REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 99 OF 2018

BETWEEN

AHMED MOHAMED ABDULLAHI *Alias* ARAB.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani in Cr. Case No. 611 of 2015 delivered by Hon. Andayi W. F. (CM) on 20th March, 2018).

JUDGMENT

1. The Appellant, **Ahmed Mohamed Abdullahi *alias* Arab,** was charged with eight counts of offences in the trial court.

i. In count 1, he was charged with being in possession of explosives contrary to **Section 29** of the **Explosives Act, Cap 115, Laws of Kenya**. The particulars were that on the 13th day of March, 2015 at Makongeni Police road block in Thika within Kiambu County, he was found in possession of an explosive substance namely **Trinitrotoluene (TNT)** weighing approximately 614g, for unlawful object.

ii. In count 2, he was charged with committing an act intended to cause grievous harm contrary to **Section 23(1)** of the **Penal Code.** The particulars were that on the 13th day of March, 2015 at Makongeni Police road block in Thika within Kiambu County, while on board Makkah Travels Bus registration number KBV 024V, he put an explosive substance namely **Trinitrotoluene (TNT)** weighing approximately 614g under seat number 33 in the said bus with intent to cause grievous harm to members of the public.

iii. In count 3, he was charged with being in possession of property for commission of a terrorist act contrary to **Section 6** of the **Prevention of Terrorism Act, 2012**. The particulars thereof were that on the 13th day of March, 2015 at Makkah Travels booking office in Mandera within Mandera County, he was found in possession of three electronic detonators, one piece of green detonating cord 40.5cm long, one piece of blue/green detonating cord 45cm long, one piece of red detonating cord 46cm long and one piece of blue detonating cord 48cm long all being property intended for use in the commission of a terrorist act.

iv. In count 4, he faced a charge of being in possession of explosives contrary to **Section 29** of the **Explosives Act Cap 115 Laws of Kenya**. The particulars thereof were that on the 13th day of March 2015 at Makkah Travels booking office in Mandera within Mandera County, he was found in possession of three electric detonators for unlawful object.

v. In count 5, he faced a charge of being in possession of explosives contrary to **Section 29** of the **Explosives Act Cap 115 Laws of Kenya**. The particulars thereof were that on the 13th day of March, 2015 at Makkah Travels booking office in Mandera within Mandera County, he was found in possession of one piece of green detonating cord 40.5cm long, one piece of blue/green detonating cord 45cm long, one piece of red detonating cord 46cm long and one piece of blue detonating cord 48cm long for unlawful object.

vi. In count 6, he was charged with committing an act intended to cause grievous harm contrary to **Section 23(1) (f)** of the **Penal Code**. The particulars thereof were that on the 13th day of March, 2015 at Makkah Travels booking office in Mandera within Mandera County he put three electronic detonators, one piece of green detonating cord 40.5cm long, one piece of blue/green detonating cord 45cm long, one piece of red detonating cord 46cm long and one piece of blue detonating cord 48cm long in Makkah Travels Bus registration number KBV 024V with intent to cause grievous harm to members of the public.

vii. In count 7, he was charged with obtaining registration by false pretences contrary to **Section 320** of the **Penal Code**. The

particulars were that on the 22nd day of November, 2012 at the National Registration Bureau Office in Habaswein within Wajir County, not being a Kenyan national, he willfully and by false pretences procured registration as a Kenyan citizen and was issued with a Kenyan identity card number 31096870 in the names of Ahmed Mohamed Abdullahi.

viii. In count 8, he was charged with being unlawfully present in Kenya contrary to **Section 53 (1) (f)** as read with **Section 53(2)** of the **Kenya Citizenship and Immigration Act, 2011**. The particulars were that on the 13th day of March, 2015 at Makongeni Police road block in Thika within Kiambu County, not being a Kenyan national, he was found being unlawfully present in Kenya without a valid pass or permit allowing him to remain in Kenya in contravention of the said Act.

2. The Appellant pleaded not guilty to all the eight counts. After a full trial, he was found guilty of count 1 and convicted accordingly. Consequently, he was sentenced to serve a prison term of five (5) years. Dissatisfied with both the conviction and sentence, he filed the instant appeal in this court.

Grounds of appeal

3. The Appellant raised five (5) grounds of appeal in his Petition of Appeal filed on 27th June, 2018. These were that:

i. The learned trial magistrate erred in both law and fact by convicting him after the prosecution failed to prove their case beyond reasonable doubt, and more so in proving that the Appellant was found to be in possession of the exhibits in question.

ii. The learned trial magistrate erred in both law and fact by convicting him without considering the strong and corroborated defence put forth by the Appellant, hence arriving at a wrong conclusion in law.

iii. The learned trial magistrate erred in both law and fact by convicting him despite the glaring contradictions and inconsistencies on the prosecution's case.

iv. The learned trial magistrate erred in both law and fact by sentencing him excessively and without taking into consideration the time already spent in custody in violation of the Constitution and the relevant laws.

v. The learned trial magistrate erred in both law and fact by taking into account irrelevant and extraneous considerations that did not form part of the evidence tendered, therefore reaching a wrong conclusion in law hence the entire decision amounts to a miscarriage of justice.

