REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 244 OF 2019

BETWEEN

SAR GURACHA HARO.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 1049 of 2014 delivered by Hon. Andayi on 13th September, 2019).

JUDGMENT

Background

1. The Appellant was the 2nd Accused person in a joint charge with one Warque Dejene Sar who is his son. In counts I, II and III, they were jointly charged with commission of a terrorist act contrary to **Section 4(2) of the Prevention of Terrorism Act, 2012**. In Counts I, and II, it was alleged that on 4th May, 2014 at Homeland area along Thika Highway within Nairobi County, jointly with others not before court, committed a terrorist act by placing an Improvised Explosive Device (IED) in a public service vehicle Reg. No. KBT 090S Isuzu Mini Bus which exploded resulting to the death of Anthony Mugo Nganga and Anthony Baabu Miriti respectively both passengers on board the said motor vehicle.

2. **In Count III**, it was alleged that on 4th May, 2014 at Roysambu underpass along Thika Road, within Nairobi County, jointly with others not before court committed a terrorist act by placing an Improvised Explosive Devise (IED) in a public transport vehicle Reg. No. KAW O27H Mitsubishi minibus which exploded resulting to the death of one Najibo Abdi a passenger on board the said motor vehicle.

3. **In Count IV**, they were jointly charged with soliciting and giving support to a terrorist group for the commission of a terrorist act contrary to **Section 9 (1) of the Prevention of Terrorism Act, 2012**. The particulars were that on 8th May, 2012 at Kiamaiko area within Nairobi County jointly with others not before court solicited and received Kshs. 85,000/= through Mpesa Agent known as Cool Breeze Kakuma though cell phone number 0714155353 which was registered in the names of Sar Guracha Haro and meant for supporting a Terrorist act in contravention of the said Act.

4. **In count V**, the first accused was charged with being a member of terrorist group contrary to **Section 24 of the Prevention of Terrorism Act 2012**. The particulars were that on the 12th of May, 2014 at Anti-Terrorism Police Unit office in Nairobi within Nairobi County, he professed to be a member of outlawed criminal organization namely Al-Shabaab which is an outlawed criminal organization by the Kenya gazette notice number 12585 of 2010.

5. **In count VI**, the Appellant was charged with retaliation against a witness contrary to Section 17 of the Prevention of Terrorism Act of 2012. The particulars were that on 4th day of July 2014, at Milimani Law Courts within Nairobi County, he threatened one Paul Karanja Muchiri a witness who had testified in a **Criminal Case No. 750/2014** by saying "mbona unatoa ushahidi ndiyo kijana wangu afungwe, nitakuua" which are words showing an intent of retaliation against a witness in contravention of the said Act.

6. At the close of the prosecution case, the 1st accused was acquitted in Counts V and the Appellant in Counts I, II, III and IV. The trial court accordingly ruled that the Appellant had a case to answer in respect on Count VI only. Upon completion of the full trial, the court convicted him accordingly and sentenced him to serve fourteen (14) years imprisonment. It is on the dissatisfaction of both the conviction and sentence that he has preferred the instant appeal to this court.

Grounds of Appeal

7. The Petition of Appeal was filed on 29th November, 2019 by M/s Chacha A. Mwita Advocate. He raised eight grounds of appeal which I duplicate as under:

> ***i. The learned Hon. Magistrate erred in both law and fact in convicting the Appellant in an offence with no known Occurrence Book entry.***
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> ***ii. The learned Hon. Magistrate erred in both law and fact by convicting the Appellant on the strength of a single witness whose evidence was hearsay, speculative, inconsistent and uncorroborated.***
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> ***iii. The learned Hon. Magistrate erred in both law and fact by convicting the Appellant with no known and unidentified victim.***
>
> ***iv. The learned Hon. Magistrate erred in both law and fact by convicting the Appellant without establishing Mens rea and Actus Reus in relation to the offences as charged.***
>
> ***v. The learned Hon. Magistrate erred in both law and fact by convicting the Appellant while the prosecution had failed to prove their case beyond reasonable doubt.***
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> ***vi. The learned Hon. Magistrate erred in both law and fact by failing to make a finding that material witnesses and evidence was not availed at the detriment of the prosecution's case and an inference ought to have been drawn in favour of the Appellant.***
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> ***vii. The learned Hon. Magistrate erred in both law and fact by convicting the Appellant without considering the strong, unrebutted and unshaken defence put forth by the Appellant, hence arriving at a wrong conclusion in law.***
>
> ***viii. The learned Hon. Magistrate erred in both law and fact by sentencing the Appellant excessively and in violation of the relevant laws/policy guidelines on sentencing and failure to consider the pre-sentencing report requested for by the court and that he is a first offender.***

Summary of Evidence

8. This being the first appellate court, its duty is to re-evaluate and re-analyze the evidence adduced and come up with its own determination. In so doing, the court must take into account that it has neither heard nor seen the witnesses and give due regard for that. See **Njoroge V Republic (1987)KLR 19 and Okeno vs R [1972] EA 32**.

9. I will briefly summarize the evidence as follows. The case involved the unfortunate twin bomb blast along Thika Road involving two public service transport (PSV) vehicles on the 4th May, 2014. The chronology of what transpired was summarized in the evidence ;of the investing investigating officer, **PW17, Sergeant Silus Igade**. On the material date, he was at Kasarani Police Station with other Anti - Terrorism officers namely CPL Waka, PC Gitonga, PC Mburu and PC (driver) Ndirangu interrogating a terrorist suspect. At about 5.15 PM, they heard a loud blast coming from Thika Road Highway which they suspected was a trye burst. Immediately, he received a phone call on his mobile phone from Anti- Terrorism Police Unit (ATPU) headquarters from one Chief Inspector Newton Mwiti requesting him and his colleagues to proceed to Homeland area along Thika Highway where an explosion had taken place involving a public transport bus for Githurai route 45. The information was followed by another police radio call giving similar instructions. As they proceeded to Homeland, just before joining Thika Road at Royasambu area, they heard another blast. They first arrived at the Roysambu blast where they found that the blast involved a public transport motor vehicle KAW 027H Mitsubishi bus plying Mwiki route in Kasarani. They condoned off the scene and evacuated the casualties to various hospitals in town. Meanwhile, the team divided itself into two. He instructed CPL Lobwaka, PC Ndirangu and PC Gitonga to proceed to the Homeland blast scene whilst he remained at Roysambu with PC Mburu. The team that left for Homeland found other police officers from ATPU and Bomb experts. PW17 was equally joined by a similar team. The blast at Homeland also involved a public transport bus registration number KBT 090S.

10. Amongst the passengers in KAW 027H were **PW3, James Miringu Munene**, its driver and **PW4, Anthony Mutua Musila** the conductor. According to their evidence, they left Nairobi at about 4.30 PM or thereabout and as they approached the Rosters area, they encountered traffic snarl up. One passengers requested to alight and due to the heavy traffic, the driver and conductor allowed him to do so. They however could not recall who the passenger was. It was just as they passed the Rosters Bus Stage that they heard a loud bang inside the vehicle. They later realized it was a bomb blast which extensively damaged the vehicle.

11. As regards motor vehicle KBT 090S, that was en route to Githurai 45. the same had left Nairobi at about the same time. According to the evidence of **PW5, Geoffrey Mwangi Gakunyi** and **PW6, Joshua Wambugu Mwangi** both of whom were conductors in the bus, on arrival at the Rosters bridge, they heard a loud bang from inside the body of the vehicle which they later learnt was a bomb blast that had extensively damaged the vehicle. Two passengers who were the victims in Counts I and II died in this incident.

