



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 23 OF 2019**

**MAHFUDH ASHUR HEMED.....1<sup>ST</sup> APPELLANT**

**IBRAHIM MAHFUDH ASHUR.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment of M.N Gicheru (Mr.) Chief Magistrate as he then was delivered on 5<sup>th</sup> of February, 2019 by Hon. Makori (Mr.) Chief Magistrate in Mombasa CMCRC No. 2380 of 2008).*

**JUDGMENT**

1. The appellants herein were accused persons in Mombasa CMCR No. 2380 of 2008 in which they were charged in five counts with the following offences: in count I, they were charged jointly with LUTFIYA ABUBAKAR BASHRAHIL with the offence of accessory after the fact to murder contrary to section 222 of the Penal Code.
2. The particulars were that the appellants well knowing that Fazul Abdulla Mohamed alias Mohammed Abubakar Ali alias Adan Hussein Ali Mirza alias Abdulla Mohammed Fazul alias Abdul Kareem alias Haron Fazul did on the 7<sup>th</sup> August, 1998 in Nairobi murdered 219 people did in the month of December, 2007 in Malindi district within Coast province and on the days thereafter receive comfort harbour assist and maintained the said Fazul Abdulla Mohammed in order to enable him escape punishment.
3. The second count they were also charged with offence of accessory after the fact to murder contrary to section 222 of the Penal Code. The particulars were that the appellants jointly with LUTFIYA ABUBAKAR BASHRAHIL well knowing that Fazul Abdulla Mohamed alias Mohammed Abubakar Ali alias Adan Hussein Ali Mirza alias Abdulla Mohammed Fazul alias Abdul Kareem alias Haron Fazul did on 28<sup>th</sup> November, 2002 at Kikambala Paradise Hotel in Kilifi district within Coast province murder 15 people did in the month of December 2007 in Malindi district within Coast Province and on the days thereafter receive comfort harbour assist and maintained the said Fazul Abdulla Mohammed in order to enable him escape punishment.
4. The third Count, they were charged with the offence of harbouring a person who is unlawfully present in the country contrary to section 13 (2) (d) of the Immigration Act Cap 172 Laws of Kenya. The particulars were that the appellants together with LUTFIYA ABUBAKAR BASHRAHIL on unknown dates between the months of December, 2007 and 2<sup>nd</sup> August, 2008 at Silver Sand estate in Malindi district within Coast province harboured one Fazul Abdulla Mohamed alias Mohammed Abubakar Ali alias Adan Hussein Ali Mirza alias Abdulla Mohammed Fazul alias Abdul Kareem alias Haron Fazul whom you had reasonable cause to believe had committed an offence of being unlawfully present in Kenya.
5. The fourth count, the appellants were charged with offence of stealing contrary to section 275 of the Penal Code. The particulars were that on the 13<sup>th</sup> day of March, 2008 at Kilimanjaro lodge in Eastleigh within Nairobi province jointly with others not before Court stole a Kenyan Passport No, 545187 the property of Ali Mohammed Abubakar
6. In the alternative to count IV, the appellants were charged with the offence of handling stolen goods contrary to section 322 (1) of the Penal Code. the particulars are that on the 2<sup>ND</sup> day of August, 2008 at Maweni estate in Malindi district of the Coast province otherwise than in the course of stealing dishonestly assisted in the retention of a Kenya passport No. A545187 in the names of Ali Mohammed Abubakar having reason to believe it to be stolen.
7. In the fifth count, the appellants were charged with the offence of making a false document contrary to section 347 (b) of the Penal Code. The particulars were that on unknown dates between 3th March, 2008 and 2<sup>nd</sup> August, 2008 at Maweni estate in Malindi district within Coast province jointly with others not before court altered a Kenyan Passport No. 545187 in the names of Mohammed Abubakar Ali without authority by substituting a passport size photograph purporting it to belong to the said Mohammed Abubakar Ali.

8. The evidence of prosecution witnesses was taken by Hon. Mutende Chief Magistrate (as she then was) save for the evidence of PW37 which was taken by Hon. Riechi CM and upon the appointment of the two trial Magistrates to the office of Judges of the High Court Hon. Gicheru CM (as he then was) took over and heard the defence of the appellants and their two witnesses.

9. Based on the prosecution's evidence as well as the defence case and submissions of respective parties Hon. Gicheru convicted the two appellants in Counts I-III. The 2<sup>nd</sup> accused person having passed on in the course of the trial. He also convicted the 1<sup>st</sup> appellant in Count IV for stealing contrary to section 275 of the Penal Code. Both appellants were acquitted in Count V for the reasons that section 347 (1) of the Penal Code under which the appellants were charged is a definition section and does not create an offence. He said the offence is created by section 357 of the Penal Code.