Summary of Evidence

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See **Okeno v Republic (1972) EA 32).**

5. The Prosecution's case was that acting on information from intelligence sources, officers from the Anti-Terrorism Police Unit, Nairobi (hereafter ATPU) intercepted a bus in which the Appellant was traveling from Mandera to Nairobi and arrested him in possession of some substance which was later established to be an explosive known as Trinitrotoluene (TNT).

6. PW1, Corporal Postal Gitonga of ATPU recalled that on 13th March, 2015 at 7.00 am, their commander CIP Charles Ogeto informed him and his colleagues **PW8, PC Martin Kiragu** and CPLl Ndirangu that a dangerous suspect of Somali origin was en route from Mandera to Nairobi on board a bus called Makkah registration number KBV 024A. He instructed them to proceed and intercept the bus at Makongeni in Thika. The three rushed to Makongeni and laid a road block. They were joined by officers from Bomb Disposal Unit and the GSU who acted as their back up.

7. At around 11.30 am, the said bus arrived at the road block. They stopped it and ordered all the passengers on board to alight with their luggage and identification documents in order for them to carry out a search. The Appellant who bore the description as they had been given alighted without any luggage but produced his identification card number 31096870 bearing the names Hamed Mohamed Abdullahi. When they asked him about his bag, he said he had left it inside the bus.

8. PW1 and PW8 escorted the Appellant back into the bus. The Appellant took them to seat number 33 where he had sat and picked a bag underneath the said seat. The bag was grey and blue in colour and was labelled *"ronglida"*. They went back outside with the Appellant and his said bag. Once outside the bus, the bag was opened in the presence of the other police officers and the Appellant. Inside it were five pieces of assorted clothes and the Appellant's driving permit number C2599647. PW1 then opened the side pocket of the bag and found a yellow container with the words *"garlic essence hair treatment cream, 800ml"* inscribed on it. When the yellow container was opened, it had some cream inside and a polythene bag protruding from inside the cream. PW1 pulled out the polythene bag which was white with blue spots written Kaymart Supermarket. They opened the paper bag and found some brown granular substance inside which they believed to be explosive material.

9. The Appellant told PW1 that the package had been given to him by one Adbuhalim Mohamed who resides in Bulahawa town in Somalia to take to someone in Nairobi whose name he did not disclose. The Appellant also told him that there were many other boys who had been sent by Maalim Mohamud to Nairobi in different buses. PW1 prepared an inventory of what was recovered from the Appellant after searching the bag and it was signed by him and PW8. The Appellant also signed the inventory at the scene on that day. Thereafter, the Appellant agreed to stay with them at the road block to wait for the other buses which were ferrying the other boys. They camped at the scene with the Appellant for two days being Friday and Saturday but did not manage to arrest any other suspects. As such, on 15th March

2015, they took the Appellant to ATPU headquarters where he was booked.

10. On 30th March, 2015, PW1 prepared an exhibit memo form to accompany the following exhibits to the government chemist: A1-sample of round granular substance found in the yellow container inside Kaymart Supermarket polythene bag, A2-swab sample from the Appellant's assorted clothes, A3-swab sample from the Appellant's hands and A4-swab sample taken from the bag. In the memo, he sought to determine whether the said exhibits contained explosive elements. PW1 also prepared a chain of custody form of the said exhibits and indicated that a sample of the 614gm of the granular substance recovered from the Appellant had been taken to the government chemist.

11. PW1 further testified that while at the scene where they arrested the Appellant, the conductor of the bus gave them a passengers' chart which was exhibited in evidence. The chart showed that the Appellant had been issued with ticket No. 3115 for seat number 33 and his name and identification card number 31096870 as indicated thereon corresponded with the identification card handed to him by the Appellant.

12. In cross examination, PW1 stated that they did not record any statement from the passenger on seat number 32 because the bag was not recovered from him. He stated that the Appellant spoke to them in English and Kiswahili languages at the time he was arrested and denied that the conductor interpreted the Appellant's language to them. He added that they were only given the Appellant's description and not name and admitted that his statement did not give a description of the Appellant. He also denied that the Appellant was arrested together with the occupant of seat number 32 or that he was taken to a forest and forced to confess or admit. Finally, he stated that he was not aware that any substance had been applied to the Appellant's hands, pockets or clothes and did not witness any such thing.

13. PW8, PC Martin Kiragu of ATPU who accompanied PW1 to arrest the Appellant corroborated the evidence of PW1. He added that on the material day, CIP Ogeto informed them that the person whom they were to arrest in the said bus was suspected to be in possession of explosive materials which they were to recover.

14. In cross examination, PW8 stated that CIP Ogeto did not give them the name of the suspect when briefing them. He admitted that he did not give a description of the Appellant in his statement as the information they had was general and not specific. He stated that IP Mahiri from GSU was the senior most officer in the team. He also stated that the Appellant was speaking broken Kiswahili and further, that his name was not in the OB entry for 15th March, 2015 when the Appellant was booked since CPL Ndirangu is the one who extracted the OB. Further, PW8 said that he never asked anybody if they had seen the Appellant enter the bus with a bag because the Appellant is the one who took them to seat number 33 and told them that that was his bag. PW8 denied that they arrested the Appellant in the company of white men from the Federal Bureau of Investigations, took him to the forest and tortured him for two days. He further stated that the bag recovered from the Appellant was small and had no compartments. Finally, PW8 stated that he had no answer as to whether there was any document in the recovered bag identifying the Appellant.