12. Another passenger in motor vehicle KAW 027H that was headed to Mwiki was a victim who died in respect of Count III. She was heading to Mwiki area to visit her parents from Nakuru where she worked. Coincidentally, her father **PW2, PC Godana Kere** then of Tourism Police was driving near Mwiki Police Station when he heard a loud blast near the Kasarani round about. He had earlier requested his wife to go and meet her daughter at the bus stage. When the blast happened, he abandoned his car and walked to the scene. That is when he found casualties being evacuated to ambulance vehicles, amongst them and unfortunately, was his daughter. He was unable to follow the ambulance but upon search in various hospitals found her at Kenyatta National Hospital. Sadly, she and two other passengers who were aboard the motor vehicle at the Homeland blast had died. The postmortem of the two victims in counts I and II was conducted by **PW14, Dr. Edwin Wellong** a pathologist at the University of Nairobi Department of Human Pathology. The cause of death for both deceased persons was multiple shrapnel injuries and traumatic amputation of the lower limbs consistent with explosives. He adduced the respective

postmortem reports in evidence.

13. **PW1, Daniel Gakure Gateru** was a passenger in motor vehicle KAW 027H and his evidence corroborated that of PW3 and 4. **PW8, CPL. Peter Lobwaka** and **PW10, Inspector Peter Odwodi** were in the company of PW17 whose evidence was corroborative. **PW7, PC Joseph Ole Shauri** of ATPU testified that he was informed by his senior Mr. Kipsir of the twin explosions on Thika Road and requested to proceed to the same. He visited both scenes and he recalled joining CPL. Igade and PC Lobwaka.

14. PW10 was a scene of crime officer heard a blast while he was at Thome Estate near Thika Road performing official duties. He visited the scene at Homeland involving KBT 090S, an Isuzu Bus heading to Githurai 45. On arrival, he heard another blast at Roysambu. He was involved in taking photographs of both scenes of crime. His further evidence was that when he was at the second scene, that is Homeland, he was informed that a second vehicle being a Nissan Matatu KBC 814 D was also involved in the blast and accordingly took photographs which he adduced in evidence.

15. In the respect of the Appellant, he was connected to the offence by his secondary link to the 1st accused who was the main suspect. While police were combing the scene at Roysambu, they recovered a YU mobile phone subscriber Sim Card with a phone compartment attached to it together with ball bearings which were all adduced in evidence. Investigations revealed that the Sim Card was linked to serial NO. 892540500012424986 and belonged to subscriber number 0755313159. According to **PW11, Vincent Magu** an Airtell Security Manager under whom YU mobile subscriber (ESSAR) communications was attached, the Sim Card was registered in the name of Omar Molu of Kayole. Further investigations revealed that this Omar Molu had bought the sim card from an Agency in Kayole owned by Paul Karanja Muchiri. The number was later traced to the Appellant. It was discovered that the Appellant had been sent money in two tranches from an M-pesa Agency in Kakuma Lodwar. It was the evidence of the investigations that this money which was Kshs. 15,000/= and 70,000/ respectively was intended to reward the persons who had carried out the bomb blasts. That is how the Appellant and his family were arrested. This included himself, his wife and three sons. After investigations, police released his wife and two of his sons. One of his sons, the 1st accused was charged in **Criminal Case 750 of 2014**. The Appellant was kept in custody for a while pending further investigations. He was shortly afterwards released with no charges. He was later re-arrested after it was alleged that he had threatened the first witness in Cr. Case No. 750 of 2014 with death for testifying against his son. He was charged with **Cr. Case No. 1049 of 2014** which was then consolidated with Cr. Case NO. 750 of 2014.

16. Back to the scene of crime, the investigators collected some swab samples from the damaged motor vehicles which were subjected to chemical analysis. **PW13, Catherene Serah Murambi,** a Government Analyst conducted the analysis and in her evidence concluded that the swabs contained ammonium nitrate which can be misused as an explosive if mixed with other substances like diesel, petrol or kerosene causing it to explode. This then informed the investigators that the blasts were caused by improvised explosive device (IED).