10. The trial magistrate believed the prosecution's case for reasons that police officers who were involved in the recovery of exhibits did not know the appellants before 2<sup>nd</sup> August, 2008 and there was no time for the police officers to plant any of the items recovered. He also found that there was no reason as to why all the Anti-Terrorism Police Officers from Malindi and Mombasa would descend on the home of an ordinary family in Malindi and accuse them of hiding the most wanted terrorist in this region and then claim to have recovered material that was non-existent. He was convinced that the police officers acted on intelligent information which led them to the discovery and that they had no malice or any reason to implicate the innocent people.

11. According to the trial magistrate the exhibits recovered was conclusive proof that a Fazul Abdulla Mohammed was at the appellants' house. He also found that the appellants 'ought to have explained how suspect material came into their possession. He believed the appellants knew Fazul and that he was a terrorist wanted for the US Embassy and Paradise hotel bombings and that the Friday bulletins containing Fazul's picture and stories of suicide bombers were clear proof that the appellants were closely monitoring terrorism issues in the word in general and in Kenya in particular.

12. Having convicted the appellants, sentencing proceedings were undertaken on 7<sup>th</sup> February, 2019 by Hon. E.K Makori CM who sentenced the two appellants in Count I & II to life imprisonment, in Count III they were each fined then thousand Kenya Shillings in default six months' imprisonment, in Count IV, the 1<sup>st</sup> appellant was sentenced to serve 1-year imprisonment.

13. Being aggrieved by the trial Magistrate's decision the appellants filed separate petitions of appeal on 18<sup>th</sup> February, 2019 by different Counsel but with similar grounds. The grounds are consolidated as follows;

1. That the Learned Trial Magistrate erred in law and fact in proceeding with the matter to conviction on a charge that was defective.
2. That the Learned Trial Magistrate erred in law and fact in convicting the appellants as accessories after the fact to murder based on an assumption that one Fazul Abdulla Mohammed murdered 219 people on 7<sup>th</sup> August, 1998 in Nairobi and 15 people on 28<sup>th</sup> November, 2002 at Kikambala Paradise Hotel Kilifi district.
3. That the Learned Trial Magistrate erred in law and fact by convicting the appellants as accessories after the fact to murder despite the prosecution failure to prove beyond reasonable doubt the essential ingredients of an accessory after the fact.
4. That the Learned Trial Magistrate erred in law and fact in finding that there was theft yet there is clear evidence to the contrary.
5. That the Learned Trial Magistrate erred in law and fact by convicting the appellants as accessories after the fact based on belief despite the fact that the learned magistrate only handled the defence case.
6. That the Learned Trial Magistrate erred in law and fact by failing to analyse based on evidence and not belief the recovery process and the chain of custody of the flash disk, the shaver, the Friday bulletins and passport No. A545187 allegedly recovered from the appellants.
7. That the Learned Trial Magistrate erred in law and fact by convicting and sentencing the appellants entirely based on belief and not evidence on record for a trial that proceeded for over 11 years.
8. That the Learned Trial Magistrate erred in law and fact and misdirected the Court by holding that the material allegedly recovered from Friday Bulletins, the 912 pages in the flash disk, the shaver and the passport proved conclusively that Fazul Abdulla Mohammed was at the home of the appellants.
9. That the Learned Trial Magistrate erred in law and fact by holding that one Fazul Abdulla Mohammed was ever in the appellants' house.
10. That the Learned Trial Magistrate erred in law and fact by holding that the appellants knew that one Fazul Abdulla Mohammed committed mass murder at the US embassy in Nairobi and Paradise hotel in Kikambala.
11. That the Learned Trial Magistrate erred in law and fact by holding that the appellants harboured one Fazul Abdulla Mohammed knowing that he was unlawfully present in Kenya.
12. That the Learned Trial Magistrate erred in law and fact by disregarding the appellants' mitigation.
13. That the Learned Trial Magistrate erred in law and fact by shifting the burden of proof to the appellants to allegedly explain how the alleged suspect materials were recovered.

14. That the Learned Trial Magistrate erred in law and fact by convicting the appellants without proof that the alleged items were within the appellants' specific custody, control and/or knowledge.

15. That the Learned Trial Magistrate erred in law and fact by relying on numbers of prosecution witnesses which is immaterial considering that the magistrate never heard their testimony or saw their demeanour.

