—

(i) intimidating or causing fear amongst members of the public or a section of the public; or

(ii) intimidating or compelling the Government or international organization to do, or refrain from any act; or

(iii) destabilizing the religious, political, Constitutional, economic or social institutions of a country, or an international organization:

Provided that an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm referred to in paragraph (a)(i) to (iv);

52. In the present case, no evidence was adduced that the Appellant committed or was planning to commit any of the terrorist acts as listed. The evidence adduced by the prosecution was that the Appellant was unlawfully in Kenya and was attempting to go to Somalia. When cross-examined, the investigating officer, admitted that there was no evidence that the Appellant had communicated with any militant group or the Al Shabaab. Besides, the record shows that the Appellant had been charged and convicted of the offence of being illegally in Kenya. Count 1 cannot therefore stand. The charge under section, 30D was not sufficiently proved.

53. On the second count, the Appellant was charged with presumption of travelling to a country for purposes of being trained as a terrorist contrary to section 30C of the Prevention of Terrorism Act 2012 in regard to legal notice No. 200/15. The Appellant submitted that the said provision only created a presumption, which was not an offence, and therefore he could not be found guilty.

54. Section 30C of the POTA was examined by this court in **Pius Wambua & 5 others v Republic [2017] eKLR** where Dulu J stated that:-

“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.”

Indeed, in **Garissa Criminal Appeal No. 109 of 2015 Richard Baraza Wakachara Vs. Republic** this court 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.”

55. 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.”

56. In the present suit, the charges against the Appellant referred to 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 Secretary for Interior and Co-ordination of National Government.

57. The legal notice above includes Somalia as a designated terrorist training country and therefore operationalizes section 30C of POTA. There is also no doubt that the Appellant had entered Kenya without passing through a designated entry point. When he was first arraigned in court, the Appellant pleaded guilty to being in Kenya unlawfully contrary to section 53 of the Immigration and was sentenced to two years imprisonment.

58. The evidence adduced by the prosecution was that the Appellant was arrested on his way to Somalia. PW5 gave evidence of information that was extracted from the Appellant’s phone among it was a google map searching for Kisimayu in Somalia and displayed various points including Mwambore, Kiwayu and Ras Kamboni. This was supported by PW2’s evidence that the Appellant was arrested at Kiwayu as he sought a way to go to Mwambore. The Appellant’s defence that he did not know Mwambore and that he got lost on his way to Kiwayu is clearly a lie. PW5 adduced in evidence that the Appellant had drafted a text message to his father informing him he had been arrested on his way to Mwambore. The Appellant in cross-examination admitted writing the draft text message. In addition, the Appellant further admitted during cross-examination that he informed his brother, Halfan, through Facebook that he was going to Somalia.

59. The evidence above clearly corroborates the Appellant’s confession in which he confessed that he planned to go to Somalia so he could live an Islamic life under an Islamic led country.

60. The totality of the evidence above proves Count II beyond reasonable doubt being that the Appellant entered Kenya illegally and was illegally trying to go to Somalia for purposes of training as terrorist. The Grounds (ii) and (v) of the appeal therefore fail.

61. On counts 3 to 6 the Appellant was charged with the collection of information contrary to section 29 of the Prevention of Terrorism Act 2012.

62. The elements of the offence under section 29 of the POTA were interpreted in the case of **Mohamed Abdi Adan v Republic [2017] eKLR** where Ngenye-Macharia J stated that:-

My understanding of the provision is that in establishing the offence, the prosecution must prove that a member of a terrorist group, or other person, in committing or in instigating, preparing or facilitating the commission of a terrorist act does any of the following;

- Holds

- Collects

- Generates, or

- Transmits information of a terrorist act.

Therefore, in the first scenario the prosecution is mandated to prove the following elements; that the accused was affiliated to a terrorist group and in that capacity he either held, collected, generated or transmitted information and finally that this information was used in instigating, preparing or facilitating the commission of terrorist acts. The second scenario involves proving that the accused in any other capacity other than being a member of a terrorist group held, collected, generated or transmitted information and secondly that the information in question was used in instigating, preparing or facilitating the commission of terrorist acts.

63. In the present case having found that the Appellant was not a terrorist, the second scenario applied. On count 3 to 5, PW5 adduced evidence that the audio recordings were extracted from the Appellant's phone using logical system. The Appellant did not refute that the phone was his or that the audio recordings found in his phone were falsified, he instead chose to cross-examine the witnesses on the meanings of the audio recordings/poems which were in Arabic language.

64. No. 87647 PC Hassan Bunu (PW4) testified that he had translated the poems. He produced his Arabic language qualification (P-exhibit No. 6) and the translations and certificate (P-exhibit 8) PW4 admitted that he did not understand the meaning of all the words in the audios but that the poems were meant to incite the listeners to die for their cause. In summary the 4 poems were:-

(i) *Shaheed*: which speaks of spilling blood and the joy of being engaged in spilling blood.

(ii) *Ghuraba* which speaks of being a soldier and fighter who do not fear rebellious people, who do not fear imprisonment or jail who will fight to the end.

(iii) *Enyi Ndugu* (oh brothers) which speaks of heeding the call to unite and achieve their goals.

(iv) The other poem was *Yalshaheedan*.

According to PW4, the clear message from these poems was that a terrorist fighter had to instigate direct murderous violence against their targets in the name of Islamic religion. All the recordings were saved in the Appellant's phone Huawei Phone Model Y52C – U22 IMEI 86672902158817 and 86672902162806 (Exhibit No. 3). The audio recordings amounted to collection.