17. In his sworn defence, the Appellant denied committing the offence. Briefly he stated that he was arrested on 8th May, 2014 and put in custody in Ngomongo Police Station until 12th May, 2014. Between 12th and 13th May, 2014 he was remanded at Muthaiga Police Station. After his family members were arrested, he enquired to know what had happened and he was informed that he had received money that was intended to aid in committing a terrorist act which he denied. Consequently, his three sons and wife were also arrested but two sons were released on 24th May, 2014. In his respect, the police found him not culpable and bonded him to attend court on 4th July, 2014 as PW2 in Criminal Case No. 750 of 2014. He was however disinclined to testify against his son, arguing that he knew nothing about the offences.

18. Back to the evidence**, PW16, Assistant Superintendent of Police(ASP) Anthony Sunguta** then working with ATPU headquarters he was requested to take a confession of the 1st accused. When the 1st accused was asked whom he wished be present when he was recording the confession, he mentioned his parents. The Appellant and his wife were thus his witnesses. This is the basis on which the police wanted him to testify against his son, the 1st accused. To him, that was not sufficient reason for which he could have testified against the 1st accused. He strongly held the view that police charged him because he declined to testify against his son. He entirely denied that he threatened or attempted to threaten the witness who testified against the 1st accused. He was charged on 22nd July, 2014.

Determination

19. The appeal was canvassed before me on 30th June, 2020 by way of oral submissions via Google Teams video link. Learned Counsel, Mr. Chacha Mwita appeared for the Appellant whilst learned State Counsel, Mr. Okello appeared for the Respondent. Mr. Mwita argued grounds I – VII of appeal collectively thus summarizing the crux of the appeal which is that the prosecution did not prove its case beyond a reasonable doubt. The issue for determination therefore is whether the prosecution proved beyond all reasonable doubts that the Appellant was guilty of retaliation against a witness contrary to **Section 17 of Prevention of Terrorism Act 2012**.

20. On the part of learned Counsel Mr. Mwita, he factually submitted that the case for the prosecution was that the Appellant confronted PW1 after he adduced evidence in court against his son and threatened him with death for so doing. It is said that the offence took place along Milimani Law Courts corridors outside court room No. 1. According to PW17, who was the investigating officer, he was present when the Appellant uttered the words "mbona unatoa ushahidi ndiyo kijana wangu afungwe, nitakuua" which literally means "*Why are you testifying against my son? You want him to be jailed?* against which back drop he whisked away the witness to safety. It suffices it to state that PW1 testified on 12th November, 2014. Mr. Mwita questioned why this threat to the witness was not brought to the attention of the trial magistrate immediately. That it was not until 21st July, 2014 that the Appellant visited police to collect his mobile phone and identity card that he was shocked to be informed that he was under arrest. He was separately charged after which his file was consolidated with Criminal Case No. 750 of 2014 and the trial began afresh.

21. Earlier, the 1st accused had been charged in Criminal Case no. 750 of 2014 in which **PW1 was Paul Karanja Muchiri**. After the consolidation of the cases, the witness was not recalled to testify in Criminal Case No. 1049 of 2014. According to the learned counsel, the 1st Accused was acquitted after the full trial on the basis that this Paul Karanja Muchiri did not testify. Counsel adopted the same reasoning while persuading the trial court to acquit the Appellant in Count VI. He observed that only the investigating officer testified against the Appellant, thus his evidence could not be assessed against the would-be key prosecution witness who was the victim in Count VI.

