REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 149 OF 2016

ABDIRIZAK MUKTAR EDOW.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the

Chief Magistrate's Court Milimani Cr. Case No.884 of 2014

delivered by Hon. Gandani on 30th September, 2016).

JUDGEMENT

Introduction

1. The Petition of Appeal dated 31st March, 2017 is an appeal against both conviction and sentence by the trial court in the Chief Magistrate's Court at Milimani, Nairobi. In the said criminal case, **Criminal Case No. 884 of 2014**, the learned Senior Principal Magistrate, Gandani (Mrs), convicted the Appellant in counts 1-III and V-VIII and acquitted him in count IV. She consequently sentenced the him to serve 20 years imprisonment for count 1 and 10 years each for counts II, III, V, VI, VII & VIII. The sentences were to run concurrently.

2. The counts were as follows:

Count I: Giving support for the commission of a terrorist act contrary to Section 9(1) of the Prevention of Terrorism Act of 2012. The particulars were that between the 31st day of June 2014, at Mandera town within Mandera County knowingly gave support to Sheikh Hassan alias Blacky authorizing the use of motor vehicle registration number KBP 274U Toyota Succeed for use in the commission of a terrorist act.

Count II: Being a member of a terrorist group contrary to Section 24 of the Prevention of Terrorism Act. The particulars were that, on the 2nd day of June 2014, at Talek area within Narok County was found to be a member of a terrorist group namely Al-Shabaab which is an outlawed terrorist organization by the Kenya Gazette Notice No. 12585 of 2010.

Count III: Collection of information contrary to Section 29 of the Prevention of Terrorism Act of 2012. The particulars were that, on the 2nd day of June 2014 at Talek area within Narok County was found in possession of Samsung mobile phone GT 19300 of IMEI number 3542450558054043 with Safaricom micro sim card serial number 89254029741003458554 of mobile number 0722595662 and 4GB micro SD card which had an audio namely AUD–201140324–WA0023 which is an article for the use in instigating the commission of a terrorist act in contravention of the said act.

Count IV: Arrangement of meetings in support of terrorist groups contrary to Section 25 of the Prevention of Terrorism Act 2012.The particulars were that the Appellant, on 2nd day of June 2014, at Talek area within Narok County was found in possession of Samsung mobile phone GT 19300 of IMEI number 3542450558054043 with Safaricom micro sim card serial number 89254029741003458554 of mobile number 0722595662 and 4GB micro SD card which had information inviting people for meeting at Masjid Musa Mosque in Mombasa on 2nd February 2014 the agenda of the meeting being furtherance of the activities of a terrorist group namely Al-Shabaab in contravention of the said Act.

Count V: Being in possession of an article contrary to Section 30 of the Prevention of Terrorism Act 2012. The particulars were that, on 2nd day of June 2014, at Talek area within Narok County was found while in possession of Samsung mobile phone GT 19300 of IMEI number 3542450558054043 with Safaricom micro sim card serial number 89254029741003458554 of mobile number 0722595662 and 4GB micro SD card which had an audio namely AUD–201140324-WA0023 which is an article for use in instigating the commission of a terrorist act in contravention of the said Act.

Count VI: Being in possession of an article contrary to Section 30 of the Prevention of Terrorism Act 2012. The particulars were that on 2nd day of June 2014, the Appellant at Talek area within Narok County was found in possession of Samsung mobile phone GT 19300 of IMEI number 3542450558054043 with Safaricom micro sim card serial number 89254029741003458554 of mobile number 0722595662 and 4GB micro SD card which had an audio namely AUD–20140331-WA0003 which is an article for use in instigating the commission of a terrorist act in contravention of the said Act.

Count VI: Being in possession of an article contrary to Section 30 of the Prevention of Terrorism Act 2012. The particulars were that the Appellant on 2nd day of June 2014, at Talek area within Narok County was found in possession of Samsung mobile photos GT 19300 of IMEI number 3542450558054043 with Safaricom micro sim card serial number 89254029741003458554 of mobile number 0722595662 and 4GB micro SD card which had an audio namely AUD–201140324-WA0004 which is an article for use in instigating the commission of a terrorist act in contravention of the said Act.

Count VIII: Being in possession of an article contrary to Section 30 of the Prevention of Terrorism Act 2012. The particulars are that on 2nd day of June 2014, at Talek area within Narok County was found in possession of Samsung mobile photos GT 19300 of IMEI number 3542450558054043 with Safaricom micro sim card serial number 89254029741003458554 of mobile number 0722595662 and 4GB micro SD card which had an audio namely AUD–201140324-WA0005 which is an article for the use in instigating the commission of a terrorist act in contravention of the said Act.

3. The Appellant raised 12 grounds in support of his appeal which may be adumbrated as follows;

a) That the trial court failed to appreciate that knowledge on the part of the Appellant was an essential ingredient of the crime under Section 9(1) of the Prevention of Terrorism Act. (ground 1).

b) That the Appellant was convicted on count 1 in the absence of evidence that the Appellant knew that his motor vehicle would be used for the commission of a terrorist act. (Ground 2).

c) That the learned magistrate ignored evidence that the motor vehicle in question was hired in the ordinary course of business. (Ground 3).

d) That the trial court failed to appreciate that count 2 in the charge sheet particularised and specified that Al-Shabab was gazetted under Gazette Notice No. 12585/2010 under the provisions of the Preventions of Terrorism Act and that the trial court convicted the Appellant on the offence that he was not charged with. (Ground 4).

e) That there was no direct evidence of membership to the Al-Shabaab terrorist group and the available circumstantial evidence could not lead to the same inference. (Ground 5)

f) That the possession of information per se is not a crime under Section 29 of the Prevention of Terrorism Act and that it must be proved that the information is to be used for the commission of a terrorist act by a member of a terrorist group or any other person. (Grounds 6 & 7 combined).

g) That the prosecution did not adduce any evidence to proof that the article or information in question was to be used in instigating the commission of a terrorist act contrary to Section 30 of the Prevention of Terrorism Act. (Ground 8).

h) That the trial court erred in placing reliance on inadmissible hearsay evidence in the form of 'intelligence reports' (Ground 9)

i) That the trial court erroneously engaged in speculation and drawing adverse inferences in circumstances where those were not the only inference to be drawn. (Ground 10).

j) That the trial court convicted the Appellant on poor quality evidence which does not meet the required standard of proof. (Ground 11).

k) That the trial court erred in convicting the Appellant when the totality and weight of the evidence is against conviction. (Ground 12).