15. PW2, SSP Eliud Lagat from the Bomb Disposal Unit, CID Headquarters stated that though he was at the road block, he personally did not witness the recovery of the bag in the bus. The ATPU officers handed over the bag to him outside the bus. He pulled the items out of the bag and saw PW1 record the items recovered from the bag. He used a digital camera to take photographs of the bus, the blue bag recovered from the bus and the yellow container with the brown granular substance. According to him, the granular substance was concealed in the bag very professionally. PW2 also took swabs at the scene from the clothes recovered in the Appellant's bag, the Appellant's hands and the recovered bag. He then handed over the swabs together with granular substance to PW1 to take them to the government chemist for examination. He produced the photographs in evidence.

16. In cross examination, PW2 stated that there was a sniffer dog at the road block that drew his attention to the bus in question. He stated that he was not privy to any information that had been given regarding the registration of the bus. That he personally did not conduct the search but stood about 10-15 meters away watching as the senior most officer present. He stated that the first on-spot test was done at the scene by one of his colleagues' known as handler CIP Peter Munyoto using the auro machine and no report was generated from that test. He also admitted that he did not have any report to summarize the photographs that he produced in evidence.

17. PW4, Catherine Serah Murambi was a duly gazetted analyst from the government chemist. She stated that she analyzed the samples on 2nd May, 2015 and detected Trinitrotoluene (TNT) in exhibit A1 and trace amounts of the same in exhibits A2 and A3. There was however no trace of the same on exhibit A4 which was a swab from the recovered bag. PW4 opined that TNT is classified as a military high explosive because it is mostly used for military applications. She stated that upon detonation, TNT releases a very high energy and has a detonation velocity of 6,900M per second hence the reason it is defined as a military high explosive. She prepared a report in that respect on 8th May, 2015 and produced it in evidence.

18. In cross examination, PW4 stated that she examined the exhibits on 2nd May, 2015 because they had a lot of work in the department. She also stated that the granular substance cannot explode on its own and that one must apply energy for it to explode. She further noted that RDX and TNT are different explosives which is evident even in their names. In reexamination, she stated that the date of collection of samples has no bearing on the analysis.

19. PW9, PC Consolate Maeti was a traffic officer attached to Kamukunji Police Station. She stated that on the material day, she was manning a road block at Kilimambogo area along the Garissa-Thika Highway with four of her colleagues when they were joined by officers from ATPU. The officers informed them that they had information that there was a terror suspect travelling from Mandera to Nairobi in Markah bus registration number KBV 024A. She reiterated the other witnesses' testimonies on what happened thereafter. She however stated that the Appellant was accompanied back into the bus by four officers from ATPU.

20. During cross examination, she stated that no other information or description of what the suspect was carrying was given to them. She also denied that the officers from ATPU spoke in Somali language at the scene.

21. PW10, Samuel Ngui Munyithya was the driver of the subject bus on the material day. He stated that they left Mandera on 12th March, 2015 at 7.00 am after being inspected at the police station and that all the seats in the bus were occupied. The bus was inspected again by

police at the first road block at Rhamu. Thereafter, they proceeded to Wargadut then Elwak where some people alighted and others boarded. He did not see anything unusual at these sports. Thereafter they proceeded to Wajir and stopped for lunch at Kotuto in the Mandera - Wajir boarder at 3.00 pm. After lunch, they proceeded to Wajir town where some passengers alighted again and others boarded. They then left Wajir at 7.00 pm for Garissa and by the time they got to Garissa at around midnight, the bus was full to capacity. They spent the night at Garissa since the government had banned motor vehicles from moving at night.

22. They left Garissa town the following day at 5.00 am with a full bus. At the Tana River border checkpoint, passengers alighted and produced their identity cards. Each one of them was checked as they returned to the bus. They then proceeded to the junction to Mombasa where police entered the bus, checked the passengers and alighted. The same procedure was carried out at Bongale, Ukasi, Mwingi, Kitioko and NYS Yatta check points.

23. When he reached the check point ahead of Kilimambogo, he found the situation looking unusual as several motor vehicles had been stopped and there were many police officers as well as government vehicles. PW1 told him to find a place and park as they wanted to inspect the bus. When he stopped, the police ordered all the passengers to alight with their luggage. The police spoke to them in Kiswahili. PW10 went and asked a police officer at the road bock what the problem was but the officer told him to wait as he would be told later. One of the police officers who was not in police uniform told him that they were looking for a person in that bus with a scar on his jaw. The Appellant alighted without any luggage but the police officers took him back into the bus accompanied by the conductor of the bus and came out with a small bag. Thereafter, the police took the Appellant in their car and told all the other passengers to go back into the bus and continue with their journey.

24. In cross examination, PW10 stated that he could not tell whether the Appellant kept changing seats whenever passengers alighted. He also stated that at Mandera, there was no checking of luggage since the checking was done by immigration people who only checked the tickets, the passengers and then the boot. He also stated that no police officer said there was a problem at all the checkpoints where they had been stopped before. Further, that he did not see white people at the roadblock.