14. The prosecution's case in the trial Court was that on 2<sup>nd</sup> August, 2008 he Anti-Terror Police Unit in Malindi received intelligence information that one of the most wanted terrorists in connection with the US embassy and Paradise hotel bombings was hiding in Malindi. Led by Chief Inspector Otieno PW 24, the officers proceeded to the cyber café in which the suspect was said to be communicating in e-mail. The officers did not know the suspect and when they saw the 2<sup>nd</sup> appellant riding away on a bicycle, they gave chase and knocked his bicycle and when he wanted to escape, they caught up with him and arrested him.

15. According to the prosecution witnesses, a flash disk exhibit 12 was recovered from the 2<sup>nd</sup> appellant's pocket. When the 1<sup>st</sup> appellant learned from the wife that the 2<sup>nd</sup> appellant had not returned home at 9 pm, he left his place of business and proceeded to the Malindi police station to inquire on whether he may have been arrested for riding a bicycle without lights. The 1<sup>st</sup> appellant was arrested and placed in cells and thereafter he is alleged to have led a contingent of about 50 police officers to his home to search for Fazul Abdulla.

16. They did not find the said Fazul Abdulla instead evidence was led that an electric shaver, two passports in the name of PW 1 Mohammed Abubakar Ali No. A545187 exhibit 1 and PW 2 Jerenuag Kariannjah Mwangi No. R958677 were alleged to have been recovered. The said two passports had been manipulated and falsified and the photograph substituted. The contingent of police officers also allegedly recovered 9 Friday bulletins magazines with Muslims news updates, one of the bulletins had the story of the bomblast at paradise hotel and another had the photograph of Fazul Abdulla.

17. PW 1 in his evidence in chief testified that he lost his passport on 13<sup>th</sup> March, 2008 when he was accommodated at Kilimanjaro lodge in Eastleigh within Nairobi province. He said he had travelled to Kampala for the burial of his father and on return he had a stopover in Nairobi and booked a room where they were two beds and he occupied one. The next day he found the person who had occupied the other bed had left and his passport was missing. He went to Pangani police station and was issued with a police abstract before he left for Garissa. He further stated that he read on the daily newspaper that his passport had been recovered in Malindi in possession of some suspects and on 13<sup>th</sup> August, 2008, his step-brother's cousin Noordin Mohammed Haji asked him where his passport was, he told him that it was lost. Noordin Mohammed Haji told him that he was supposed to go and report in Mombasa and the said Noordin escorted him to the police headquarters and handed him over to the investigators. He stated that the passport was his but the photograph on it was not his.

18. In cross examination, PW 1 testified that the police abstract indicated that his passport was lost and not stolen and that he had not applied for re-issuance of another passport. He denied having given away or sold his passport to someone and said his cousin worked for NSIS hence new exactly where he was required. He stated that the loss of the passport was not an arrangement between him, his cousin and the police.

19. PW 2 stated that he applied for a passport on 4<sup>th</sup> April, 2002 and gave his certificate of birth, identity card and passport photos to Pauline Kagai to process the passport on his behalf but he did not get his passport and in June, 2007 when he went to Nyayo house, he was told Pauline Kagai was on leave. That on 9<sup>th</sup> August, 2008, an officer visited his home in Muranga central and told his father that his documents had been recovered in Malindi and he was required to record a statement at Nairobi Traffic Police station. He told the officer that he had applied for an international passport but he did not get it and that he did not know Aden Hussein Ali whose name and photographs appeared in passport No. A699115.

20. PW 3 Alfred Abuya Omangi an immigration officer was asked by the Anti-Terror Police Unit to verify the status of two Kenyan passports. One passport was in the name of Mohammed Abubakar No. A545187 exhibit 4 (a) and passport No. A699115 in the name of Jeremiah Kandiah Mwangi which was applied for on 4<sup>th</sup> April, 2002 but was never collected. PW 3 found that for exhibit 4 the particulars given were not corresponding to the ones in their file and there is an extension of the bio data since page 32 does not correspond with the other pages and the photograph of the applicant does not correspond with the photograph on the exhibit. He said that the features on the passport are superimposed and that the passport was tampered with.

21. PW 3 said that PW 1 indicated in his application for a passport that his father died in 1972 and not in February, 2008. The certificate of birth also shows that PW 1 was born in 1972 and he applied for the passport in 1999 when he was a student at Sabulei Secondary School. PW 3 stated that he could not conclude how the passport for Jeremiah Mwangi was collected from the immigration department.