Appellant's Submissions.

4. The Appellant filed written submissions dated 17th October, 2018 through M/S Kilukumi & Co. Advocates. The Appellant's counsel based his written submissions on various thematic areas as follows;

On Supporting Commission of a Terrorist Act;

5. Counsel combined grounds 1, 2, 3, 9, 10, 11& 12. The Appellant's counsel submitted that to secure a conviction under **Section 9(1) of the**

Prevention of Terrorism Act (POTA), the Prosecution must prove two essential ingredients which are knowledge and support or solicitation of support for the commission of a terrorist act.

6. While referring to count 1, counsel submitted that the charge sheet failed to particularise the terrorist act that was allegedly supported by the Appellant. He stated that the same was generic and lacked specificity. To this end, counsel referred the court to **Article 50(2) (b) of the Constitution of Kenya**. He submitted that the article required the accused person to be informed of the charge with sufficient detail so as to answer it. Counsel also referred to **Article 25 of the Constitution** on the non-derogable nature of right to fair trial captured in **Article 50**.

7. It was further submitted that **Section 134 of the Criminal Procedure Code (CPC)** required that an accused person be confronted with a specific and particularised allegation of commission or omission and not omnibus and nebulous allegations such as terrorist acts. Counsel submitted that by dint of the provisions of **Section 2 of POTA** there are more than nine (9) different acts of commission that are specified as constituting terrorist act. Therefore, it was incumbent upon the prosecution to specify which of the prescribed terrorist acts the Appellant was accused of. In sum, counsel stated that the absence of specificity meant that the trial was not a fair hearing as envisaged by **Article 50(2) (b) of the Constitution** as read together with **Section 134 of the CPC.**

8. It was submitted that in view of the testimony of the star witness PW5, a motor vehicle was hired. Counsel stated that there was no legal requirement for such agreements to be in writing when a person is hiring a taxi. It was submitted that given the fact that the motor vehicle in question was hired out at the market rate, it could not be said that the Appellant was giving support.

9. It was submitted that there was no iota of evidence that was tendered by the prosecution to prove the ingredient of knowledge in relation to Count I. Counsel submitted that the Appellant had no knowledge that his motor vehicle would be used to ferry grenades, which according to intelligence sources was intended for a terrorist attack in Mandera. It was submitted that the trial court failed to observe that the motor vehicle in question was a taxi clearly marked with a yellow line. As such, it was common knowledge that it offered transport services.

10. Counsel submitted that the police witnesses tendered falsehood to fix the Appellant. To this end, counsel referred to the case of **Simon Musoke vs. R [1958] EA at 718** where the Court of Appeal stated that in a case depending exclusively upon circumstantial evidence, the circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt.

11. Counsel submitted further that prosecution placed reliance on intelligence sources that the grenades were to carry out a terrorist act at Mandera. He stated that intelligence reports constitute nothing, but inadmissible hearsay evidence. To this end, counsel cited the holding in **Latif vs. Obama No. 10-5319(D.C. Cir. 2012)** where the United States Court of Appeal, District of Columbia Circuit observed that;

> ***"…intelligence consists of anonymous hearsay in the form of unsupported bottom-line assertions and hence it is impossible to assess the reliability of the assertions in the documents."***

12. Counsel also relied on the following cases; in the case of **United States Vs. Spotts No. 00-3741** where the United States Court of Appeal, Eighth Circuit observed that;

> ***"Intelligence reports amount to more than anonymous tips which must be more closely scrutinized."***

13. While in the case of **Parhat Vs. Gates 532 F. 3d 834 (D.C. Cir. 2008) at pg 24**, the United States Court of Appeal for the District of Columbia Circuit observed; that intelligence reports are hearsay evidence and that on admitting the same the court must take into account the reliability of such evidence in the circumstances.

14. Counsel submitted further that possession of grenades, *per se*, does not constitute a terrorist act under the law and that the prosecution failed to prove the two essentials of the crime which are; knowledge and support for commission of a terrorist act. Counsel urged the court to reverse the trial court's finding that the Appellant was guilty of contravening **Section 9(1) of POTA**.

On Membership of a terrorist group;

15. Under this thematic area, counsel combined grounds 4 & 5. It is submitted that the Appellant was charged and convicted of being a member of a terrorist group contrary to **Section 24 of the POTA**. It is submitted that in the case of **Mohammed Haro Kare Vs. Republic [2016] eKLR,** the Honourable Court laid down the process of proving membership to a terrorist group. In the foregoing case, the court observed that membership to a terrorist group may not be so easily determinable. As such, the use of circumstantial evidence that points to a person's association with such a group is vital and that the prosecution ought to take steps to show a clear linkage between actions of the Appellant in relation to the outlawed group.

16. Counsel stated that no link was established between the actions of the Appellant and those of *Al-shabaab*. Appellant's Counsel in his written submissions stated that suspicion however strong cannot be a basis of conviction and that likewise sympathy to a cause or agenda cannot be conclusive evidence of membership to an organization. Further, that the golden rule in circumstantial evidence is that all the circumstances taken together must irresistibly point to the membership of the accused to a terrorist organization.

On Collection of Information;

17. Counsel combined grounds 6 & 7. He submitted that the trial court did not analyse the evidence adduced in support of count III and whether the requisite standard of prove had been reached. Further, that the offence created by **Section 29 of the POTA** can only be committed by a member of a terrorist group or a person who is committing or instigating, preparing or facilitating the commission of terrorist act Counsel also submitted that the charge as drawn did not disclose an offence. As well, that no direct evidence was adduced to prove that the video in question was to be used in the commission of any terrorist act. Further, that the prosecution is obligated to specify which terrorist

act was to be committed and the aim of the terrorist act. To this end, counsel referred the court to the case of **Mohammed Abdi Adan Vs. Republic [2017]eKLR at Pg 16** where the court held that the prosecution was mandated to prove various elements. Firstly, that the accused was affiliated to a terrorist group in which capacity he either held, collected, generated or transmitted information and that this information was used in instigating, preparing or facilitating the commission of terrorist acts. Secondly, that the accused in any other capacity other than being a member of a terrorist group held, collected, generated or transmitted information and that the information in question was used in instigating, preparing or facilitating the commission of the terrorist acts.