22. Mr. Mwita went on to submit that on the date of the alleged offence, the learned trial magistrate was within the court premises yet no report of the threat was made. Further, although according to PW17 he whisked away the witness to safety in the presence of other police officers who were involved in the case namely, PC Lobwaka and PC Sunguti who testified on 15th July, 2015 and 15th February, 2017 respectively, counsel wondered how and why the said witnesses made no reference to the incident. He went on to argue that in any event, the Milimani Law Courts corridors are fitted with CCTV cameras and no evidence that the Appellant and the victim were caught arguing was adduced in court to corroborate the offence. According to the counsel therefore, the learned magistrate by convicting the Appellant entertained extraneous factors consisting of fantasy reasoning that was not backed by any evidence at all. This was in view of the fact that the learned trial magistrate made a finding that the Appellant threatened the victim because he was bitter that he had testified against his son. On the whole therefore, it was the learned counsel's submission that the conviction of the Appellant was not based on any evidence, was unsafe and the Appellant ought to be acquitted.

23. Mr. Okello in the other hand opposed the appeal. He submitted that the Appellant was convicted under Section 17 of the Prevention of Terrorism Act, 2012. He submitted that the witness to the offence was an investigating officer, PW17 who the learned trial magistrate believed in on account of the prevailing circumstances of the case. He argued that the failure to call the victim Paul Karanja Muchiri did not at all weaken the case for the prosecution. Other circumstances included the fact that the Appellant had been declining to testify against his son as a result of which he threated the 1st witness who gave evidence against him.

24. According to Mr. Okello, a threat against a witness can be made even without that witness/victim testifying or even in the absence of the witness. Thus, there would be no reason to call the witness to court. Counsel agreed that the investigating officer referred to CPL Lobwaka and PC Sunguti as being present when the threats were made. That although the two witnesses did not testify, it was sufficient evidence that only the investigating officer testified whose evidence was not challenged.

25. There is no doubt that the only witness to count No. VI for which the Appellant was convicted was PW17. According to the witness, whilst they were carrying out investigations, they learnt that a YU mobile subscriber Tel. No. 0755313159 was used to transmit money for purposes of rewarding for commission of the terrorist acts. The Sim Card to this number was sold at an agency in Matopeni Area in Kayole owned by the victim in the count VI, one Paul Karanja Muchiri of ID Card No. 30222386. He was called as a witness in Criminal Case No. 750 of 2014 in which the 1st accused was initially charged. According to PW17, the Sim Card belonged to one, Umar Molu and that when Paul Karanja Muchiri was interrogated, he stated that the said Umar Molu bought the sim card in the company of the 1st accused. That is how he became a witness. He testified in Criminal Case 750 of 2014 on 4th July, 2014 when he indicated that he recognized the 1st accused as one of the persons accompanying the registered owner of the sim card purchased from him.

26. Having set that background, it is trite that PW17 testified that he was on the court corridors in the company of CPL Lobwaka and PC Sunguti after Paul Karanja Muchiri testified and after the Appellant confronted him. As rightly submitted by Mr. Chacha Mwita, the two police officers testified in court on 15th July, 2015 and 15th February, 2017 respectively. Reading through their evidence, none of the two witnesses mentioned that they were with PW17 at the time the incident happened or they witnessed the incidence at all. Furthermore, the offence in Count VI demands that specific evidence and more so from the victim comprises critical evidence upon which the trial court would convict the Appellant. In that regard, after the consolidation of the charges, either of the two things ought to have happened, namely; the prosecution applies to recall Paul Karanja Muchiri as their witness or applies to adopt the evidence adduced in Cr. Case No. 750 of 2014. None of the two was opted for by the prosecution, implying that Count VI was unsupported by crucial evidence. The Appellant was accordingly convicted only on the basis of the evidence adduced by PW17.

27. I thus grapple with the question of the credibility of the evidence of PW17. Whilst the court begs why such crucial witnesses were not called, I cannot make a conclusion for this omission without mentioning a critical element of the background of the matter. In his sworn defence, the Appellant was candid that he had been requested to testify against his son which he declined. His justification was that he knew nothing about the offence. More crucially is that this charge could not be established without the evidence of the afore mentioned three crucial witnesses. It was argued by Mr. Okello that a victim of threat of retaliation need not be present when the threats are made. I concur with this statement, but he fell far short of appreciating the fact that the instant scenario does not compare. The threats are alleged were made directly to the victim in a confrontation witnessed by three other witnesses. So why were they not called by the prosecution?

