



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL APPEAL NO. 186 OF 2015**

**WENDO IDI ZUBERI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The appellant, WENDO IDI ZUBERI was charged with five (5) counts. In count 1, the appellant was charged with being in possession of explosives contrary to section 6 (1) of the Explosives Act, Cap 15 of the Laws of Kenya.

The particulars were that;

“On the 12<sup>th</sup> day of JANUARY,2013 at around 10.00pm at Mwembo Tayari area within Mombasa County, the appellant was found in possession of two hand grenade inscribed s/cts without the authority from an Explosives licensing Authority.

In count 2, the appellant was charged with being a member of a terrorist group contrary to section 24 of the Prevention of Terrorism Act of 2012

The particulars were that;

“On 12<sup>th</sup> January, 2013 at Mwembe Tayari area within Mombasa county professed to be a member of the AL-SHABAAB a proscribed terrorist group to No 69674 INSPECTOR DANIEL MAKAU, NO. 74734 CPL JACKSON CHACHA AND NO. 76797 CPL. BERNARD MUNDAVANDI”.

In count 3, the appellant was charged with being in possession of an Article connected with and office under this Act contrary to section 30 of the Prevention of Terrorism Act of 2012.

The particulars were that;

“On 30<sup>th</sup> January,2013 at 10.00am at Mtwapa area of Kilifi County, the appellant found in possession of one compact disc inscribed PRINCO by the late SHEIKH ABOUD ROGO instigating people to commit terrorist acts.”

In count 4, the Appellant was charged with resisting arrest contrary to section 254 (b) of the penal code.

The facts were that;

“On 12<sup>th</sup> January, 2013 at Mwembe Tayari area within Mombasa county, the appellant willfully resisted arrest by No. 74734 CPL JACKSON CHACHA a police officer who at the time of the said resistance was acting in due execution of his duty”

In count 5, the Appellant was charged with preparing to commit a felony contrary to section 308 (1) of the Penal code. The facts were that:

“On the 12<sup>th</sup> day of January, 2013 at Mwembe Tayari area within Mombasa county the appellant was found armed with two hand grenades in circumstances that indicate that he was intending to commit a felony namely murder”.

The trial commenced with taking plea on the 13.1.2013 and was concluded when the trial court rendered its judgment on the 1<sup>st</sup> October, 2015, whereby the appellant was acquitted in counts 2 and 3 but convicted in counts 1, 4 and 5. He was subsequently sentenced to serve.

- (i) One year (1) imprisonment in count 1;
- (ii) Three (3) years imprisonment in count 4;
- (iii) Eight (8) years imprisonment in count 5;

The sentences were ordered to run concurrently.

This triggered an appeal premised on five (5) grounds namely;

1. The Honourable learned trial magistrate erred in law and fact to convict the appellant on purely circumstantial evidence that failed to link him to the alleged offences;
2. The learned Honourable magistrate erred in law and fact by concluding the possession of the exhibits had been proved beyond reasonable doubt.
3. The learned Honourable magistrate erred in law and fact by discrediting the defence of the appellant without giving it any considerations.
4. The learned Honourable magistrate erred in law and in fact by relying on uncorroborated evidence in convicting the appellant and more so in proving the offence of resisting arrest and that of preparation to commit the offence of murder.
5. The Honourable learned trial magistrate erred in both law and fact by convicting the appellant in the presence of screaming contradictions on the prosecution case.

This is a first appeal. It is thus trite law that this Honourable court has a duty to analyse and re-evaluate the evidence that was tendered before the trial court a fresh so as to arrive at its own conclusion, while bearing in mind that it does not have the advantage the trial court had in observing the demeanor of the witnesses.

To prove their case, the prosecution called a total of six (6) witnesses, all of whom were police officers.