18. It was further submitted that in the case of **Mohammed Abdi Adan Vs. Republic, supra,** the court defined holding to mean 'keep possession of'. In view of the said definition, the application of the doctrine of constructive possession could not apply with regard to the offenses under the POTA of which the Appellant had been charged with.

19. Counsel submitted further that knowledge is an essential element of the offence created by **Section 29 of the POTA.** As such, it is that knowledge which constitutes the *mens rea*. As well, that the holding information for the use in the commission of a terrorist act must be known to the accused person and that additionally he must know that the information would be used in the commission of a terrorist act.

20. It was submitted that the prosecution did not tender any evidence to establish that the Appellant knew that his mobile phone or the micro SD card was holding the offensive video. To this end, he relied on the holding in the case of **Josephat Kisilu Mulinge vs. Republic [2014]eKLR** where the court observed *inter alia* that for one to be said to have possession of an item, one must have knowledge that it exists and power to control over it.

On Possession of Articles;

21. Counsel combined grounds 8, 10, 11, & 12 and submitted that there are two essential ingredients or components in respect of the charge under **Section 30 of POTA**. These are; firstly, knowledge of the information and secondly, the holding of the said knowledge on behalf of a person. It was submitted that all the four counts, these are counts V to VIII did not assert that the Appellant had knowledge thus rendering the defect in the charge fatal. Further, that the charges as drawn did not make any reference whatsoever to the articles in question. He stated that the audio recordings could have been held by the Appellant on behalf of an unnamed person. In the absence of the two essential elements the charges *ex facie* do not disclose a criminal offence. To this end, counsel referred the Honourable Court to the case of **Kipkurui Arap Sigilai & Another Vs. Republic [2004] eKLR** where the learned judge Kimaru J. observed as follows;

> ***"The principal of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principle of the law has a constitutional underpinning. (See Section 77 of the Constitution of Kenya)."***

22. It was submitted that the four (4) aforesaid counts, were fatally defective for failing to incorporate essential elements of the offence created by statute. Consequently, the Appellant was facing charges unknown and alien to the law. It is submitted further that the charge sheet is defective for failing to state the aim of carrying out the terrorist act in question.

23. Counsel submitted that in the event the Honourable Court takes the view that the charges were properly drawn, it ought to find that the trial court did not address its mind to the possibility of mixture and or mismatch of the analysed data. It was submitted that the prosecution never bothered to adduce evidence to show what data was in Mr. Adan Mohammed's phone and how separate and distinct it was from the data/material found in the Appellant's phone.

On sentence;

24. It is submitted that the Appellant was sentenced to serve twenty (20) years for all seven counts he was convicted of. It is submitted that the trial court did not take into account that the Appellant had been in custody for a period of two (2) years and four (4) months at the time he was sentenced to serve 20 years. It is submitted that the trial court should have taken into account the entire duration the Appellant was in custody before sentencing in accordance to Section 333 of the Criminal Procedure Code.

Respondent's Submissions.

25. The Director of Public Prosecutions (DPP) through Duncan M. Ondimu, Principal Prosecution Counsel filed their written submissions dated 31st October, 2018.

26. Counsel submitted that the evidence adduced by the prosecution against the Appellant is both direct and circumstantial evidence. To this end he referred to the case of ***Simon Musoke Vs. R (1958) EA 715 at Pg 718*** where it was held that in a case depending exclusively upon circumstantial evidence, the judge must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilty. Counsel also cited the holding in ***Teper Vs. R (2) (1952) A.C 480 (PC)*** where the court observed that before drawing the inference of the accused's guilty from circumstantial evidence it ought to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

27. Counsel cited the principal set out in the cases of ***Okeno Vs. R (1972)KLR, 32*** and ***Caroline Wanjiku Ngugi Vs. Republic*** and where in both cases the court observed that the first appellate court must itself weigh evidence on record and draw its own conclusion and also scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. And that in doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

28. Counsel referred the Honourable Court to Section 107(1) of the Evidence Act Cap 80 where it is provided that facts must be proved. He submitted that the said position of the law was reiterated in the case of ***Woolmington Vs. DPP (1935)AC 462*** where it was stated that the burden of proof is beyond a reasonable doubt and falls on the prosecution. To this end he referred the Honourable Court to the holding in ***Miller Vs. Minister of Pension (1947) 2 All ER 372 at 373*** where Lord Denning held that proof beyond (reasonable) doubt does not mean proof beyond the shadow of doubt.

29. Counsel further proposed issues for determination and submitted on the same as hereunder;

On whether the Appellant gave support for the commission of a Terrorist Act pursuant to Section 9(1) of the Prevention of Terrorism Act 2012;

30. Counsel submitted that the act of giving support must be construed to be one where an accused person transfers ownership or possession of an item capable of being transferred or given, be it money or otherwise to another party or a group for the sole intention of enabling that party /group to act and further their agenda.

31. It was submitted that the only probable inference that the court can draw is that given the evidence of PW5, PW6 and PW8 is that the Appellant herein must have had prior knowledge or reason to believe that his act of directing PW5 to give physical possession of his motor vehicle was for the sole purpose of committing a terrorist act.

32. Counsel submitted further that the evidence adduced by the prosecution clearly shows that the grenades recovered in the subject motor vehicle must have been meant for the commission of a terrorist act. It was submitted that the mere possession of the eight (8) grenades by Sheikh Hassan *alias* Blacky and his accomplices was in itself a terrorist act bearing in mind that the said eight grenades were capable of endangering lives and property thus creating a serious risk to the health and safety of the public and thus prejudicing national security and public safety.

33. It was submitted that the prosecution has adduced evidence to prove that the Appellant gave support to the commission of a terrorist act by providing his motor vehicle which was used to ferry grenades to Sheikh Hassan alias Blacky.

On whether the Appellant was in possession of an Article contrary to Section 30 of POTA 2012;

34. Counsel submitted that counts V,VI,VII and VIII relate to audios recordings which were in the phone belonging to the accused person. In referring to Black's Law Dictionary 9th Edition was is submitted that possession is defined as the fact of having or holding property in one's power. Counsel also referred to the definition in the Penal Code where possession is defined as not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for use or benefit of oneself or of any other person.