22. According the investigating officer PW 37 and PW 24 who led the operation, the home of the appellant was visited again on 3<sup>rd</sup> August, 2008 and more recoveries made. Among them being a manual shaving machine which was subjected to DNA analysis and DNA profile generated therefrom compared to DNA profile generated from samples taken from the alleged wife and children of Fazul Abdulla on 21<sup>st</sup> February, 2007 by PW 29 Timothy Kenneth Walsh in Ethiopia as well as DNA profile generated from samples taken from the body of a person alleged to have been Fazul Abdulla in Somalia on 9<sup>th</sup> June, 2011 by PW 34 William Kevin Harrison an FBI special agent.

23. According to witnesses from the Government chemist laboratory, the DNA profile generated from the manual shaving machine matched the DNA profile generated from the samples taken by PW 34 and it was concluded that the DNA profiles from the machine and from the body matched the DNA profile of the two children who samples were taken from Ethiopia. It was therefore concluded that the DNA profiles from the saving machine and the body of the alleged Fazul was 99.99 % that of the father of the two children.

24. The prosecution relied on this evidence to support their case that Fazul Abdulla was in the house of the appellants where he left the shaving machine. They also relied on the two passports to prove that the photographs on the passports belonged to the said Fazul Abdulla. Witnesses were called to identify whether the photographs on the two passports was that of Fazul Abdulla including **Amina Kubwa Mohammed PW 4** who said that she was married to Abdul Kareem Mohammed in December, 2002 in Lamu where the said Abdul Kareem

Mohammed was an Islamic teacher. She identified the photographs in exhibits 1 & 2 as that of the said Abdul Kareem Mohammed.

25. **PW 6 Tamara Chepkemoi Ratemo** testified that she leased her house in Runda to Fazul Abdulla who said he had come from Morocco and was in the company of Shikanda. She identified the photo on the passports saying that the nose and eyes were those of Fazul Abdulla. The texture of the hair and the moustache was different from that of the tenant but the face was that of her former tenant. She said that it is Fazul who wanted the house and not Shikanda and that she could produce the agreement to the police but she had not been asked for a copy. The receipts for payment of rent could not be traced.

26. **PW 7 John Siruni Simon**, the caretaker to house No. 43 Runda, said that Fazul Abdulla occupied the house and he used to clean up the compound and cut fence for 200 Kenya Shillings per day which Fazul was paying. He said that it is Fazul who alerted him about the bomb blast. Three days after the family had left, he asked him to help get him a lady to clean the house which had only a mattress and a bedsheet and he helped him to load them onto the pickup Datsun before he left and he never saw them again. He identified Fazul's photograph in exhibit 1 although he said that the complexion in the photograph was lighter since Fazul was of dark complexion. PW 7 said that Fazul had a shorter moustache than the one that appeared on the photograph.

27. **PW 31 Sikanda Mughammed Juma** testified that he met Fazul following the death of his brother in law Jellaha. A Fazul wanted to rent a house in Kenya but he did not have documents hence the house was rented in his name. He said Fazul stayed with him for two weeks after the bomb blast and the Anti-Terror Police officers went to him because they were looking for Fazul. Fazul went to pick his parents using a white pick up as means of transport and that he knew Fazul for about six months as a man who was from Cameroon. In cross examination he identified that the photos in exhibit 1 & 4 the passports are the face of Fazul. However, his skin colour was different in the photograph but the face and the hair was the same.

### SUBMISSIONS.

28. This appeal was canvassed by way of written submissions. The appellant submitted that the onus to prove a case against the accused persons was forever on the prosecution. In this case the prosecution failed to prove its case beyond reasonable doubt and merely relied on hearsay and circumstantial evidence which did not meet the threshold in considering circumstantial evidence. They contended that the prosecution's case was all based on suspicion and that it is trite law that no matter how high a suspicion, it can never be a basis for conviction. It was wrong for the trial Magistrate to conclude that the said Fazul Abdulla Mohammed stood guilty as alleged.

29. They submitted that the holding in **Republic versus Yusuf Nkuru Gitonga [2011] eKLR** to fortify their argument that suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt. They further argued that although it was alleged that Fazul Abdulla Mohammed was indicted in the United States of America, they were no documents that were produced to indeed confirm that such a charge sheet was ever registered in the US judicial system and it was therefore erroneous for the trial magistrate to adopt the view which was never proved beyond reasonable doubt.