Pw1, NO. 7975736 SERGEANT JOSEPH KALAMA, is a police officer attached to the Anti Terrorism Police Unit (ATPU). He said that on 12.1.2013 at about 3.00am, he was at their Nairobi office when he received instructions from his superior Deputy Commander, Mr John Mulaula ACP, who briefed him that he had some information from intelligence and asked him to go to the Central Business District to carry out some inquiries. He narrated that there was a young man in Central Business District who was believed to be having grenades which he wanted to transport to Mombasa using motor vehicle registration No KBS 411 K belonging to Parrot bus Services. He said that the suspect had been described as being

middle aged and was carrying a small bag. That he was also given the suspects photo. Pw1 said that the drafted Pw2 CORPORAL CHACHA into the mission and he accompanied him to the bus station on River road where they started tracing the suspect. They had no information that the bus did not have specific booking office but collects passengers by moving around. Pw1 also told the court that there was an undercover police who was tracking the suspect's movements Pw1 went to narrate that they boarded the bus which was half full at around noon. According to Pw1, they identified the suspect who was wearing a green T shirt and blue jeans sitting on one of the seats on the left side of the driver but could not see the bag he had been told he was carrying. Pw1 then sat on seat No. A1 while Pw2 sat in the middle opposite the suspect. The bus set off after about 30 minutes and then when got to Mtito- Andei, the suspect alighted and Pw2 followed him discreetly. They proceeded with the journey. The bus stopped at Voi to drop some passengers. Pw1 said he noticed that the suspect was looking uncontrollable and he communicated with other officers in Mombasa to inform them of their mission. It was Pw1's evidence that when they reached Mombasa, the bus finally stopped at Mwembe Tayari where they saw the suspect pick a black bag with yellow stripes and a paper bag from the opposite carrier. He got out of the bus, and they followed him. That Pw2 ordered the suspect to stop but he started to flee. They all chased after him, and because the traffic could not allow him escape easily the suspect fell down. They were also assisted by their colleagues in Mombasa. The suspect struggled with Pw2 but he was finally arrested. They asked him to open his bag but he refused. Pw2 and one IP Makau from Mombasa opened the bag. Pw1 said he saw 2 black grenades wrapped in a white T shirt and tied with cello tape, personal belongings of the suspect and 2<sup>nd</sup> black bag and a tissue. Pw1 stated that the suspect had changed from the green T shirt into a black one when they were at Voi. He also identified a towel, a wooden bar, a new Nokia mobile phone, a Sagem No 0725064718, a manual pad with unwritten telephone number, a black powder, a receipt for Midview Central Hotel in Nairobi, a bus ticket in the name of Onesmus for sit No 9A and a KAP being a house receipt in the name of IDRIS MOHAMED ALI, and another from Mubura Ganter Hotel, a wallet, a sim registration form, earpiece /head phone, and M-pesa registration form, another sim card No 1725 064735, a micro CD card with adapter make sun disk, a Nokia charger and adapter, a black cap and a cream jacket. Pw1 identified the appellant to court the suspect they had pursued and arrested. He also identified all the items he enumerated in his evidence as having been recovered upon arresting the appellant as exhibits p1 to P25. They were entered into an inventory which was signed by IP DANIEL MAKAU and CORPORAL CHACHA, also identified as exhibit P26. Pw1 said he escorted Pw2 to Coast General Hospital for treatment. He also said that from questioning the appellant they learnt that the grenades he was found with were meant to be used to rescue a suspect at Shimo La Tewa.

In cross examination, Pw1 testified that their source of information did not tell them the origin of the grenades all through briefly got in touch at the CBD Nairobi and he got into the bus and identified the appellant to them. He also said that he did not indicate in his statement that the inventory was prepared by IP Makau or that the search was carried out at Kilindini. He also said that he had not displayed his bus ticket because he gave it to the investigating officer. He said that bus ticket for seat No 9A was in the name of IDRIS MOHAMED whose originality was Somali but could not tell if the appellant home was from Mombasa was Somali. Pw1 told court when cross examined further that the appellant sat on seat No A9 but this was not captured in his statement and neither does his statement indicate that the appellant got out of the bus at Mtito -Andei and appeared very serious at Voi. It also came out that he did not mention the conversation between him and corporal Chacha about the appellant in his statement. He admitted that they did not introduce themselves before Pw2 ordered the appellant to stop and that they had to shout thief ! thief! to get support from the public. And again he admitted that he did not indicate this in his statement. He said that his statement was recorded on 13.1.2013 but did not indicate where the hand grenades were recovered from . He said the sim registration form (Exhibit P17) was blank and the M-Pesa registration form (Exhibit P19) was in the name of IDRIS MOHAMED but recovered from the appellant. He also did not mention the black cap in his statement. He finally told court that he was not the investigating officer but was the arresting officer.