35. Counsel referred the honourable to the case of ***Tima Kopi V Republic [2005] eKLR*** where the court defined possession and observed as follows;

> ***"In the case of Hussein Salim V R (1980) KLR 139, the Court of Appeal adopted the definition of the word "possession" in Stephen's Digest of Criminal Law, 9th Edn at page 304 where it is defined as follows;***
>
> ***"A movable thing is said to be in possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need"***

In adopting this definition their Lordship stated as follows;

> ***"We take this definition to mean, not that any legal title has to be proved, nor that access to the complete exclusion of all other persons has to be shown, but that a possessor must have such access to and physical control over the thing that he is in a position to deal with it as an owner could to the exclusion of strangers".***

36. It was submitted that in view of the evidence adduced by PW6, the Appellant had exclusive control and possession of the phone where the incriminating evidence was retrieved and there was no break in the chain of custody of exhibit 5 where the still image, video and audios were retrieved from. It was submitted that there was adequate evidence to sustain the offences in the respective counts; count III,IV,V,VI,VII and VIII. Counsel further relied on the provisions of Article 33(1) of the Constitution as read with Article 33(2) and submitted that the Appellant possessed the said articles whose intent was for the promotion of *Al-Shabaab* terrorism ideals without any color of right and was in total breach of the law of the land. It is submitted that the violence language against non-muslim was loud and clear in the video and the audio recordings.

37. Counsel submitted further that the image, video and audio recordings were in Kiswahili language and that the accused has shown proficiency in the said language and as such was well aware of the nature of content and cannot claim ignorance. It was argued that evidence has shown that the accused had downloaded and severally viewed the articles and that he had transmitted them *via* whatsapp which is conclusive enough that he was aware of the contents.

On whether the Appellant was a member of a Terrorist Group Contrary to Section 24 of the Prevention of Terrorism Act.

38. It was submitted that the Honourable Court should take judicial notice of the existence of *Al-Shabaab* which is an outlawed terrorist

organization in Kenya under Gazette Number 12585 of 2010. In referring to Section 2 of POTA counsel submitted that there is no doubt that the *Al-Shabaab* does exist and that by dint of the provisions of Section 24 of POTA membership to a terrorist group can either be through construction of the prevailing circumstances/circumstantial evidence, conduct of an accused person and or by an accused person publicly affirming /admitting that he is a member of a terrorist group.

39. Counsel submitted that in the absence of an accused person's own admission that he is a member of a terrorist group, the court has discretion and power to construct his/her membership through his conduct and the prevailing circumstances /evidence. Counsel singled out the evidence of PW5 and PW6 which pointed to the fact that the Appellant, by his conduct of relating with Sheikh Blackie and authorizing his monitor vehicle KBP 274U to be used for the transmission of a terrorist act and by his possession of articles which were intent on promoting *Al-Shabab* activities by encouraging and advocating for recruitment, radicalization, instigation to violence towards non-Muslims in Kenya and preparation for the commission of terrorist act is a member of the *Al-Shabab* terror group.

On whether the Appellant collected information for the use of a terrorist act contrary to Section 29 of POTA.

40. Counsel submitted that in view of the testimonies of PW3, PW6, PW7 and PW10, the images of video and audio recordings were all meant for all intent and purpose for the promotion of the *Al-Shabab* terrorist agenda and for the promotion of violence against non-Muslims in Kenya. He argued that the Appellant had collected a video in relation to the West Gate attack where a huge number of Kenyans were killed which by being in its possession is conclusive that he espoused the view therein. This, counsel added, was indicative that he aligned himself to the views of the *Al shabab* terror group and is in fact and without any doubts that he is a member of the terror group.

On whether the Appellant was part of the arrangements of meetings in Support of Terrorist Groups contrary to Section 25 of Prevention of Terrorism Act 2012.

41. Counsel submitted that according to the evidence of PW6 and PW8, the Appellant possessed information in soft copy, a poster inviting the Muslims for a meeting at Masjid Musa Mosque on the 2nd day of February, 2014. It was submitted that the agenda of the meeting was explicit to the effect that its intent was for the promotion of Jihad and terrorism against non-Muslims and to further the activities of *Al-Shabab* terror group.

42. Counsel added that the said meeting took place and that the Appellant's conduct of being found in possession of the poster was evident that the Appellant had taken part in the arrangement of the same. Counsel argued that the Appellant knew of the agenda of the meeting and could have reasonably foreseen that the agenda would be for promotion of Jihad and furtherance of the *Al-Shabab* agenda.

On contradictions and inconsistence of evidence.

43. It was submitted that there were no contradictions or inconsistence and even if they existed, they are minor and could not go to the root of the prosecution case which does not prejudice the case and negate the fact that several offences related to terrorism were committed.

On Defective Charge Sheet.

44. Counsel submitted that the charge sheet herein is not defective and was framed properly in accordance to Section 137 of the Criminal Procedure Code that disclosed offence and the particulars which the Appellant was charged with.

On the Sentence.

45. It was submitted that the sentences passed are legal and proper. Counsel emphasized that the offences which the Appellant was charged with are serious. Hence, the court should take judicial notice of the notoriety, the callousness and viciousness of the actions of *Al Shabaab* terrorist group in Kenya and the East African region and that the said acts have had an impact on the National Security of the Country. That therefore, the sentence should be a deterrent factor on would-be offenders.

The Case at Trial and Summary of Evidence.

46. On 16th June, 20014, the Appellant was arraigned in court and charged with five counts related to terrorism activities. The Appellant pleaded not guilty to the five counts and the matter was set down for hearing. After the prosecution had availed six witnesses, they sought to amend the charge sheet on the 25th March, of 2015 whereby the accused was charged with eight counts related to terrorism activities as duplicated in this judgment. He once again pleaded not guilty to the all eight counts.

47. **PW1, Musa Weche**, Police Force No. 100265, testified that while in company of fellow officers on 1/6/2014 laid an ambush on terrorists who were on a mission to attack Mandera. He testified that the terrorists were abode motor vehicle registration No. KBP 270U. On laying the ambush, the occupants of the motor vehicle hurled grenades and opened fire at them and they responded and managed to gun down two terrorists but one managed to escape.

48. **PW2, Emmanuel Nae Kahindi**, Police Force No. 102263 100265, corroborated the PW1's testimony and stated further that on laying the ambush they recovered eight grenades from the said motor vehicle registration No. KBP 274 U.