25. PW11, IP Hassan Abdullahi from ATPU was the investigating officer in this case. He testified that he was told by the OCS CIP Charles Ogoti to take up the case as lead investigator on 15th March, 2015 at 0900hrs. He summed up the evidence of all prosecution witnesses and preferred the charges against the Appellant. In addition, he testified that he believed that the Appellant had been sent by an Al-Shabaab commander who had been killed to carry out a Westgate Style attack. In that regard, PW11 produced a newspaper cutout for Friday 13th March, 2015 titled ***"US Forces kill Al-Shabaab Commander, Adan Garar was killed by the US drone attack."***

26. In cross examination, PW11 stated that upon arrest, the Appellant was not immediately taken to ATPU for booking. That the arresting officers had to go to Eastleigh and check other buses from Mandera with intention of arresting more suspects but they were not successful. He stated that his statement talked of RDX instead of TNT because it was recorded before the analysis report from the government chemist was prepared. He also admitted that they did not carry out a DNA of the bag that the Appellant was carrying to show that it was connected to him.

27. When placed on his defence, the Appellant elected to give a sworn testimony. He testified that he worked in his mother's shop and was also a driver. He stated that he has a wife and children who lived with his mother in Mandera while he stays in Nairobi on Jam Street Alfardos Apartment with his sister. He denied the charges brought against him and recalled that on 13th March, 2015, he was travelling from Mandera to Nairobi on board Makkah bus. He had booked his ticket on 11th March, 2015 at around 7.30 pm and paid Kshs. 3,000/=. He boarded the bus in Mandera town at around 5.40 am on 12th March, 2015 then they proceeded to the police station at 6.00 am since it was procedural that people be searched at the police station when leaving Mandera. Everybody alighted from the bus. The police questioned them about their identity cards and where they were going and everything including the luggage was searched.

28. They passed through several road blocks where similar searches were conducted. Since the bus was not fully booked, he would sit on any empty seat because passengers were alighting and boarding along the way. They spent the night at Garissa and left the following day at 6.00 am. At Garissa Bridge, they all alighted and everybody in the bus was searched then they continued with the journey and passed several other road blocks.

29. When they reached the last road block in Thika, four police officers, three of whom were in uniform and one in civilian clothes entered the bus and conducted a search while others remained outside. The bus had a three seater column and two seater on either side. He was seated on seat number 33. When the police were approaching where he was seated, they called the person in seat number 32 because his phone rang. The two police officers took the person out of the bus. Two officers who were searching the three seater column called him and asked him questions but he did not understand the language. The conductor went to him and told him that those two were police officers and that he should go with them then the conductor would go and pick him.

30. The officers took his identification card, driving permit, mobile phone and Kshs. 7,000/= then asked him to alight from the bus and join the occupant of seat number 32 in a Toyota car that was being used by police.

31. He testified that the police did not ask him about his luggage before escorting him out of the bus. It was his testimony that since he lived in both Nairobi and Mandera, he would not usually carry luggage at all times because he had belongings on both sides. He denied signing anywhere when police took his items in the bus.

32. He stated that he was blindfolded and taken to an unknown place by the police officers one of whom was a Somali. He recalled that he was shown various photos one of which was of the occupant of seat number 32. He told the police that he did not know the people on the photos. The Somali police officer told him that if he did not confirm who the people in the photo were, he would leave him with the whites and he would regret but he maintained that he did not know them. At that point, they started torturing him and beat him up seriously thereby causing him injuries which he still suffers from. They kept insisting that he knew the occupant of seat number 32 but he denied.

33. He testified that he was tortured for two days. That on the last day of torture, they applied some substance all over his body and clothes but did not see what it was as he was still blindfolded. Thereafter, the blindfold was removed and he was shown a paper to sign. He could not see and did not know what it was but since he was scared because of the two days torture, he countersigned it after the officer.

34. He recalled that thereafter, he was taken to ATPU office and the blindfold removed. It is then that he saw the occupant of seat number 32 whose blindfold had also been removed. He was taken to a room inside the ATPU and did not see the occupant of seat number 32 again. PW11 went to him and was interpreting to him as he could not understand English. They continued telling him to admit that he could identify the people in photos then they would release him. He declined and was later charged in court.

35. He testified that he knew nothing about TNT and believed it was applied on his finger and body when he was being tortured. He denied that the bag that was recovered was his and stated that the analysis of the FBI did not bring out any finger prints and no DNA connection was made to him. He stated that in Mandera, they dominantly speak Somali language so he did not know how to speak Kiswahili.

36. In cross examination, he denied he has ever communicated with anybody in Somalia. He maintained that his driving permit was in his pocket together with his identification card and money when he was arrested. He stated that his lawyer asked severally that he be taken to hospital for treatment of the injuries sustained from the torture. He stated that he did not know any of the police officers who arrested him and did not have any grudge with anybody.

Submissions

37. The Appellant was represented by learned counsel, Mr. Chacha Mwita who filed written submissions on 28th February, 2020 and highlighted the same via Microsoft Teams video platform when the appeal was canvassed on 1st July, 2020. Mr. Mwita combined grounds 1, 2, 3 and 5 of the appeal into one namely that the prosecution did not prove the charge against the Appellant beyond reasonable doubt as its evidence was inconsistent, contradictory and lacked corroboration. This he argued as follows:

i. Identification of the Appellant leading to his arrest:

38. On this issue, counsel submitted that it was doubtful whether the arresting officers PW1 and PW8 were acting on intelligence reports since they did not provide material evidence in terms of the Appellant's physical features/description that could have, with precision pointed at the Appellant as the suspect they were to arrest from the bus. Counsel questioned why PW1 stated that the Appellant matched the description they had been given but neither him nor PW8 gave the Appellant's alleged description in their respective statements. He relied on the case of **Nathan Muchiri Ndunda v Republic [2015] eKLR** to buttress the importance of giving the description of a suspect in a first report.