28. My conclusion is that there was a likelihood that the police were not unhappy that the Appellant did not support the evidence against his son. Thus, PW17 could not be regarded as a credible witness upon whose evidence culpability could be attached to the Appellant. In return therefore, adverse inference can be made that if the prosecution called the three crucial witnesses, they most likely would have adduced adverse evidence against their case. See the case of **Bukenya and others vs Uganda [1972] EA 594** where it was held that:

> ***"...the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; the court has the right and the duty to call witnesses whose evidence appears essential to the prosecution of the case, and lastly that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

29. Applying the above principle to this case, and at the risk of repeating myself, it suffices to state that when the police went to arrest the 1st accused, the Appellant was additionally arrested together with his wife and two other sons. On the 19th May, 2014, his wife and the elder son were released from the custody. On 24th May, 2014, him and his second son were also released from custody. The Appellant was however ordered to go and collect his national identity Card and mobile phone after 14 days. The 1st accused was charged on 21st May, 2014 in Criminal Case No. 750 of 2014. That case commenced hearing on 4th July, 2014 when Paul Karanja Muchiri testified as PW1.

30. The case for the prosecution was that the Appellant confronted this witness because of testifying against his son. With this in mind, and having regard to the fact that the police indeed intended the Appellant to testify against the 1st accused gives credence to the assertion that they were not happy that he did not back up their case. Consequently, a likely framed up case would not have found support from any witness. No wonder the would-be crucial witnesses were not called to testify.

31. I would accordingly agree with learned counsel for the Appellant, Mr. Mwita that the learned trial magistrate entertained extraneous matters and imported personal opinion in his finding that the Appellant committed the offence because he was bitter that Paul Karanja Muchiri had testified against his son to found a conviction against him. The law is clear that an accused person should be convicted only on the basis of cogent evidence, which evidence must be proved beyond any reasonable doubt. A court cannot assume the existence of facts that were never alluded to by witnesses as in this case to make a conclusion of culpability of an accused person. It is therefore a case in my view that was not founded on any cogent evidence but on assumptions that were imported into the case by the trial court. In so holding, I find solace in the case of **John Muriithi Nyaga vs Republic [2014] eKLR** where the court of Appeal in summary held as follows:

> ***" we agree with the Appellant's counsel that the issue of grudge or lack of it was not supported by evidence and that the first appellate court introduced and relied on it to justify the conclusion it reached. In Okethi Okale and others vs Republic [1965] EA555 this court observed that the learned judge had been in determining a murder case in which the main evidence was by the deceased's wife who claimed to have seen the assailants attack and kill her husband had stated :***
>
> *"this is a case in which reasoning has to play a greater part than actual evidence"*

In its judgement in the case, this court deprecated that approach thus;

> *"with all due respect to the learned trial judge, we think that this is a novel proposition for in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel's speeches (see R v. Isaac [1965] Crim. L.R. 174. This theory by the learned Judge was inconsistent with the evidence of Joyce that the injury on the head was caused by the second Appellant with an axe, neither is it supported by the medical evidence."*

32. Likewise, in the instant case, the learned trial magistrate went on a fishing expedition as opposed to applying the sacrosanct principle of only relying on the evidence adduced to found a case against an accused person. In my view, I am unable to conclude that PW17 was an honest witness, the basis on which the Appellant ought to have been convicted. For this reason, it is my view that the conviction of the Appellant was not safe.

33. In regard to the sentence, learned counsel Mr. Chacha Mwita submitted that the same was harsh and excessive in the circumstances of the case. He submitted that the learned trial magistrate failed to take into account that the Appellant had been in custody for five years before the date of the sentence. He submitted that this implied that in addition to the 14 years jail term imposed he would serve up to 19 years imprisonment which would be an illegal sentence.