Pw2 No. 74734 CORPORAL JACKSON CHACHA, also attached to the Anti Terrorism Police unit ( ATPU) in Nairobi gave evidence which was largely similar to pw1's evidence but said that when the bus stopped at Mtito- Andei it stopped for about 15 minutes and passengers alighted for a break. He said that the suspect who looked restless remained in the vehicle. That at Voi, the suspect, who was wearing a green T-shirt removed it and changed into a black one. Pw2 told court that they reached Mwembe

Tayari at about 9.50 pm and the suspect got up. That he picked a stringed black bag from the luggage carrier above his seat and a black striped bag from the right side carrier and walked out. Pw2 said he signaled Pw1 and they followed the suspect. He then shouted, "stop, police!" and instead of stopping, the suspect took to his heels. They gave chase and managed to catch up with the suspect, who he said wrestled him down while telling him "I am Al shabaab". He said that he was assisted by other officers who included Pw2, and they subdued the suspect. He was injured one knee that he had to be escorted to Coast General Hospital for treatment on 13.1.2013. Pw2 then said that a quick search was conducted on the suspects luggage and 2 grenades which were concealed in a white T- shirt were found in the 1<sup>st</sup> black bag. That the 2<sup>nd</sup> black bag had personal belongings like a towel, Nokia mobile phone, memory card Safaricom sim card holder, M -pesa registration form, Guest house receipt, Ksh 500/= bangles, necklace, towel, jacket, a wrist watch and other items. He identified an inventory which was prepared, treatment notes and hospital card (Exhibit P1-P27 B. He also identified the appellant as the said suspect.

When cross examined, Pw2 said that he did not include in his statement that their boss told him the identity of the source. He also did not include in his statement there was no one else in the bus where description matched those of the appellant and that he was the only person wearing a green T shirt and occupying 2 seats on the 5<sup>th</sup> column. He further did not indicate in his statement who, between him and his colleague entered the bus first. Again, Pw1 said that IP Makau conducted the search and prepared the inventory but he did not capture it in his statement which he recorded himself on 14.1.2013. He did not also mention in his statement that the grenades were covered in a white T shirt and neither did he quote their serial numbers. He said that the appellant was wearing a black T- shirt at the time of arrest but could not tell where it was.

Pw3 NO 69674 INSPECTOR DANIEL MAKAU, stated that he was attached to Moi International Air port (MIA) in Mombasa. His testimony was that on 12.1.2013, he received from the Deputy officer in charge Anti Terrorism Police Unit of Coast Province, one Mr NYAGA who instructed him to cover a bus registration number KBS 411 K belonging to parrot Bus Services which was travelling from Nairobi to Mombasa and was suspected to be carrying a person suspected to be carrying explosives. Pw3 drafted two other police officers being Corporal Munadi and Corporal Mbogo in the mission together with a police driver and they proceeded to Maungu to wait. When he saw the bus approached at about 7.00pm, he called Pw1, Sergeant Kolum to inform him that they were covering the bus. They then drove behind this bus and he could see a person who was seated behind the driver look outside the bus at every stage it stopped. When the bus reached Mwembe Tayari, Pw3 said he saw people alighting. That among these people, he saw Sergeant Kolum ( Pw1) alight and Corporal Chacha was the last one to come out of the bus, then suddenly there was a commotion. Pw3 rushed towards the commotion and saw Corporal Chacha ( Pw2) struggling with a suspect on the ground, who he was holding by one hand. He rushed to Pw2 and took out a handcuff which he used to handcuff the suspect's free hand. He told court that the suspect had a handbag on one of his arms and a backpack on the other shoulder. He then conducted a quick search on the suspect's pockets and the bus. Pw3 testified that from the black hand bag, he saw green T shirt, a black ..a white T shirt bounded using a transparent cello tape, which when he opened had 2 grenades, a Safaricom wallet with two notes of Ksh 500/= 2 cards for holding sim cards, a Uchumi supermarket bag with toilet tissue rolls. He said that he instructed Corporal Mudavadi to prepare an inventory, which he found at Port Police station since the streets were dark. The inventory was counter signed by the suspect as Pw3 entered the incident the OB at Port Police station. He identified the appellant as the suspect to the court. And on 13.1.2013, he escorted Corporal Chacha, Pw2, to hospital for treatment of the injuries he had sustained while arresting the suspect.