49. **PW3, P.C Jackton Ingar**a testified that he picked the Appellant from Narok Police Station together with an inventory that had been signed by the accused person. He stated that the said inventory constituted two mobile phones nanely a Samsung Galaxy and City Call, a Safaricom line inside and a 4GB memory card. The City Call phone had an Orange (card) line. He testified that he interrogated the Appellant who informed him that his vehicle KBP 274 U had been impounded in Mandera whereby the two occupants had been shot by the police.

50. **PW4, No. 79969, Hudson Henry Masaki** testified that on 1/6/2014 while at Mandera was called by AIPO officer who was detaining motor vehicle registration No. KBP 247 U Toyota Succeed. His evidence was that the said motor vehicle had been involved in offences related to terrorism and it had been detained at Mandera CID Headquarters. The vehicle was operating as a taxi. It had several bullet holes. He took about 15 photographs which he produced as exhibits together with a certificate confirming that he was the author of the photographs.

51. **PW5, Abdirachid Mamo Ibraham** came from Mandera where he had operated a taxi since 2012. He added that he was the taxi driver for the vehicle registration No. KBP 274 U having been employed by the Appellant. He stated that on 1/06/2014, the Appellant had called him and instructed him to hand over the said motor vehicle to Sheikh alias *Black*y who wanted a taxi. Sheikh paid Ksh 2,000/ and told him that he was going to Karame to attend to a pregnant woman.

52. **PW6, No. 85198 P.C Nicholas Waringa** a forensic specialist with various qualifications did a forensic examination of the mobile phone make Samsung recovered from the Appellant. The same was forwarded to him with an exhibit memo form by one P.C Franklin Okisai, No. 88708. He stated that the phone had information, pictures, audios and videos which were played in court. He produced a report in that regard.

53. **PW7, Constable Julius Muchiri** of AP Post Masai Mara in Narok received the Appellant after his arrest. Amongst the items found in possession of the Appellant was a mobile phone make Samsung Galaxy3 (exhibit 3) that was subjected to analysis by PW6. The Appellant also had a City Call mobile phone. The witness prepared the inventory in this respect.

54. **PW8, No. 88708 P.C Franklin Okisai**, a terrorism investigator testified that he got information that there were terrorists who intended to launch an attack and that they were to collect some devices from Somalia. Acting on the said information the police officers laid an ambush at Omaljilo, a centre bordering Somalia. The suspects were on the other hand headed to Mandera town. He stated the police officers managed to gun down two of the terrorists who tried to escape from the motor vehicle registration No. KBP 274 U Toyota Succeed. It was at midnight when the incident occurred. The motor vehicle belonged to the Appellant. One Abdirashid Mamo the driver of the motor vehicle identified it and informed the witness that he had been employed by the Appellant who was the owner. He stated that on 2nd June, 2014, the in-charge at Talek AP post managed to arrest Abdirizak Murtar Edow, the Appellant, who was later booked by Julius Michaki Muchimi.

55. According to PW8, the Appellant was found to be in possession of a driving license, two mobile phones; makes Samsung and City Call. An inventory was prepared which he signed.

56. **PW9, CPL Hassan Siyad** testified that that he and his colleagues received intelligence report that terrorists would attack Mandera. It was said that the terrorists were under the command of Sheikh Hassan Blacky and had left for Umar Jilao a border town with Somalia. They formed a team that was commanded by Chief Inspector Siele and included PC Weche, PC Meli and some APs under the command of Osman Guchand. They laid an ambush along Laffe-Mandera Road. They were able to gun down two terrorists and recovered eight (8) grenades from the motor vehicle registration No. KBP U make Toyota Probox that was being used by the terrorists. He added that the said motor vehicle was being used as a taxi.

57. **PW10, Inspector Peter Mburu** attached to tracking system arrested the Appellant on 2nd June, 2014 at the Mumtaz Shop within the Talek area, Narok. He was accompanied by APC Muchiri. He stated that they searched him and recovered two phones, a driving license and ID card.

58. **PW11, No. 61973, Joseph Sang Langat** a bomb technician was on 14th December, 2015 requested by **P.C Franklin Okisai** to analyze hand grenades. In his analysis, all the hand grenades contained a RDX or TNT explosive. He produced his report as exhibit No. 24.

59. At the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He opted to keep silence and await the court's decision.

Determination.

60. It is a settled principal of law that the first appellate court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own. See **Pandya vs. R (1957) EA 336, Ruwala vs. R (1957) EA 570 and *Okeno v R [1972] EA. 32*,**

61. In brief, the prosecution case is that they learnt of a terrorist mission to be launched within Mandera Town by some terrorists under the command of Sheikh *alias* Blacky who had crossed over to Somalia to secure grenades. On laying the ambush they managed to gun down the said Sheikh and another terrorist while one managed to escape. Apparently, the said Sheikh had earlier communicated with the Appellant who was the owner of the motor vehicle that was used to launch an aborted terrorist mission and had purportedly hired the said motor vehicle as a taxi from him at a fee of Ksh. 2000.00. The said motor vehicle was handed over to the said Sheikh *alias* Blacky by PW5 who was apparently the taxi driver of the same.

62. On arresting the Appellant he was found to be in possession of what appeared to be in support of terrorist activities. The said information was stored in the form of digital information. He was therefore charged with 8 counts all related to terrorism. He was convicted on counts 1,II,III,V,VI,VII and VIII. He was acquitted on count IV. He was consequently sentenced to serve 20 years for count 1, and 10 years for the rest of the counts. The sentences were to run concurrently. This means that the Appellant was to serve a maximum of 20 years imprisonment.

63. It follows therefore that in view of the evidence on record and the rival submissions by both parties the issues for determination may be deduced as follows;

a) Whether the charge sheet was defective;

b) Whether the Appellant supported acts of terrorism;

c) Whether the Appellant was in possession of articles/information for the use in the commission of a terrorist act; and

d) *Whether the Appellant was/is a member of the Al-Shabaab.*

Whether the charge sheet is defective.