34. On his part, learned counsel Mr. Okello submitted that the mitigation of the Appellant informed the court on the sentence to impose, hence, it was appropriate to pass the maximum imprisonment sentence of 14 years. He had reliance on the cases of **R vs Samson Alumbe Gota and another [2017] eKLR** and **R vs Mwau Kimeli and 2 others [2019] eKLR** in that regard. When referring to Samson Alumbe case, he stated that in that case, the court noted that the mitigating circumstances can shed light on how the offence was committed in which case, mitigation can aid the court in altering a sentence on appeal. Echoing the same spirit in R vs Mwema, he submitted that in the present case, the Appellant displayed anger, anguish and despair that would cause his son to be convicted, reason wherefore he confronted the witness who testified against him. According to Mr. Okelllo therefore, the court ought to believe that he actually committed the offence. He faulted the learned trial magistrate for not stating when the sentence should commence.

35. In rejoinder, Mr. Chacha submitted that the Appellant offered mitigation merely for purposes of sentencing but not for purposes of collection of new evidence.

36. On this, my view is that it can be correct to submit that the mitigation an accused person offers may shed light into the circumstances of a case. However, this approach should be taken with a lot of caution particularly when a court is not sitting as an appellate court. The rationale is that an appellate court may overturn both the conviction and the sentence of the trial court. As such, it may not be appropriate for a trial court to conclude that the accused person committed an office based on the mitigation he offers. At the point of mitigation, an accused person has already been convicted any way. And therefore, he mitigates only for purposes of persuading the court to impose a lenient sentence.

37. The converse may be true where an accused pleads guilty. In that case, the law is very clear that an appellate court can only vary the sentence on account of its illegality. Such a scenario offers a good platform for the court to conclude that the mitigation an accused person offers sheds light into the circumstances of the case.

38. In the present case however, the Appellant did not plead guilty and has been vindicated by this court. It is not a good case as argued by Mr. Okello that because he mitigated that he was angry, he committed the offence, anyway. This court has absorbed him.

39. It is important all the same, to comment on the severity of the sentence. Under Section 17 of the Prevention of the Terrorism Act, 2012, ***'a person who does or omits to do any act against a person or a member of the family of a person in retaliation for the person having given information or evidence under this act commits an offence and is liable on conviction, to imprisonment for a term not exceeding twenty (20) years.'*** Under the proviso to **Section 333(2) of the Criminal Procedure Code,** a court in sentencing shall take into account the period that an accused person spent in custody prior to sentencing. The Judiciary Sentencing Policy Guidelines cements this provision at paragraph 7.10 where it obligates the court to take into account the time already served in custody during the trial.

40. In the present case, the learned trial magistrate stated that he had considered that the Appellant that the Appellant was sentenced to 14 years imprisonment since he had been in custody since his arrest. He went on to state that the time he had spent in remand custody since he took plea on 22nd September, 2014 shall be taken into account and the remaining time would be served accordingly. The latter statement

accords with **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.

41. My take on this is that the sentencing ruling was vague in that it ought to have, in candid terms specified the date that the sentence was to commence. Having regard that the court intended that the sentence commences on 22nd September, 2014, and additionally that the Appellant had been in remand custody for five years, meant that he was to serve nineteen years imprisonment which is near the maximum provided by law. This would be harsh and excessive in the circumstances of the case. All the same, having pronounced the conviction as unsafe, I shall not further comment on what would have been an appropriate sentence.

42. In the end, I find that this appeal is meritorious. The prosecution failed to prove their case beyond a reasonable doubt. The conviction was unsafe. I quash the conviction, set aside the sentence and order that the Appellant be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 15th day of July, 2020

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Chacha Mwita for the Appellant.

2. Ms. Chege h/b for Mr. Okello for the Respondent.

3. Appellant present.