39. Further, counsel pointed to PW1's testimony that they were instructed that there was a dangerous suspect of Somali origin travelling in the subject bus differed from PW8's narrative that they were informed that the person was suspected to be in possession of explosive materials. It was also argued that it was strange that PW2 was not privy to the information which had been shared to PW1 and PW8 concerning the Appellant's description yet PW2 claimed that he was the 'senior most officer present' during the operation. Counsel further pointed out that contrary to PW2's aforesaid assertion, PW8 testified that IP Mahiri, who was not called as witness, was the senior most officer in the team.

40. Counsel further took issue with PW10's testimony that an officer in civilian clothes informed him that they were looking for a person with a scar on his jaw because the same was not corroborated by either PW1 or PW8. He argued that in the circumstances, PW10's aforesaid claim was a baseless dock identification and proves that the alleged intelligence report was fake.

41. In counsel's view, the sole reason why PW1 and PW8 arrested the Appellant was because he alighted from the bus without any bag yet the intelligence report that they had never talked of any luggage and neither was any bag described beforehand so as to match it with the alleged recovery. He submitted that it was evident that PW1 and PW8 cooked a story in collaboration with PW2 and the same could only have been corroborated by CIP Ogeto who was not called to testify in any case.

42. It was further submitted that PW1's explanation that they held the Appellant at the scene for two days from 13th to 15th March, 2015 with the hope of arresting more suspects extinguished the assertion that PW1 and PW8 had intelligence reports and confirms the Appellant's defence that he was taken to the forest and tortured. Counsel submitted that it was criminal, illegal and irregular for the Appellant to be held along the highway for two days incommunicado without being accounted for by being booked in the Occurrence Book.

43. Further, counsel questioned why the OB entry of 15th March, 2015 when the Appellant was booked in after having been arrested on 13th March, 2015 did not indicate that PW8 was involved in the arrest of the Appellant despite PW8's claim that he was with corporal Ndirangu.

ii. Alleged recovery of the bag in the bus

44. On this, counsel submitted that the prosecution did not prove that the alleged bag was recovered in direct or constructive possession of the Appellant. He submitted that PW2 failed to corroborate PW1 and PW8's testimonies that they escorted the Appellant back into the bus to fetch his alleged luggage since PW2 said that he only saw the Appellant after his arrest. He took issue with PW2 stating that the bag was recovered under seat number 33 yet PW2 acknowledged that he did not personally witness the recovery of the bag. He also questioned why PW2 stated that his attention was drawn to the bus by a sniffer dog yet no other witness talked of or made reference to the said dog. In his view, this showed that the prosecution witnesses were not reading from the same script.

45. Counsel further questioned why the conductor of the bus who PW10 stated that had accompanied the Appellant and the police back into the bus was not called as a witness to back up the allegation that the bag was recovered under the Appellant's seat. He urged the court to

draw an adverse inference from the prosecution's failure to call the conductor whom he regarded as a crucial witness. He argued that it was incredible that both PW1 and PW8 insisted that the conductor was not with them when they went back into the bus despite PW10 stating otherwise. In addition, he pointed out that PW9 also testified that four ATPU officers accompanied the Appellant back into the bus. In his view, PW1 and PW8 were not being candid by claiming that they were the only ones who accompanied the Appellant back into the bus.

46. Further, counsel submitted that the PW1, PW2 and PW9 tendered contradictory evidence regarding who carried the bag outside and opened it. He stated that PW1 claimed he opened the bag, PW2 also claimed it was handed to him then he opened while PW9 said that the Appellant was ordered to open the bag. In his view, these were serious contradictions which cast serious doubt on the prosecution's case. He relied on the case of **Salim Chagawa Karisa v Republic [2016] eKLR** where the court noted that contradictions in the evidence of two different officers who were in the same operation were material and vitiated the conviction.

47. Counsel further pointed that the alleged recovery of the bag was suspicious because of the language barrier between the Appellant and the arresting officers. He faulted the fact that the inventory was prepared in English language yet the Appellant was only conversant with Somali language. He questioned why the inventory was not signed and/or witnessed by PW2 or any other independent witness present at the scene of arrest to prove that it was prepared there since PW10 stated that he did not see the police writing anything at the scene. He also wondered why no Somali interpreter countersigned the inventory to prove that the Appellant understood what he was doing when he signed the inventory. In his view, this confirmed that the Appellant only signed the inventory after he was tortured as stated in his defence and as such, the inventory is inadmissible since a suspect cannot be compelled to incriminate themselves.

48. Counsel also submitted that the passengers on seats number 32 and 34 would have been better placed to confirm whether or not the recovered bag belonged to the Appellant.

iii. Whether there was a link or nexus between the Appellant and the said bag?

49. On this issue, counsel submitted that a person has possession of something if the person knows of its presence and has physical control of it or has the power and intention to control it. He contended that the prosecution's evidence reveals that the bag containing the explosive substance was not in the physical possession/control of the Appellant but was inside the Makkah bus under seat number 33. He questioned why there was no other independent witness called by the prosecution to corroborate the allegation that the bag was found under seat number 33. He also took issue with the fact that scene of crime personnel were not involved to take photos of the scene for the court to appreciate that indeed a bus existed and that there was a seat number 33 beneath which the alleged bag was found.