64. In the case of **B N D v Republic [2017] eKLR, H.C at Kiambu Criminal Appeal No. 25 of 2016** the learned Ngugi, J. observed at paragraph 28-29 of the holding as follows;

> ***"28. Hence, here, we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given crucial pointers. Two cases are pertinent: the case of Yosefa v. Uganda [1969] E.A. 236 – a decision of the Court of Appeals – and Sigilani v. Republic [2004] 2 KLR 480 – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. Sigilani v. Republic [2004] 2 KLR held:***
>
> > ***The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.***
>
> ***29. The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective. …"***

65. In the instant case, the charge sheet cited the offence and laid down the particulars of each offence in unambiguous manner. The particulars clearly disclosed the offences the Appellant faced that he clearly was able to plead to and aptly defend himself. All the offences are related to terrorist activities which are outlawed by dint of the Prevention of Terrorism Act No. 30 OF 2012. In view of the holding by Ngugi J. in the foregoing case, it cannot be gainsaid that the instant charge sheet is proper and drafted in accordance with the law. It suffices to state that not all information or fact of the case can be squeezed into the particulars of the charge. What is paramount is that the particulars disclose all the essential elements necessary for the proof of the offence. This threshold was met in all the charges the Appellant was facing. Hence, this ground of appeal fails.

Whether the Appellant supported commission of a terrorist act

66. This issue respects Count I in which the Appellant is charged with giving support for the commission of a terrorist act contrary to Section 9(1) of the Prevention of terrorism act of 2012. The particulars are that the Appellant between the 31st day of June. 2014, at Mandera town within Mandera County knowing gave support to Sheikh Hassan alias Blacky authorizing the use of motor vehicle registration number KBP 274U Toyota Succeed for the use in commission of a terrorist act.

67. Section 9 of the Prevention of Terrorism Act, (POTA) No. 30 of 2012 provides as follows;

> ***"9. (1) A person who knowingly supports or solicits support for the commission of a terrorist act by any person or terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years.***
>
> ***(2) For the purposes of sub-section (1), support includes the provision of forged or falsified travel or other documents."***

68. The key witness in respect of the charge was PW5, Abdirachid Mamo Ibraham who stated that he hailed from Mandera where he had operated a taxi since 2012. It was his evidence that he was the taxi driver for the vehicle registration No. KBP 274 U having been employed by the Appellant. He stated that on 1/06/2014, the Appellant had called him and instructed him to hand over the said motor vehicle to Sheikh *alias* Blacky who wanted a taxi and consequently paid him Kshs. 2,000/. He stated that Sheikh told him that he was going to Karame to attend to a pregnant woman.

69. Evidence established that Blacky was a Sheikh within Mandera town and was constantly in touch with the Appellant. The said Black's SIM card was produced in court where it was demonstrated that his cell phone number had been used to communicate with the Appellant on different occasions. Blacky was apparently gunned down together with another person who was alleged to be a terrorist at the Kenya/ Somali border (Omaljilo Centre) after the security officers laid ambush on the said motor vehicle and recovered 8 grandees.

70. Appellant's counsel submitted that it was incumbent upon the prosecution to specify which of the prescribed terrorist acts the Appellant. His view was that in the absent of specificity, the trial could not be regarded as a fair trial as envisaged by Article 50(2)(b) of the Constitution as read with Section 134 of the CPC.

71. The view of the prosecution on the other hand was that the act of giving support must be construed to be one where an accused person transfers ownership or possession of an item/goods capable of being transferred or given, be it money or otherwise to another party or a group for the sole intention of enabling that party /group to act and further their agenda. That therefore, the act of the Appellant of directing PW5 to give the vehicle to Blacky must be construed that he had prior knowledge or reason to believe that the vehicle was for use of a terrorist act.

72. Based on PW5's evidence, it is not in doubt that the motor vehicle herein belonged to the Appellant and that he is the one who authorised him to give it to Blacky. It is also not in doubt that based on PW5's testimony, the vehicle operated as a taxi and Blacky informed him that he was hiring the motor vehicle to attend to a pregnant woman. Blacky indeed gave Kshs. 2,000.00 to PW5 as the taxi charge.

73. I have no doubt that the grenades recovered in the motor vehicle must have been intended for the commission of a terrorist act. Thus, capable of endangering lives and property and in turn prejudicing national security and public safety.

74. The foregoing notwithstanding, the prosecution failed to directly link the Appellant to the eight grenades that were recovered. In so concluding I give regard to Section 2 of POTA which provides as follows;

> ***"terrorist act" means an act or threat of action—which—involves the use of violence against a person;***
>
> ***(ii) endangers the life of a person, other than the person committing the action;***
>
> ***(iii) creates a serious risk to the health or safety of the public or a Section of the public;***
>
> ***(iv) results in serious damage to property;***
>
> ***(v) involves the use of firearms or explosives;***
>
> ***(vi) involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;***
>
> ***(vii) interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;***
>
> ***(viii) interferes or disrupts the provision of essential or emergency services;***
>
> ***(ix) prejudices national security or public safety; and***
>
> ***(b) which is carried out with the aim of— intimidating or causing fear amongst members of the public or a Section of the public; or***
>
> ***(ii) intimidating or compelling the Government or international organization to do, or refrain from any act; or***
>
> ***(iii) destabilizing the religious, political, Constitutional, economic or social institutions of a country, or an international organization:***
>
> ***Provided that an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm referred to in paragraph (a)(i) to (iv)"***

75. In view therefore, the Appellant ought to be given the benefit of doubt since it is not in dispute that his motor vehicle used to operate as a taxi within Mandera town. It had a yellow line. PW5's evidence was certain on this issue. There was however no direct evidence that the Appellant was seized of knowledge that indeed Blacky was to use his car for terrorist activities. It is difficult in the circumstances to fault the Appellant for hiring out his vehicle.

76. Additionally, although the police had intelligence report that a terrorist attack would carried out in Mandera, there was no iota of evidence that it would be facilitated by the Appellant's vehicle. Neither did they tender any evidence to demonstrate that the Appellant gave out the said motor vehicle solely for the commission of a terrorist attack. It was after an ambush that they learnt that the vehicle belonged to the Appellant. Needless to state, the Appellant may have been a victim of the circumstances.