65. PW5 produced a Computer Forensic Examination Report (Prosecution Exhibit 9) which detailed findings from a forensic examination of the Appellant's phone P-Exhibit No. 3, sim cards Exhibits No. 4A and 4B respectively and Micro SD Card (P-Exhibit 5). The Appellant did not try to give a contrary explanation. He also did not deny that the phone, sim cards and audio-recordings were his. In cross-examining PW5 he only dwelt on the meaning of the messages. From the translation of the audio poems recovered, it is clear that they are being used to encourage the listeners to be willing to do anything and be prepared to be martyrs for their fight against non-believers. This evidence coupled the text messages adduced by PW5 and the Appellant's own admission that he was a follower of the teachings of Aboud Rogo, who was widely known to have radicalised teachings about terrorist acts, leads to the inference that the poems were meant to instigate commission of terrorist acts. I find the evidence sufficient to prove that the Appellant held, collected, generated or transmitted information for use in the preparation or commission of a terrorist act, an offence under Section 29 of the Act. The 3rd, 4th, 5th and 6th counts were therefore proven. Grounds IV, V and VII of the appeal must therefore fail.

66. The Appellant submitted that there was material contradiction between the evidence first given in court and when the case started de novo. That the contradictions clearly exposed the witnesses as untrustworthy. That the case was full of contradictions, inconsistencies and lack of corroboration. This submission brings to observation two issues. Firstly is whether the parties having started the case de novo were bound by the evidence given in the earlier case, and; Secondly whether the contradictions and inconsistencies if any, were material.

67. On the first issue, it is clear that de novo means a fresh start. It means the earlier proceedings will not form part of the new proceedings. I have therefore looked at the 'new' proceedings to see whether there were any contradictions and inconsistencies. I have however found no material contradictions that would affect the substance of the case and for this reason this ground fails. I am guided by the Court of

Appeal decision in **Jackson Mwanzia Musembi Vs Republic(2017) eKLR** which cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda , Cr. Appeal No. 139 of 2001 [2003] UG CA,6)** that:-

“with regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”(Emphassis mine)

68. On whether the failure of the prosecution to call the two young men who took the Appellant to the police post at Kiwayu was fatal, it is trite that there is no requirement that the prosecution should call any particular number of witnesses to prove its case. This is buttressed by Section 143 of the Evidence Act which provides that:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

69. The question is whether the evidence of the two young men was crucial in the determination of this case. The only evidence that the two young men could give was the reason as to why they led the Appellant to the police post at Kiwayu and what the Appellant had told them. However, as already demonstrated in this judgement, the prosecution adduced more than sufficient evidence to prove that the Appellant was not lost but was trying to find a way into Somalia and therefore this ground must fail.

Appellant’s defence

70. The Appellant admitted in his sworn defence that he had travelled into Kenya on 5th May 2016 and lodged in Mombasa on 6th May 2016 before arriving at Lamu on 6th May 2016. He said that he was on a mission to find a school for religious teaching. The mission took him to Faza and Kiwayu where he met two young men who escorted him to Kiwayu police post to seek assistance to return to Lamu as it turned out that the boat he had boarded was heading to Mkokoni.

71. I have closely considered the Appellant’s defence. Other than his explanation of why he was in Kenya, he made material admissions. Firstly, he admitted to being in Kenya illegally. Secondly, he admitted to having evaded security checks all the way to Lamu. Thirdly, he admitted that he had given a confession statement to the police and that he signed it voluntarily and fourthly, he admitted having authored the SMS messages on jihadist fighters and war which he sent to his friend Athu; and lastly that he had searched google maps for directions to Somalia.

All these admissions lend corroboration to the prosecution case which I have already found proven.

Sentence

72. In the final analysis, I come to the conclusion that the case against the Appellant was proved to the required legal standard.

73. The only other issue is whether the trial magistrate erred in ordering that the sentences in count 3 to 5 were to be served consecutive to sentences in count 1 and 2. Section 14 of the CPC provides:-

(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

74. The Judiciary sentencing policy guidelines, 2016 state that:

7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.

7.14 The discretion to impose concurrent or consecutive sentences lies in the court.

75. The Court of Appeal in **Peter Mbugua Kabui vs Republic [2016] eKLR** pronounced itself thus:-

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

76. In this case, the offences charged in the six counts were committed in the same transaction when the Appellant illegally entered Kenya. The trial court therefore erred in imposing consecutive sentences. Accordingly, I set aside the consecutive sentences and substitute the same with an order that the sentences shall run concurrently.

77. The appeal succeeds to the extent only that the conviction and sentence on Count 1 is set aside. The conviction on Count 2, 3, 4, 5 and 6 is upheld. The Appellant shall serve 20 years’ imprisonment for Count 2 and 15 years imprisonment each on Count 3, 4, 5 and 6. The

sentences shall run concurrently from the date of conviction and sentence. The Appellant shall be repatriated to Tanzania after serving his sentence.

78. The Appellant has 14 days right of appeal.

79. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED THIS 3RD DAY OF JUNE, 2021.

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R. LAGAT KORIR

JUDGE

In the presence of Appellant linked at Shimo la Tewa Prison, Mr. Chacha Mwita Appellant's counsel, and in the absence of Prosecution.

Judgment emailed to the parties: cmwita@gmail.com