50. Counsel further submitted that the prosecution did not call any witness to confirm that they saw the Appellant entering the bus with the alleged bag. He urged the court to draw an adverse inference from the failure by the prosecution to call any of the passengers who were on the bus as a witness. Counsel placed reliance on the case of **Republic v George Onyango Anyang & Another [2016] eKLR** where the court stated, *inter alia*, that the prosecution is required to avail to the court all relevant evidence to enable court make an informed decision.

51. Further, counsel contended that since the bus had over forty passengers, the prosecution should have employed DNA and fingerprint forensic evidence so as to zero in on the real owner of the bag as well as the contents therein. In this respect, he relied on the case of **Abdi Osman Ahmed v Republic [2007] eKLR** where the court stated that possession in abstract cannot be possession in the sense envisaged by law. He stated that taking of swabs was a wrong approach as it was merely speculative. He submitted that the failure to conduct a DNA analysis only confirms the prosecution's malicious intention to shield the court from the truth so as to fix the Appellant despite knowing fully well that he is innocent.

52. Further, counsel questioned how a further analysis by PW4 revealed that the alleged explosive was TNT which is different from the first on-spot test that revealed it was RDX. He contended that the amendment of the charge sheet by the prosecution to replace possession of RDX with TNT was not a genuine error and only shows that the evidence was being cooked as the case proceeded.

53. Counsel further submitted that the officers should have presented the whole bag plus the granules to the government chemist instead of taking samples. In his view, that would have been the only way to ascertain that the samples presented to the government chemist were exactly what was recovered in the bag. He also noted that there was a contradiction between PW1's testimony that he opened the side pocket of the bag and found a yellow container and PW8's testimony that the bag was small and had no compartments.

54. Further, it was argued that the swabbing of the clothes was intended to contaminate the exhibits and not to collect samples since it is evident from swab A2 that only one piece of cotton wool was used to swab all the five pieces of clothes that were in the bag. Counsel also questioned how traces of TNT were found on swab A3 obtained from the Appellant's hands yet none was found on swab A4 obtained from the recovered bag which the Appellant allegedly carried using his hands.

55. Mr. Chacha submitted that if traces of TNT were indeed found on the Appellant's hands, then the same resulted from intentional contamination with the substance that was poured on the Appellant as per his defence which was never rebutted. To buttress this argument, he relied on the case of **R v Maguire & Others 919920 2 ALL ER 433**. He submitted that it is interesting that the clothes that the Appellant was wearing at the time of his arrest were not subjected to analysis to establish if he had come from an environment of explosives. He also questioned why no swabs were taken from the bus and the Appellant's seat number 33.

56. It was also his contention that the evidence of PW4 was very shallow as the traces of TNT were never quantified as was done in the **Maguire Case (Supra)** so as to guide the court in determining whether contamination was primary or secondary. Counsel further faulted PW4 for not explaining the process and methodology she used in reaching her conclusion for the court to look at the same and make its own independent conclusion. He placed reliance on the case of **Republic v John Nyamu & 2 Others [2005] eKLR**.

57. Further, counsel argued that the prosecution did not recover anything from the bag to suggest that it indeed belonged to the Appellant. He noted that PW1's testimony that the Appellant's driving permit was one of the items he recovered from the bag was refuted by PW8 who stated on cross examination that he had no answer to whether there was any document in the bag identifying the Appellant.

58. Counsel also submitted that the Appellant's defence that he was tortured cannot be termed as an afterthought as he raised the same early in the proceedings and went on to reiterate it in his defence. He argued that the onus was not on the Appellant to prove that he was tortured but was on the prosecution to prove otherwise by availing medical records of the Appellant which they failed to do. In his view therefore, that part of the Appellant's defence was uncontroverted.

59. Finally, Mr. Chacha submitted that the fact that PW4 explained that the granular substance cannot explode on its own disqualifies it from being classified as an explosive under the Act. Counsel stated that in any case, the definition of explosive in the Act does not include TNT as an explosive thus the charge fails automatically.

iv. Sentencing

60. On this, the learned counsel faulted the trial court for sentencing the Appellant harshly and excessively. He took issue with the fact that the Appellant was sentenced to five (5) years imprisonment for an offence that attracts a maximum sentence of seven years imprisonment yet there were no aggravating circumstances to justify such a harsh sentence. Counsel submitted that since the Appellant was in custody throughout his trial which took three years, if **Section 333(2)** of the **Criminal Procedure Code** is considered, it would mean that he was sentenced to eight years which is more than the maximum prescribed sentence of seven years. According to Mr. Mwita therefore, the period served thus far is more than enough if remission is factored in.

The Respondent's Submissions

61. The Respondent through the learned State Counsel, Ms. Jillo opposed the appeal and filed written submissions on 30th June 2020.

62. Ms. Jillo submitted that the prosecution proved beyond any reasonable doubt that the Appellant was in possession of the explosives in the bag found under seat number 33 where he was sitting when the bus was stopped at the road block in Thika. She argued that a driving permit bearing the Appellant's name was found in the recovered bag which proves that it belonged to him. Further, she submitted that there was corroboration in the evidence of the police officers and the driver of the bus to the effect that the Appellant was escorted to the bus and came out with a bag. Finally, Ms. Jillo denied that the Appellant was set up as there was no evidence on the same.

