REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 5 OF 2018

UNKNOWN alias JULIUS YOHANA MBUNGUNI....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 174 of 2016 by Hon. T. L. Ole Tanchu (SRM)

JUDGMENT

1. The appellant was convicted on his own plea in two (2) counts. Count 1 was for travelling to a terrorist designated country without passing through designated immigration exit point contrary to section 30C (1) of the Prevention of Terrorism Act 2012.

2. The particulars of the offence were that on 12th February 2016 in Masalani Ijara Division within Garissa County knowingly and without lawful authority was found on his way travelling to Somalia, a terrorist designated country. Count 2 was being unlawfully present in Kenya contrary to section 53 (1) (j) as read with section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence were that on the same day and place being a Tanzania national was found to be unlawfully present in Kenya without a valid permit. He pleaded guilty and was convicted on both counts, and was sentenced to serve ten (10) years imprisonment with respect to travelling to a terrorist designated country and six (6) months imprisonment in respect of being in Kenya illegally. The sentences were ordered to run concurrently. The court further ordered that he be repatriated to Tanzania on completion of his sentence.

3. He has now come to this court on appeal against both conviction and sentence.

4. During the hearing of his appeal, he relied on written submissions which I have perused and considered. He elected not to make oral submissions in court.

5. The learned Principal Prosecuting Counsel Mr. Okemwa submitted that the appellant was initially charged with receiving training for terrorist acts, and for being unlawfully present in Kenya. He pleaded not guilty to both counts. The prosecution then substituted the first count to travelling to terrorist designated country. When the charges were read to him this time he pleaded guilty on both counts.

6. Counsel submitted that the plea and conviction on Count 2 was proper, and the sentence was also not excessive. With regard to Count 1, counsel submitted that this court had made a number of decisions in the past in which it held that the section of the law cited merely created a presumption of training but did not create an offence. The major issue was whether Somalia had been declared a terrorist designated country.

7. I have myself perused the proceedings and the plea of the appellant. In my view, the plea on Count 2 was proper, and the sentence imposed was within the law. As such I uphold the conviction and the sentence for the offence of being unlawfully present in Kenya.

8. The appellant pleaded guilty to Count 1 for travelling to a terrorist designated country contrary to section 30C (1) of the Prevention of Terrorism Act 2012. That section does not declare Somalia to be a terrorist designated country. No legal notice has been referred to by the prosecution to establish that the Cabinet Secretary or authorities have declared Somalia to be a terrorist country. Section 30C (1) provides as follows:-

> **"30C (1) - A person who travels to a country designated by the Cabinet Secretary to be a terrorist training country without passing through designated immigration entry or exit point shall be presumed to have travelled to that country to receive training in terrorism."**

9. It is clear from the above provisions of the statute for an offence to be committed under section 30C (1), the Cabinet Secretary has first to designate the country as a terrorist training country. There is no indication in the charge sheet that Somalia was declared by the Cabinet Secretary to be a terrorist training country, when, and how. Therefore in my view, that section does not create an offence if the Cabinet Secretary has not designated a country to be a terrorist training country. The immigration laws are clear that a person is required to enter or

leave Kenya through designated entry and exit point. However, Count 1 was not a charge under any existing provisions of the Kenya Citizenship and Immigration Act. Section 30 (c) (1) of the Preventions of Terrorism Act does not create an offence of travelling to a terrorist designated country without passing through a designated country.

10. Though the appellant pleaded guilty to Count 1, he was convicted of a non-existent offence, and the Prosecuting Counsel was therefore correct in conceding to the appeal with regard to Count 1. In my view, if the Kenyan authorities want to operationalize the section, they need to formally designate Somalia as a terrorist training country through the Cabinet Secretary. It is only by doing so that the offence presumed to be created under the section can be operational. However, before the designation by the Cabinet Secretary is done, the presumption of training in terrorism in Somalia will not arise.

11. Consequently, I dismiss the appeal on Count 2 for being unlawfully present in Kenya, and I uphold the conviction and the sentence. With regard to the charge of travelling to a terrorist designated country, I allow the appeal, quash the conviction and set aside the sentence of ten (10) years imprisonment imposed by the trial court.

12. On completion of the sentence for being unlawfully present in Kenya, the appellant will be repatriated to Tanzania his home country as ordered by the trial court.

Dated, and delivered at Garissa this 18th day of September, 2018.

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George Dulu

JUDGE