77. In the case of ***Republic v Michael Muriuki Munyuri [2014] eKLR, H.C at Meru, Criminal Case No. 71 of 2010*** The learned Lesiit, J. relied on various authorities and delivered herself at paragraph 10 and 11 of the decision as follows;

> **"10. In SAWE –V- REP [2003] KLR 364 the Court of Appeal held.**
>
> **"1. *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 hypotheses than that of his guilt.***
>
> ***Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***
>
> ***The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.***

....suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

11. ***In ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:***

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

78. In view of the foregoing, it was not safe to convict the Appellant in count I. The circumstances under which the vehicle that was loaded with grandees was recovered are inconsistent with Appellant's guilt. They do not specifically point to his guilt. They also do not satisfy the provisions of Section 9(1) of POTA which reads;

"(1) A person who knowingly supports or solicits support for the commission of a terrorist act by any person or terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years."

79. It follows therefore that the prosecution did not avail any cogent evidence that clearly demonstrated that the Appellant gave out his vehicle with full knowledge that the said motor vehicle was to be used for terrorist acts. It is my humble view that the prosecution failed to prove count 1 to the required standard.

Whether the Appellant was in possession of the articles/ information for the use in the commission of a terrorist act and whether the Appellant supported the acts of terrorism.

80. In the case of ***Osman Mohamed Balagha v Republic [2018] eKLR , H.C at Garissa Criminal Appeal No. 30 of 2017*** learned judge Dulu, J. observed at paragraphs 16 to 21 as follows;

"16. What are the contents of the two videos? The contents were seen and heard by the court as the videos were played at the trial. The first video lasted two minutes and eleven seconds. It was in Kiswahili talking about others joining the group and encouraging them to join Al–Shabaab. The second video was for a shorter period of thirty six seconds which was slightly more than half a minute and portrayed a man being beheaded by a group professing it to be an act of terrorism from an unknown place. It was in Arabic but of course the pictures were seen by the magistrate.

17. From the Face-book chats, it was also clear that the Appellant Balagha was communicating with somebody called Tatu Bila just after the Garissa University attack. All this was not denied by the Appellant or disputed at the trial.

18. The prosecution was required to prove that the information contained in the video was for use in instigating commission of or preparation to commit a terrorist act. In my view, the content of the first video which called or encouraged others to join Al-Shabaab was clearly meant to facilitate commission of a terrorist act or acts. The Appellant himself said that he went to Mombasa to teach people whom he did not identify using that video among others.

19. The second video was meant to demonstrate how terrorist acts can be executed.

20. In my view, the sum total of the contents of the videos and the teaching of the Appellant to others relating to those videos, which he admitted, fell squarely within the definition of Section 30 of the Prevention of Terrorism Act. Both possession and intended use were proved. In my view therefore, the learned magistrate was right in convicting the Appellant. The sentence was lawful.

21. The authorities cited by counsel for the Appellant, such as the case of Mohamed Haro Kare vs Republic(Supra) and the English case of Zafar & Others vs Republic (Supra) are distinguishable as they relate to a different set facts and situations.

22. I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court."

81. In the instant case, PW 5 testified that he had been employed by the Appellant as a taxi driver. Apparently, the Appellant was the owner of the motor vehicle that was involved in the aborted terrorist mission. According to PW10 the tracking system led to the arrest of the Appellant in Telek area in Narok. On doing search the Appellant was found to be in possession of two cell phones. PW6 who was a digital expert analysed the Samsung phone and retrieved various information that relate to terrorism. He played various audio and video files in the trial to that effect.

82. In regards to count V, audio file number 3 was played. It was at least 12 minutes long. The audio encouraged Muslims to conduct jihad activities against non-Muslims. It had, *inter alia*, the following information;

''Don't worry he is dead so don't worry when your youth go to Somalia…''

83. The video number 3 was adduced by PW6 as **AUD-201140824-WA0023** and marked exhibit number 5. The general spirit of the audio

was to encourage the youth to join Jihad. Mothers are also persuaded to allow their children to join the Jihad.

84. In relation to count VI, audio file number 4 was also played in court. It was marked as **AUD-20140331-WA003**. The video ran for about 4 minutes and 28 seconds. The same was advocating for jihadism and extremism as well as praising the Alqaida activities in Somalia. It declared praise to *Al Shabaab* and ***Majaheedin*** in Somalia. The audio contained, *inter alia*, the following information;

> ***''We praise you Al-Shabaab in Somalia…."***

85. In relation to count VII, audio file number 5 was played. It was adduced in exhibit as **AUD-20140331-WA0004**. It ran for at least 2 minutes. The same case applied to exhibit **CD AUD-201400331-WA005** in relation to count VII. It was marked as file No. 6 and ran for 6 minutes. It contained writing like "**Sauti ya Ribat".** It also had the following information;

> ***''God break Kenya'''. .. ''Shair Mola Funga Kenya'' … Mujahideen in Somalia''''***

> ***''No retreat no surrender we shall be at the front line to fight in Kenya. We are youth from Mombasa ….demolish their houses so that they have nowhere to stay…demolish their houses so that they have nowhere to stay…. We are not afraid of threats …… Alqaidas are the Wakombozi….''***

86. Generally, all the audio videos retrieved from the Appellant's phone spoke to encouraging Jihadism and extremism all of which are acts of terrorism. Moreover, it was not singular audio but repetitive information with the same spirit of encouraging terrorism. How then can the Appellant claim innocence or ignorant of the videos which he even had transmitted to third parties?

87. It is apparently clear that the content of the said pictures, videos and audio relate to terrorist activities. The audio and videos definitely were encouraging the followers or sympathizers of the group to harden themselves in the fight against Kenya. The videos also concluded that the *Alqaidas* are the saviours of the bad Kenyan enemy. Furthermore, the Kenyan youth are also encouraged to go to Somalia where they will help fight the enemy, Kenya.

88. It is common knowledge that Kenya is a first enemy of the terrorist groups in Somalia and therefore any message intended to encourage a terrorist group to fight Kenya can only be intended for purposes of terrorism. I do therefore conclude that the Appellant was properly charged for the offences of possession of materials for use of terrorism. All videos and audios were contained in a CD marked as Exhibit 14.The ingredients of the offence as defined under Section 30 of POTA were sufficiently established. He was safely convicted in counts V, VI, VII and VIII.

89. The Appellant did not dislodge the prosecution's evidence in regard to the said possession of such information. He chose to keep quiet and did not give his version of story as to why he had in possession of the said articles/information that relate to terrorist activities.