63. On the sentence, Ms. Jillo submitted that the sentence meted out was proper and legal given the seriousness of the offence which the Appellant was convicted of. She also stated that the trial magistrate took into account the fact that the Appellant was in custody throughout his trial during sentencing. She urged that the appeal be dismissed.

Determination

64. Upon carefully re-evaluating the evidence on record and considering the rival submissions by both parties, I find the issues that emerge for determination may be deduced as follows: *Whether* the prosecution proved beyond any reasonable doubt that the Appellant was found in possession of an explosive substance; and whether the sentence imposed by the trial court was legal and proper.

a. *Whether* the prosecution proved beyond any reasonable doubt that the Appellant was found in possession of an explosive substance

65. Section 29 of the **Explosives Act** provides for the offence of possession of an explosive for an unlawful object as follows:

> ***"Any person who makes or knowingly has in his possession or under his control any explosive, in circumstances which give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of an offence and liable to imprisonment for a term not exceeding seven years, and the explosive shall be forfeited."***

66. From the reevaluation of the evidence on record, it is clear PW1 and PW8 and PW9 gave consistent and corroborative evidence that there was an intelligence report that a person suspected to be in possession of explosives was en route from Mandera to Nairobi onboard a bus called Makkah registration number KBV 024A. The prosecution established that the Appellant was indeed one of the passengers in the said bus which was intercepted at a road block laid along Thika-Garissa Highway. It was also established that the Appellant booked and indeed was seating on seat number 33 in the said bus.

67. When the passengers were ordered to alight with their respective luggage for purposes of a search, they all did except the Appellant. PW1, PW8 and PW9 all testified that on being asked where his luggage was, the Appellant said that he had left it in the bus. PW1 and PW8 escorted him back into the bus and he took them to his seat number 33 and picked a bag under the said seat. They went back outside with the said bag and it was opened in the presence of the police officers and the Appellant.

68. Whilst I agree with counsel for the Appellant that there was a contradiction in the testimonies of PW1 and PW8 regarding whether the Appellant's driving permit was found in the said bag, I find that there was circumstantial evidence that pointed to the Appellant as the only possible owner of the said bag.

69. The law allows the conviction of an accused person based on circumstantial evidence subject to satisfying certain criteria. The circumstantial evidence must be so cogent that the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The principles that guide the court when considering circumstantial evidence were spelt out in the case of **R vs Kipkering Arap Koskei** and **Another [1949] 16 EACA, 135** in which it was observed that:

"That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, and the burden of proving facts which justify the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

This principle was late in the case of Simon Musoke vs R. Criminal Appeal No. 188 of 1956 given more explanation when the court added that at the same time there must not be any co-existing facts in or circumstances which may weaken or destroy that inference of the guilt of the accused person".

70. In **Peter Mote Obero & Another V Republic [2011] eKLR** Court of Appeal at Kisumu, in Criminal Appeal No. 177 of 2008, the learned Judges Omolo, Waki & Nyamu, JJA reiterated as follows;

"It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V R [1952] AC 480. With those safeguards in place, circumstantial evidence is as good as any direct evidence which is tendered and accepted to prove a fact. In R V TAYKLOR, WEAVER AND DONOVAN [1928] 21 Cr. App. 20 CA, the court stated:

"Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."

71. In the case of **Alex Miseki Wambua vs. Republic [2008] eKLR**, the Court of Appeal observed as follows:

"The same court expanded the principle in Simon Musoke V.R [1958] EA 715, which cited with approval the following passage from the Privy Council in Teper V. R. [1952] AC 480 at P. 489,:

> ***"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

72. In this case, PW1, PW2, PW8 and PW9 all testified that a yellow plastic container was recovered from the bag. Inside the container was a polythene bag immersed in some liquid. The polythene bag had brown granular substance that was analyzed at the government chemist by PW4 and established to be TNT which is a high military explosive. It must be noted that it is the Appellant who personally informed the police that he had left his bag in the car.

73. The only inference that I can draw from the Appellant's actions of confidently telling the police that he had left his bag in the bus and actually going ahead to pick it in the presence of the police, is that he thought that nobody would be able to tell that the bag contained the explosive substance from the way it was cleverly concealed inside the yellow plastic container. It suffices to point out that PW2 testified that the concealing of the explosive substance seemed to have been done by someone who knew what he was doing.

74. In my view, learned counsel, Mr. Chacha faulting the arresting officers for focusing on the fact that the Appellant alighted from the bus without a bag whereas the intelligence report did not refer to a bag, does not turn on anything. The fact is that the explosive was found concealed in a bag that no doubt was found under seat number 33 that was booked by the Appellant.

75. The question that avails itself for determination at this juncture is whether the Appellant was found in possession of the explosive substance. **The Black's Law Dictionary, 10th Edition** defines the term 'possession' as:

"The fact of having or holding property in one's power; the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. Something that a person owns or controls"

76. As earlier stated, the bag that contained the explosive was recovered under the seat that the Appellant had booked. Further, that it was not a coincidence that he is the only passenger who failed to alight with his luggage in the entire bus. That to me is conclusive testament that he was in the actual possession of the explosive and nothing less. I find that by keeping the explosive in his bag, the Appellant held the substance in his power and exercised dominion and/or control over it to the exclusion of all the other passengers in the bus. I therefore find and hold that the prosecution indeed established that the Appellant was found in possession of the TNT explosive.