In cross examination Pw3, said that the number of police officers who left for Maungu was never written in O.B. He said he was not present when the bus began its journey in Nairobi and so could not tell who boarded with which luggage. He also did not record in his statement that he saw a passenger who kept looking out of the bus at every stage it stopped. He admitted that the bus arrived at about 10.00pm and the inventory is indicated as having been prepared at 9.45 pm. He also admitted that he did not hear any conversation between the appellant, Pw1 and Pw2. He confirmed that in his statement he referred to one bag when he said "holding the bag" and when referred to exhibit 4 (a) and (b), Pw3 said that there was nothing peculiar that would distinguish this from any other 2 grenades. He also admitted that from the inventory it is not possible to know which others were in the back pack and which were in the handbag.

Pw4, No 76797 CORPORAL BERNARD MUDAVADI, also attached to Anti Terrorism Police Unit gave testimony that was similar to that of Pw3 and confirmed that he was the one who prepared the inventory ( Exhibit P 26) on instructions of Pw3.

In cross examination , Pw4 told court that even by that time they reached Mwembe Tayari, they did not have the description of the suspect they were looking for. He said that he did not hear any officer introducing himself to the appellant. He admitted that it is not indicated in his statement that he prepared the inventory. He also admitted that there was no peculiar feature on the 2 grenades in court which would distinguish them from all other grenades.

Pw5, No 61973, CORPORAL JOSEPH SANG told court that he attached to the Bomb disposal Department at the CID Headquarters as a bomb technician and has worked there for 15 years out of the 23 years he has been in the police force. He explained that he has trained as a bomb technician both locally and abroad up to Master technician. He testified that on 14.1.2013, he received an exhibit memo form from No. 75736 Sergeant JOSEPH KOLUM of Anti terrorism Police Unit, Nairobi, requesting him to examine and ascertain in exhibit marked A1-A2:-

- (i) were hand grenade;
- (ii) were able to explode;
- (iii) their make and origin.

He said that he personally examined the said exhibits and established that they were live grenades and were capable of exploding. He also established that they were 8-2 manufactured by China North Industries in Beijing. That they were basically of offensive pattern and make claims that they either be used in offensive and defence note. That they were safe to carry until ready to be used and were capable of causing death with the standard radius. He prepared and signed the report on 15.1.2013. He produced the Exhibit memo form and report as Exhibit P20 and 28.

In cross examination, pw5 told court that the two hand grenades, he examined did not bear any serial numbers. He said numbers 82-2 are written on the nooks of the cap of the grenades. He also said that he was not able to confirm the date of manufacture. He confirmed that there is a list which they rely on upon seeing that number, 82-2, that would lead them to identify the manufacturer. He said he would tell a grenade is a hand grenade first by looking at it. He admitted that his report was academic in some details it had.

Pw6, No 82753, CORPORAL SAMWEL OUMA stated that he is attached to Anti Terrorism Police Unit at Mombasa and the investigating officer in the case. He said that on 13.1.2013, he was assigned the case of WENDO IDDI ZUBERI, the appellant by his officer-in-charge, C.I.P ABEDNEGO KILONZO. His evidence covers the report of the incident, what the other officers had done and what he received from them in terms of exhibits. He produced what they alleged to have received from the appellant and what they prepared as exhibits p1 to P29.

During cross examination, Pw6 told the court that he was not the initial investigating officer and so did not draw the charge sheet. He said that he received the items shown in the inventory but did not sign for them. He then said that IP Makau , Sergeant Kolum , Corporal Chacha and Corporal Mudavadi signed the inventory but did not refer to it in their statements. He then said that the phone he talked about was never subjected to any forensic analysis to know if it had been used to enhance terrorism. As for receipt for the phone ( Exhibit P30), Pw6 said that it shows the phone was bought from a Safaricom shop in Nairobi but the name of the buyer is not shown. He also said that the bus ticket ( Exhibit P15 (c ) was in the name of one Onesmus where the travel date is unclear but the time of departure was indicted as 10.00am. he said that he did not follow to know who the driver and conductor of the said bus was because the company ceased operations immediately after this. He was also shown a form ( exhibit P19) and it was in the name of Idris Mohamed Ali. He found the name on the receipts for KAPS Guest house dated 7.1.2013 showing the name of IDRIS MOHAMED of Somali nationality. He did not record