30. On identification of the said Fazul Abdulla Mohammed, the appellants argued that it was never conclusive as PW 6 and PW 31 described him as of dark complexion while PW 4 alleged that he was of light complexion. It was also contended that the evidence on the identity of the body alleged to be that of Fazul Abdulla and the identity of the alleged wife and children of the alleged Fazul Abdulla fell below per. The facial impression/photo of the alleged fugitive was lacking so as to complete the chain of identification by PW 4, 6, 11 & 31. In the circumstances the DNA evidence lacked the much needed corroboration as no statements were recorded from the alleged children of the said Fazul Abdulla or their mother and none of them was availed to testify in Court to confirm that they indeed gave samples for DNA analysis.

31. On whether the appellants were accessories after the fact it was submitted that the bombing in Nairobi happened on the 7<sup>th</sup> of August, 1998 and the prosecution failed to take into account the whereabouts of the said Fazul Abdulla Mohammed from 1998 to 2008 more than 10 years from the date of the alleged bombing. Reliance was placed on the case of **Joel Wilberforce Obuni v Republic [2006] eKLR & John Muriithi Nyagah v Republic [2014] eKLR**.

32. The appellants counsel submitted that the testimony of PW 12 & PW 24 as to how and why they came to arrest Ibrahim Mafudh Ashur was contradictory whereas PW 12 stated that they had intelligence that the most wanted Fazul Abdulla was within Malindi, PW 24 said that the intelligence indicated that Ibrahim Mafudh was receiving and sending e-mails on behalf of the said fugitive Harun Fazul. The appellants Counsel said that credence could only be given to the information by the informer if the said informer was called to testify. They relied in the authority of **Kelvin Kamau Gatora & 2 others [2018] eKLR** where it was held that, however, we think that if the evidence of the informers is necessary to prove the guilt of the appellants it would have been necessary for them to testify perhaps outside the glare of the public. In the same authority it was also held that, but if the prosecution desires to hear the Court to hear the details of the information an informer has given to the police, clearly the informer has to be called as a witness.

33. The submissions by the appellants was that they gave a water tight defence that was not shaken or rebutted. The said evidence was supported by DW 3 & 4 that at no time was any stranger seen accessing the residence of the appellants for it to be said that they received, comforted, harboured, assisted and maintained the alleged Fazul Abdulla Mohammed in their residence. That there was no single prosecution witness who alleged to have seen any suspicious person accessing the residence of the appellants' prior to 31<sup>st</sup> July, 2008 and before 2<sup>nd</sup> August, 2008. They said that allegations of intelligence report received in the month of July, 2008 was unbelievable as it is not shown how the prosecution arrived at the analogy that the fugitive was in the appellants' residence from December, 2007 and not any other date.

34. The finding by the trial magistrate at page 10 lines 13 to 17 that the material recovered from the Friday bulletin to the 912 pages in the flash disc, the shaver and the passport proved conclusively that Fazul Abdulla Mohammed was in the appellants' house was said to be wrong. It was further submitted that the prosecution tendered contradictory evidence on how and who made the recovery of the alleged shaver exhibit 24 & 27. The appellants questioned why a search that was conducted up to 2 am between 2<sup>nd</sup> and 3<sup>rd</sup> August, 2008 did not reveal the existence of the shaver which PW 23 alleged to have photographed at the bath tub on 4<sup>th</sup> August, 2008.

35. The appellants argued that the recovery of the alleged exhibits and the preparation of the inventory much later on 16<sup>th</sup> August, 2008 in the absence of the appellants was mischievous. Whether the shaver photographed on 4<sup>th</sup> August, 2008 as alleged by PW 23 was manual or electrical was not clear and whether it was on 4<sup>th</sup> August, 2008 or 5<sup>th</sup> August, 2008 according to PW 24 is also not clear. The appellants also pointed to the contradiction on the uncorroborated evidence that flash disk was recovered on the 2<sup>nd</sup> appellant and the existence of Yemen International Cyber Café following the failure by PW 24 to investigate the existence or non-existence of the same.

36. It was argued that the prosecution failed to prove that the said Fazul Abdulla Mohammed has ever been in the appellant's house and that Count III must fail. The conviction of the 1<sup>st</sup> appellant of stealing a passport alleged to be for PW 1 was also said to be uncorroborated as the 1<sup>st</sup> appellant said that on 13<sup>th</sup> March, 2008 he was in Malindi and he was not the stranger that was in the room that PW 1 booked in Nairobi. The appellants submitted that the defence by the 1<sup>st</sup> appellant was not challenged since he refuted the claims of possessing the shaver in question, the passports and Friday bulletins magazines. They argued that it was strange it is only the 1<sup>st</sup> appellant who was asked to sign the inventory and not his wife who was also in the house.