90. I add that PW6, the IT forensic analyst testified that the vidoes and audios adduced in evidence were retrieved from the raw data of the Appellant's mobile devise. That is to say that they were not fetched from deleted materials. The information was retrieved **using logical system** of extraction where you only get data that is inside the devise, and not data that has been transferred or deleted.

91. This implies that the Appellant was responsible for that collection of the said terrorist materials. Therefore, he cannot also claim innocence with respect to count III in which he was charged with collection of information related to terrorism. The provision reads;

> ***"A person who is member of a terrorist group or who, in committing or instigating, preparing or facilitating the commission of a terrorist act, holds, collects, generates or transmits information for the use in the commission of terrorist act commits an offence, and is liable, on conviction, to imprisonment for a term not exceeding thirty years.***

92. According to PW6, the Appellant was not only having, after collection, the terrorist material but severally transmitted it to other persons. My candid view is that the evidence in Count III was water tight.

Whether the Appellant was/is a member of the *Al-Shabaab*

93. This is issue respects count II. Prosecution submitted that where the membership of Al-Shabaab is not confessed and or conceded, the court may infer such membership based on the conduct of the accused. PW6 testified that in the Samsung phone that had been recovered from the Appellant, there was a message requesting people to attend a meeting at Masjid Musa Mosque and that the said message was distributed to other people. PW8 confirmed that indeed the said meeting took place in furtherance of a terrorist agenda whereby the police officers intervened and recovered the firearms and Al-Shabaab flag from the mosque. The report to that effect was produced as plaintiff exhibit No. 13(a). (See pg 145 of the Record of Appeal).

94. Some of the excerpts printed from the Appellant's mobile phone **produced as P.Ext 11 are replicated hereunder;**

> ***"Kongamano(meeting) masjid Musa on 2nd 2.2.14. Umoja wa vijana wa jihad. Ndugu yangu muislamu huu ni wakati mzito ulizonajiliwa mitihani bona fitina haswa, ikiwa wewe ni kijana na oko na fikra jihadi; Jihadi sasa hivi sasa imekuwa ni ibada ata kwa waisilamu, mashehe ndio mustahili wasa kupinga ibada hii''***

95. Although the Appellant was acquitted of the offence of planning the meeting, it can safely be concluded that having communicated of the need to attend that meeting, which PW8 confirmed took place and and *Al shaabab* flag was recovered, leads to an inference that the

Appellant ascribed to the believes and activities of the proscribed group.

96. In addition, flowing from the fact that some of the material recovered from the Appellant's phone contained information that advocated for terrorist activities such as, calling on the Kenyan youth to go to Somalia to fight the Kenyan government and exalting the *Alqaida* terrorist group, in my view, is sufficient ground from which this court can infer membership of the *Al shabaab* group. In any event, the entire exhibit makes reference to terrorist activities.

97. The Appellant did not offer a rebuttal to this strong prosecution evidence. He did not give his version of the story as to why his phone had such message that related to a meeting at the Masjid Musa Mosque where people attended and *Al-shabaab* flag recovered. It follows therefore, that the only inference that can drawn from the message is that the Appellant was a members of the *Al-Shabaab.*

98. Consequently, it is my humble view that the trial magistrate did not misapprehend the evidence that should warrant this court to interfere with its judgment. In ***Ogeto –Vs- Republic [2004] 2 KLR 14*** the Court of Appeal stated further that:

> ***"Nevertheless a Court of Appeal will not normally interfere with a finding of a fact by the trial court unless it is based on no evidence or misapprehension of the evidence or the trial judge is shown to have acted on wrong principles in reaching the decision – Chemagongu –Vs- R [1984] KLR 730."***

99. In the instant case, the trial magistrate cannot be faulted. She properly convicted the Appellant based on the evidence on record. The conviction ought to be upheld, save for Count I.

Appeal on Sentence.

100. This count would interfere with a sentence where the sentence, *inter alia*, is not within the law. *(See* ***Mustafa Elimlim Emekwi vs. Republic, (Criminal Appeal No. 127 of 2007, Court of Appeal sitting at Eldoret, unreported,)*** **Omolo, O'Kubasu & Aganyanya JJA** while upholding the decision of the Superior Court stated as follows;

> ***"The High Court (Ochieng, J) considered the Appellant's appeal but the learned judge dismissed the appeal by stating inter alia;* "In any event, the sentence meted out are both within the law. I find no reason to fault the manner in which the learned trial magistrate exercised his discretion in that regard. Accordingly, the sentences are both upheld. In the result this appeal is dismissed" *...we agree with the learned judge of the Superior Court that the sentence imposed were lawful.")***

101. Section 354(3) of the Criminal Procedure Code, provides as follows;

> ***"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -in an appeal from a conviction -reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or***
>
> ***(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or***
>
> ***(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;***
>
> ***(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;***
>
> ***(c)...***
>
> ***(6) Nothing in Sub-section (1) shall empower the High Court to impose a greater sentence than might have been imposed by the court which tried the case."***

102. The provision has severally been affirmed by courts as was held in the case of ***Kinyanjui vs Republic [2004] 2 KLR, supra,366)"*** that;

> ***"Under Section 354(3) of the Criminal Procedure Code, the Court had the jurisdiction to impose an appropriate sentence on appeal, including enhancing the sentence imposed by the magistrate's court."***

103. In the instance case, the sentence meted against the Appellant by the magistrate court is within the law as provided for by POTA. The same is commensurate with, not only the offence, but the circumstances of the case. More so, bearing in mind that terrorism is a menace not only in Kenya but all over the world and must be deterred at all costs. Kenya as a country has borne the brunt of effects of terrorism. It is important therefore, to discourage the vice by adhering to sentencing guidelines under the law. Having regard to all these circumstances, and further bearing in mind that the Appellant was a first offender, I have no reason to disturb the sentence imposed.

104. In the end, I find that the prosecution did not adduce sufficient evidence in respect of count I. The appeal in that regard succeeds. I quash the conviction and set aside the twenty years imprisonment. I however uphold the conviction and sentence in respect to Counts II, III, V, VI ,VII and VIII. The period the Appellant was in custody since he was charged shall be taken into account whilst tabulating the jail term. It is so ordered.

Dated and Delivered at Nairobi This 13th March, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. *Mr. Kimani for the Appellant.*

2. *Mr. Momanyi for the Respondent*.