



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 30 OF 2017

OSMAN MOHAMED BALAGHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Court

Criminal Case No. 393 of 2015 by Hon. T. L. Ole Tanchu (SRM)

JUDGEMENT

1. The appellant was charged in the Chief Magistrate's Court at Garissa with being in possession of an article for the use in instigating the commission of a terrorist act contrary to section 30 of the Prevention of Terrorism Act No. 30 of 2012. The particulars of the offence were that on 9th April, 2014 at Mororo Trading Centre within Tana River County was found in possession of a Samsung Tablet GT-p5100 of IMEI No. 3587070308150520 which had two videos namely; VID-20141229 and VID-20150218 which were articles for use in instigating the commission of a terrorist act.
2. He pleaded not guilty to the charge. After a full trial he was convicted of the offence and sentenced to ten (10) years imprisonment.
3. Dissatisfied with conviction and sentence, the appellant has come to this court on appeal. He filed his own appeal in person on 6th June, 2017. On the same day an appeal was filed for him dated 5th June, 2017 by Mr. Chacha A. Mwita Advocate.
4. The said advocate also filed written submissions for the appellant but he did not attend court. On the hearing date after perusal of the written submissions, the appellant relied on the same and said that he did not need the attendance of his lawyer. He said that he had nothing to add to the submissions.
5. In the written submissions Mr. Chacha Mwita highlighted the provisions of section 2 of the Prevention of Terrorism Act. He analyzed the judgement of the trial court and stated that it was not proved or substantiated how the items could be used to instigate an act of terrorism, in that the first video did not talk about instigation of terrorism, and the second video was in Arabic language and could not be comprehended by witnesses or the court. He stated also that there was no proof that the appellant was a member of Al-Shabaab Terrorist Group. Counsel relied on the case of **Mohamed Haro Kare vs Republic [2016] eKLR** a decision of the High Court where the court said that **"it was necessary to establish through evidence the linkage between the actions of the accused and the outlawed group."**
6. According to counsel, the Face-book information found on the appellant merely established that the appellant was a teacher either in Garissa or Mombasa, which was not adequate to connect him to any terrorist acts.
7. Counsel also made a comparison of the case with a case in the United Kingdom of **Zafar & Others vs Regina [2008] EWCA – Crim 184**, and stated that the law in the United Kingdom was similar to the law in Kenya.
8. According to counsel, the evidence tendered in court was not sufficient to prove the case against the appellant. Counsel also doubted the qualifications of the expert who extracted the information from the video who was PW3 IP Joseph Kolum.
9. In response the learned Principal Prosecuting Counsel Mr. Okemwa stated that the prosecution called three witnesses and the appellant gave a long sworn defence, in which he confirmed possession of the items but denied that they were meant for instigating commission of a terrorist act.

10. Counsel submitted that the police went to the home of the appellant looking for a Tanzanian called Charles Museresero who was suspected to have participated in the Garissa University terrorist attack. At the home they found the appellant and his wife and recovered a mobile phone and iPad (Tablet), which possession of the items and which was not denied by the appellant. The appellant also said that he used to download the pictures from videos that were played in court.

11. Counsel pointed out that the trial court viewed the videos and came to its findings that they were to be used for promoting terrorist activities. The conviction was therefore proper and the sentence was lawful and lenient.

12. This being a first appeal, I am required to reevaluate all the evidence on record and come to my own conclusions and inferences. See **Okeno vs Republic [1972] EA 32**. The appellant was charged with possession of items for the use of instigating commission of a terrorist act.

13. Section 30 of the Prevention of Terrorism Act under which he was charged reads as follows:-

“30 A person who knowingly possesses an article or any information held on behalf of a person for the use in instigating the commission of, preparation to commit or committing a terrorist act commits an offence, and is liable on conviction, to imprisonment for a term not exceeding twenty years.”

14. Counsel for the appellant has argued at length about the proof of the charge herein. In my view from the evidence on record possession of the items by the appellant was not denied. The appellant admitted possession of the items in his long sworn statement. He also admitted downloading the videos in his tablet when he stated as follows –

“On 21st November, 2014 is the day I downloaded the videos on my tablet. The reason I downloaded the same is because I was doing a research on interfaith religious conflict. It was free for me to dig deep inside the internet for me be able to make a detailed presentation as I had been invited to attend the conference on young generation interfaith discussion that was to be held at Tononoka in Mombasa. After about two weeks I attended the conference and delivered the presentation, conference took three days. I then went back to my place of work, Scripture Mission East Africa. Apart from being a teacher, I am also a project administrator in that organization. I am also a volunteer teacher at Likoni Mission Adult Centre.”

15. In my view, it is clear from the above defence statement of the appellant that he was in possession of the items and knew the contents of the two videos that were found in his tablet or iPad, as he had downloaded the same.

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.

Right of appeal explained.

Dated, Signed and Delivered at Garissa this 4th May, 2018.

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GEORGE DULU

JUDGE