any statement from any one from KAPS Guest House. This was the same indication on receipt from Midview Central hotel dated 8<sup>th</sup> and 9<sup>th</sup> January 2013 Pw6 went on to state that he did not make any OB entry in relation to personal property found on appellant. He also did not witness the recovery of the items from appellant and neither did he witness the handing over of the exhibits to Pw1. Pw6's attention is drawn to Pw1's statement/evidence and he confirmed that it did not indicate an exhibit memo form nor that he took any exhibits to Nairobi. He could not tell whether Pw1 planted what he wanted planted when the appellant left the bus at Mtito Adei. He did not take photographs of the alleged bus that carried the appellant, Pw1 and Pw2 from Nairobi to Mombasa and neither did he record any statements from the driver. He said that he did not get anyone else who heard the appellant fell Pw2 and say 'he is' Al Shabaab and could blow him up. He then said that the serial numbers of the grenade did not appear in the inventory and he had no evidence to link the grenade attacks that had been experienced at the time. The weapon in the charge sheet are neither indicated in inventory or the report of Pw5. He said that no one else confirmed that they heard Pw2 identify himself as police officer. He did not produce the alleged CD.

In re-examination, Pw6 admitted that he did not witness most of the things the witnesses had said.

The appellant, WENDO IDDI ZUBERI, who testified as DW1, was placed on defence and he opted to give sworn testimony in defence. He told court that he was a resident of Mtongwe and was aged 23 years old. He denied the charges against him and stated that on 12.1.2013, a lady by the name EUNICE EBRA who works at Pirates and was his girlfriend called him to ask him to go and meet her brother by the name Onesmus. She even told him that she had given the said brother his phone number. That the said Onesmus called him and told him he would arrive at about 9.30 pm and described his physical appearance to him.. Dw1 went to the bus stop and when the bus arrived, he noticed a person with afro hair style and wearing a jean trouser and a black T shirt which met the description of Onsmus. Dw1 raised his hand so that the said Onesmus could see him. That she suddenly heard sounds of gunshots rend the air and people were shouting "Thief! thief!.

Dw1 said he witnessed Onesmus struggle with the two gun -wielding people and in the commotion, the man escaped. That the men with guns, walked towards him ( Dw1) and arrested him. He was taken into a probox vehicle as the men demanded to know from him where they could find Onesmus. He said that he took them to Eunice' house but they did not find her as she had gone on duty. The appellant (Dw 1) was then deprived of the keys to Eunice's house. Thereafter, they headed to the police station. It was his evidence that on the way to the police station, he suffered a lot of torture where he was forced to sign a statement and some blank form as he had been threatened with death. He further testified that the police took from him the mobile phone he used to communicate with Onesmus. He denied he was in possession of the items which were produced in court as exhibit P1-35.

The learned trial magistrate rendered his judgment and convicted the appellant for count 1,4 and 5.

At the hearing of the appeal, both counsel, who had filed written submissions, highlighted the same.

According to Mr Chacha, counsel for the appellant, the Honourable trial magistrate having found the prosecution mischievous and malicious in their evidence against the appellant in counts 2 and 3 he ought to have been invited by this to look at the whole evidence with a tooth pick and not disregarded his defence as an afterthought. He also submitted in arguing all the grounds collectively, that the prosecution's evidence against the appellant was merely circumstantial and full of contradictions that it did not meet the threshold in the court of appeal case of ABANGA Alias ONYANGO VRS REPUBLIC CR A NO. 32 OF 1990 (UR). He further submitted that the appellant was convicted in respect of being in possession of explosives contrary to section 6 (1) of the explosives Act, Cap 115 laws of Kenya, which is the wrong regime of laws and ought not to have been used to charge the appellant as the Act does not deal with grenades. He stated that grenades fall under chapter 114 of the laws of Kenya and not chapter 115 of the Laws of Kenya.