37. That the search was not done professionally since the police did not communicate in advance what they were looking for. Furthermore, the appellant was not informed of his right to have a lawyer attend the search or a representative of his choice. The alleged foul play in the search. On sentencing, the appellants submitted that the trial Magistrate failed to observe the law and policy guidelines on sentencing as they were n aggravating factors to justify life imprisonment for count I & ii and that the 2<sup>nd</sup> appellant who was confirmed to have been 17 years at the time of his arrest, the life sentence clearly violated his rights as a minor.

38. The respondent submissions were that PW 4 & PW 11 the wife of Abdul Karim and the sister in law were found with a mobile phone make Siemens A35 which was given to PW 11 by Abdul Karim alias Fazul Abdulla which phone was found to have been connected to the Kikambala bombings. It was also submitted that a flash disk was recovered from the 2<sup>nd</sup> appellant by PW 12 following intelligence that the most wanted terrorist Fazul Abdulla was hiding in Malindi. The respondent's argued that the telephone that was used to coordinate the attack in Kikambala was owned Fazul Abdulla, the shaver which was recovered from the appellants' house, the swabs from the children collected in Ethiopia and the swabs from the body which was collected in Somalia generated DNA profile which showed it was for Fazul. From the said evidence it was clear that the said Fazul murdered 15 people in the Kikambala bombing.

39. The respondent argued that they had proved the ingredients of the offence of accessory after the fact to murder by relying on the holding in **Bernard Sanya Okello v Republic [2018] eKLR** where the ingredients of this offence were listed as follows; that the accused received or assisted another person; with knowledge that that person was guilty of murder; and with the aim of enabling that person to escape punishment. According to the respondents' there was presence of DNA profile of Fazul in the shaver that was recovered in the appellants' house and the flash disk that was recovered from the 2<sup>nd</sup> appellant showed that the appellants knew that the Fazul had committed mass murder in the bombing of 1998 and 2002. It was argued that this position was buttressed by the newspaper cuttings which were pasted on an exercise book which reports on Fazul and were recovered from the appellant's house.

40. It was also argued that the passports belonging to PW 4 was found bearing the photograph of Fazul and thus it was submitted that the necessary ingredients of the offence of accessory after the fact to the offence of murder were proved.

41. On whether the learned Magistrate convicted the appellants based on belief or evidence, the respondent's submitted that there was ample evidence that the learned Magistrate acted on evidence and not belief.

42. On whether Fazul was in the appellant's house, it was submitted that the trial Magistrate's analysis at page 10 of the judgment was correct and that the evidence on record proved beyond reasonable doubt that Fazul was in the house of the appellants. finding that the material recovered from the Friday bulletins, the 912.

43. On whether the appellants knew that Fazul had committed mass murder in Nairobi and Kikambala, the respondent reiterated the submissions at paragraph 28 and 29 and argued that the presence of DNA profile of Fazul on the shavers that were recovered in the appellants house and the flash disk that was recovered from the 2<sup>nd</sup> appellant containing material labelled Al Qaeda general and referenced to the Nairobi US embassy and Kikambala Paradise hotel bombing, it was clear that the appellants knew that Fazul had committed mass murder in the bombings of 1998 and 2002.

44. It was alleged that there was express and or constructive knowledge on the part of the appellants on the things that Fazul had done. The respondent's alluded to the 2<sup>nd</sup> appellant's resistance to arrest as a clear indication that he knew about the content of the flash disk. The respondent argued that aspect of knowledge was proved beyond reasonable doubt.

45. On whether Fazul was harboured by the appellants' knowing that he was unlawfully present in Kenya the respondents argued that the fact that a stolen passport was found in the appellants' house with the photograph of Fazul who is alleged to have been from Morocco or Cameroon clearly shows that he was a person who was unlawfully present in Kenya.

46. Whether the offence of stealing of passport was proved, it was the respondent's argument that PW 1 proved that passport No A545187 in the name of Ali Mohammed Abubakar was his and that he lost it on 13<sup>th</sup> March, 2008 when he rented a house at Kilimanjaro lodge in Eastleigh after coming from the burial of his father in Kampala. That when the passport was recovered in Malindi his relative called to ask where his passport was and he said it was lost and he travelled to Mombasa where he identified it positively.

