



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEALS NO. 18, 19, 20, 21 AND 22 OF 2016
(CONSOLIDATED)

1. PIUS WAMBUA
2. JOHN ODHIAMBO
3. NICHOLAS MUKAHOMA
4. DAVID MBURU
5. PETER WAINAINA.....APPELLANTS

VERSUS

REPUBLICRESPONDENT

(From the conviction and sentence in Mandera SPM Criminal Case No. 648 of 2015 – P. N. Areri SRM)

JUDGMENT

The appeals herein No. 18 of 2016, 19 of 2016, 20 of 2016 and 21 of 2016 and 22 of 2016 were consolidated and heard together as they arose from the same trial.

The appellants were charged in the magistrate's court with one Leosina Wanyonyi with the offence of travelling to a terrorist designated country without passing through designated exit point contrary to section 30B (1) (a) and section 30B (2) (a) as read with section 30C (1) of the Prevention of Terrorism Act 2012. Initially, they were recorded as admitting the offence. Their mitigation however made the magistrate enter pleas of not guilty against them. Thereafter evidence was tendered by the prosecution witnesses and after the trial they were convicted except the fourth accused Leosina Wanyonyi who appears to have jumped bail. They were each sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, they have come to this court on appeal each filing his own appeal.

Mr. Okemwa, counsel for the State mentioned this matter in court the day before yesterday which is 11th of January 2017, conceded to the 5 appeals on the ground that in previous similar matters brought on appeal, this court had found that the sections of the law cited under the Prevention of Terrorism Act, did not create an offence termed traveling to a terrorist designated country without passing through a designated immigration exit point.

Indeed, in *Garissa Criminal Appeal No. 109 of 2015 Richard Baraza Wakachara Vs. Republic* this court stated as follows -

“The charge sheet does not give the legal notice which declares Somalia a designated terrorist country. In addition, there is no offence under section 30B (1) (a), 30B (2) (a) and 30C (1) of the Prevention of Terrorism Act 2012 called travelling to a terrorist designated country without passing through designated immigration point. All the above three sections which appear in the charge refer to training or instructions for the purposes of terrorism whether in Kenya or outside the country. Section 30C only creates a presumption that a person who travels to a country designated by the Cabinet Secretary without passing through designated Immigration entry or exit points be deemed to have travelled to that country to receive training in terrorism. The travel is not the offence but creates a presumption of training.”

I still hold that the above is the position. The Cabinet Secretary has to designate Somalia as a terrorist country before such an offence can arise. The prosecution has neither referred to nor produced a copy of the Notice in the Kenya Gazette published by the Cabinet Secretary designating Somalia to be a terrorist country. Therefore in my view, the charge sheet is defective as it does not disclose an offence known in law.

Consequently, the appellants herein were wrongly convicted and sentenced by the trial court. I agree with the Prosecuting Counsel. I allow the appeals and quash the convictions of all the appellants herein and set aside the sentences imposed. I order that each of the appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 13th day of January 2017

GEORGE DULU

JUDGE