77. The next question is whether TNT qualifies as an explosive under the **Explosives Act**. **Section 2** of **the Act** defines '**explosives'** to include:

"(a) gunpowder, nitro-glycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury or of other metals, coloured fires and every other substance, whether similar to those herein mentioned or not, which is used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect

(b) any fuse, rocket, detonator or cartridge, and every adaptation or preparation of an explosive as herein defined; or

(c) any other substance which the Minister may, by notice in the Gazette, declare to be an explosive."

78. PW4, the government analyst, stated that TNT is classified as a military high explosive that is mostly used for military applications. She also stated that upon detonation, TNT releases a very high energy and has a detonation velocity of 6,900M. This proves that TNT is "*manufactured with a view to produce a practical effect by explosion" when* energy is applied to it. Indeed, there was no evidence that TNT has any other function apart from being used as an explosive. In the premises, the argument by counsel for the Appellant that TNT is not an explosive under the Act has no merit.

79. Further, I hold the view that the fact that PW4 stated that TNT is used in military applications means that it should not to be used by civilians presumably because there is no situation that can justify the use of an explosive with such a high detonating velocity by the latter group without causing great damage to property or loss of life. This therefore confirms that the Appellant's possession of the explosive substance was for unlawful object.

80. As regards the inventory produced in evidence as prosecution exhibit 6, the inventory of the recovered items, I have no doubt in my mind that it was prepared by PW1 at the scene of arrest and countersigned by the Appellant at the scene of arrest. PW1, PW2 and PW8 gave consistent and corroborative evidence to that effect. I further hold that there is no requirement that an independent witness signs an inventory as the signatures of the police making recovery and the suspect are sufficient. (See **Dickson Mbogo Ireri alias Mapengo & Another v Republic [2014] eKLR.)**

81. *Further, u*nder **Section 143 of the Evidence Act,** no particular number of witnesses shall be required for the proof of any fact. This means that the prosecution is not obligated to call all witnesses who may have information on a fact. The failure to call any witness will only be deemed fatal in circumstances where the evidence tendered by the prosecution contains gaps which could have been filled by a witness who was not called to testify. In the instant case, I am satisfied that the evidence presented by the prosecution was sufficient enough to sustain the charge that the Appellant was convicted of. The contention by counsel for the Appellant that some crucial witnesses were not called is therefore baseless.

82. With regards to the alleged inconsistencies in the prosecution's evidence, I hold the view that whether or not inconsistencies will discredit the evidence of witnesses depends on the nature of such discrepancies. It is well settled that each case must be considered on its own particular circumstances. In **Philip Nzaka Watu v Republic [2016] eKLR,** the Court of Appeal held that:

> ***"…Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

83. In **Dickson Elia Nsamba Shapwata & Another v The Republic, Cr. App. No. 92 of 2007,** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

> ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

84. Further, in **Twehangane Alfred v Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:** the Court of Appeal of Uganda held as follows:

> ***"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."***

85. In the instant case, whereas I appreciate that there were some discrepancies in the evidence of the prosecution witnesses, I hold the view that the same were so minor and immaterial that they cannot warrant interference with the Appellant's conviction. To be simple, they were negligible. That ground therefore fails.

86. With regards that to the complaint that the Appellant was held incommunicado along the highway for two days without being accounted for, it is my considered view that the explanation tendered by the prosecution that they had to hold the Appellant so as to help them arrest more suspects, was satisfactory. PW1's testified that the Appellant informed him that there were many other boys who had been sent by Maalim Mohamud to Nairobi aboard different buses. It is obvious the officers did not want to take chances by booking the Appellant in the cells in the face of such crucial leads particularly in view of the numerous terror attacks in the country. In any case, even if this court was to find that it was illegal and/or improper to hold the Appellant without booking him, the same would not vitiate the Appellant's trial as redress could be sought in a different forum.

87. The net effect of all the foregoing analysis is that I am convinced that the prosecution proved to the required standard which is beyond any reasonable doubt that the Appellant was found in possession of the explosive material for an unlawful object. The appeal against his conviction therefore fails. The conviction is accordingly upheld.

b. <u>Whether the sentence imposed by the trial court was legal and proper</u>

88. On this issue, **Section 29** of the **Explosives Act** provides for a maximum term of seven years imprisonment for the offence of unlawful possession of explosives which the Appellant was convicted of. The trial magistrate correctly took into account the aggravating circumstances such as the seriousness of the offence and the fact that such explosives can be used to cause great damage to property and even death to human beings. To that end, I find that the imprisonment term of five years imposed on the Appellant was reasonable and justified.

89. Further, I note that at the time of sentencing, the trial magistrate stated that he had considered that the Appellant had been in custody for exactly three years since plea was taken. This was proper in light of the provision of **Section 333(2)** of the **Criminal Procedure Code** which requires that the period that an accused was held in custody prior to sentencing be taken into account when imposing a sentence. He however failed to indicate when the sentence would commence. If the period of three years spent in custody during trial is considered in computing his sentence, it would mean that the Appellant has already served the full term. In the premises, I order that the Appellant be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND DELIVEED AT NAIROBI THIS 15TH JULY, 2020.

G.W.NGENYE-MACHARIA

<u>JUDGE</u>

In the presence of:

1. *Mr. Chacha for the Appellant.*

2. *Mr.Kiprop for the Respondent.*

3. *Appellant present.*