47. According to PW 1 & 2's passports were recovered on 2<sup>nd</sup> August, 2008 in the 1<sup>st</sup> appellant's bedroom when a search was conducted. The respondents relied in the Court of Appeal case of **David Mugo Kimunge v Republic [2015] eKLR** to submit that the fact that a passport belonging to PW 1 was recovered in the appellants' house and there being no plausible explanation was offered as to how it found itself there the offence of theft was proved and the learned Magistrate properly invoked the doctrine of recent possession and properly

convicted the 1<sup>st</sup> appellant.

48. Whether the burden of proof was shifted to the appellants, the respondents submitted that a case can be proved among others by way of circumstantial evidence which as stated in the case of **Musili Tulo v Republic criminal appeal No.30 of 2013**, is as good as any evidence if it is properly evaluated and is usually put it can proof a case with the accuracy of mathematics. The respondent's argued that the circumstantial evidence adduced was water tight. They argued that the burden of proof was not shifted to the appellants as claimed by the appellants.

### **ANALYSIS AND DETERMINATION**

49. This being a first appellate Court, this Court has the duty to re-evaluate and analyse the evidence of the witnesses before the trial Court as well as the judgment of the trial Court bearing in mind that I did not have the privilege of listening to them and observing their demeanour while testifying as held in the case of **Kiilu & Another vs. Republic [2005]1 KLR 174**.

50. I have also considered the grounds of appeal and the respective submissions by the appellants and the respondents Counsel and find that the issues for determination are;

**i. Whether the prosecution proved that the appellants were accessories after the fact to murder contrary to section 222 of the Penal Code in Counts I & II;**

**ii. Whether they harboured a person who was unlawfully present in the country contrary to section 13 (2) (d) of the Immigration Act Cap 172 Laws of Kenya; and**

**iii. Whether the offence of theft by the 1<sup>st</sup> appellant was proved beyond reasonable doubt by the prosecution.**

**iv. Whether the prosecution proved that the appellants were accessories after the fact to murder contrary to section 222 of the Penal Code in Counts I & II.**

51. Section 222 of the Penal Code provides as hereunder: -

#### ***Accessory after the fact to murder***

***Any person who becomes an accessory after the fact to murder is guilty of a felony and is liable to imprisonment for life.***

52. The definition of accessories after the fact is provided for in section 396 (1) of the Penal Code as follows: -

***A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.***

53. The ingredients of this offence, which the prosecution is required to prove beyond reasonable doubts were spelt out in the case of **Benard Sanya Okello v Republic [2018] eKLR**, as follows:

- a) That the accused received or assisted another person;
- b) With knowledge that, that person was guilty of murder; and
- c) With the aim of enabling him to escape punishment.

54. In the instant case, PW 12 and PW 24 testified as to how they got information that the most wanted terrorist Fazul Abdulla was hiding in Malindi according to PW 12 or that the 2<sup>nd</sup> appellant was being used by the said most wanted terrorist to receive and send information through e-mail. The 2<sup>nd</sup> appellant was arrested while riding his bicycle home on the mistaken belief that he was Fazul Abdulla. According to PW 12 & 24, the 2<sup>nd</sup> appellant was identified by an informer. The respondents are relying on information from an unknown informer to support their case that the 2<sup>nd</sup> appellant was either Fazul Abdulla or that he was in communication for and/or on behalf of Fazul Abdulla.

55. The authority relied upon by the respondents which spells out the ingredients of the offence of accessory after the fact to the offence of murder requires that in the event the prosecution intends to rely on evidence as a result of information from an informer, then the said informer must testify or in the very least swear an affidavit to the correctness of such information. As it stands the evidence of PW 12 & 24 is conflicted as to what exactly they were told by the informer as to the presence or otherwise of Fazul Abdulla in Malindi.

56. Evidence was adduced that upon arrest of the appellants on 2<sup>nd</sup> August, 2008, PW 12 & 24 with a contingent of about 50 police officers went to the 1<sup>st</sup> appellant's house where a search was conducted up to 2 am and some items were recovered. On 3<sup>rd</sup> August, 2008, police again visited the 1<sup>st</sup> appellants house and arrested the wife and daughter of the 1<sup>st</sup> appellant and placed police officers to guard the house as a scene of crime. On 4<sup>th</sup> August, 2008, PW 23 testified that he took photographs of the scene, the 1<sup>st</sup> appellant's house where he found police officers guarding. In one of the photographs, a shaving machine is seen in the bath tub and PW 23 is not able to distinguish whether it was a manual or an electric shaving machine. The question that arises is why a shaving machine that was on a conspicuous place like a bath tub could not have been recovered on the 1st night when a search was conducted by a contingent of up to 50 police officers up to 2 am.

57. The shaver was said to have been taken to the government chemist for analysis, where it generated DNA profile that matched DNA profile alleged to have been taken from the children of Fazul Abdulla in Ethiopia and the alleged body of Fazul Abdulla from Somalia. Witnesses were called to this Court who claimed that they knew Fazul Abdulla physically but none of them was called upon to identify the alleged body that **PW 34 William Kevin Harrison** said he took samples from after being notified by the Somali Transitional Federal Government purporting that they had killed Harun Fazul. PW 34 did not disclose the identity of the representative of the Somali Transitional Federal Government who was present when he allegedly collected the samples and finger prints of the said Fazul Abdulla and there was no post-mortem report and certificate of death to confirm his allegations.

58. Evidence was adduced by **PW 29 Timothy Kenneth Walsh** that he travelled to Ethiopia on 21<sup>st</sup> February, 2007 and collected swabs from the family of Fazul a suspected terrorist that is, the wife son and daughter. He did not say who identified the alleged family to him because he didn't see the identity documents for the alleged wife and there were no identification documents for the children. All of them were in a detention in Ethiopia. He said that he sent the swabs to armed forces DNA US laboratory and he had not seen them since he sent them to the lab and he didn't know what happened to them.

59. It is not explained how the alleged swabs were transmitted to the prosecution witnesses herein for purposes of DNA tests. Whether Fazul had a wife and children is not clear. PW 6 who was his landlady did not say if she saw him with a family. PW 7, the caretaker at the Runda home said that Fazul later on came with his wife and child and an old sick man who was the father to his wife. Therefore, PW 7 would have been in the best position to identify whether PW 29 took swabs from the right people in the absence of identification documents.

60. Claims that Fazul Abdulla was in the house of the appellants by virtue of the alleged DNA test in the absence of him having been found falls short of the threshold of beyond reasonable doubt. Therefore, the guilt or otherwise of the said Fazul Abdulla is immaterial.

61. Evidence was also tendered as to the indictment of Fazul Abdulla in the United States of America but that too was just by word of mouth from the prosecution witnesses since no documentation was availed to that effect. Since the 1<sup>st</sup> and 2<sup>nd</sup> elements of the offence of being an accessory after the fact to the offence of murder have been answered in the negative, it would be an academic exercise to delve into the third element.

**Whether they harboured a person who was unlawfully present in the country contrary to section 13 (2) (d) of the Immigration Act Cap 172 Laws of Kenya.**

62. This issue has been dealt with in the analysis above since this Court found that the prosecution failed to prove beyond reasonable doubt that the said Fazul Abdulla was found in the appellant's house.

**Whether the offence of theft by the 1<sup>st</sup> appellant was proved beyond reasonable doubt by the prosecution**

63. The evidence by PW 1 that he lost his passport while sleeping in a lodge known as Kilimanjaro or Al Rahma hotel in Eastleigh, Nairobi as indicated by the 1<sup>st</sup> appellant is doubtful for reasons that it came out that although he claimed that his father died in 2008 in Kampala, but PW 3 testified that when PW 1 was applying for a passport he indicated that his father died in 1972 as per exhibit P5. The police abstract issued to PW 1 was not booked in the OB neither was the receipt No. issued for payment made before the abstract was issued entered in the register.

64. The 1<sup>st</sup> appellant was not put in the scene where the passport was allegedly stolen and the doctrine of recent possession could not have applied where more than 6 months had elapsed after the alleged theft.

65. Having analysed the evidence of all the prosecution witnesses and weighing them against the evidence of the appellants and their witnesses I do find that the prosecution's evidence left a lot of loose ends that cannot sustain a conviction.

66. The appellants appeal is therefore successful. The conviction is quashed and the sentences set aside. The appellants are hereby set at liberty unless otherwise lawfully detained. Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 1<sup>ST</sup> DAY OF JULY, 2021.**

**HON. LADY JUSTICE ADWERA ONG'INJO**

**JUDGE**

**In the presence of:-**

Ogwel - court assistant

Respondent - Ms. Karanja

Appellants –

1 - Present in person (virtual from Shimo La Tewa Prison)

2 - Present in person (virtual from Shimo La Tewa Prison)

Mr. Magolo J. Advocate for appellants

Mr. Chacha Mwita Advocate for appellants (virtual)

**HON. LADY JUSTICE ADWERA ONG'INJO**

**JUDGE**