In response to the submissions by the appellant's counsel, Mr Ayodo, learned counsel for the state, submitted that they wished to rely on their written submissions where they have responded to all the five

grounds of appeal. He submitted that the issue of circumstantial evidence does not arise. He also referred court to the definition of possession as defined under the Penal code.

He also submitted that the learned trial magistrate made a finding after one consideration of the evidence that was adduced before court and the defence that was also adduced by the appellant. He further submitted that the evidence that was adduced was that of eye witnesses and relate to the happening at the time of appellant's arrest. He urged that the appeal be found to be meritable and conviction and sentence upheld.

In determining the appeal, I have carefully analyzed and re-evaluated the evidence that was adduced before the trial court in line with the grounds of appeal cited by the appellant, submissions by both counsel and the law.

The learned trial magistrate in rendering his judgment, convicted and sentenced the appellant in counts 1,4 and 5 respectively.

Upon going through the charges that the appellant was convicted for and the entire evidence, the first issue I wish to deal with, which was not dealt with by the parties, is to weigh the charges and the particulars thereof against the evidence that was adduced before the trial court and the law.

In count 1, the appellant was charged with the offence under the Explosives Act, Chapter 115, Laws of Kenya.

The facts were that;

“On the 12<sup>th</sup> day of January 2013 at around 10.00am at Mwembe Tayari area within Mombasa County, you were found in possession of two hand grenade in scripted-s/cts without the authority of Explosives Licensing officer”.

Section 6 (1) of the Explosives Act, chapter 115 of the laws of Kenya states as follows;

“No person shall keep, store or be in possession of any un authorized explosives;-

(a) unless it has been manufactured as provided by section 4 (1) (a) and does not exceed two kilograms in weight; or

(b) unless it has been manufactured as proved by section 4 (1) (b) and is kept, stored or possessed in such a manner and in such qualities as have been approved in writing by an inspector”

To abridge section 6 (1) of the Explosives Act, explosives that meet the criteria set under section 4(1) (a) and (b) are permitted.

Section 4 (1) (a) provides as follows;

“No person shall manufacture any unauthorized explosives unless-

(a) it is manufactured for the purpose of chemical experiment and not for sale and in qualities not exceeding five hundred grams in weight at any one time or two kilograms in all; or

(b) it is manufactured for practical trial as an explosive and not for sale and in such qualities and under such conditions as may be specified in writing by an inspector”.

The offence capable of being committed is when one has breached the conditions imposed by sections (4) 1 to 4 (4) of the Explosives Act.

The burden of proving that explosives were for experiment or practical trial and not for sale, shall, in any

prosecution under these sections lie upon an accused person.

The prosecution in this case had the onus of proving that the appellant was the person in possession of the explosives (the 2 grenades ) and that they met the criteria under sections 6 and its sub sections and sections 4 and its sub sections.

To discharge this burden of proof that was placed on him so as to shift the same to the appellant, the prosecution was required to have adduced evidence confirming that the grenades were explosives manufactured for purposes other than what is specified in the Act.

The reason for requiring to establish the manufacturer is to determine the purpose for which the explosive was manufactured.

In the instant case, after Pw5 established that the two (2) grenades were manufactured by a Chinese company known as China North Industry Beijing, a quick certificate ought to have been obtained from the company specifying the purpose for which they were manufactured.

This standard of proof is so high, and is necessary, so that “toys” are distinguished from “war machines”.

It is not enough to state, like Pw5 did in his report that they can be used for defence or for attacks(see Exhibit P). This information in the absence of a certificate from the manufacturer, can only be found to be speculative. Pw5 was the witness who was charged with the burden of showing the grenades were not manufactured on experiment and that they did not meet the threshold provided for under sections 6 and 4 of the Explosives Act, and therefore an offence had been committed by the appellant. He did not do this.

In his own testimony to court, he stated;

“I was not able to confirm the date of manufacture. There is a list which we refer to upon seeing that number (82-2) that leads us to identify the manufacturer .....it is by looking at a grenade that I can tell it is hand grenade.....If you go to Google, you will get some narration about 82-2 grenades but it will not contain all the details I have recorded in my report .....it is true some details I included in my report is academic”.

In re-examination, he said;

‘I weighed the grenades. I also examined the grenades. But we lacked the calibration certificate and to that extent the report is academic”.

From this evidence of Pw5, it is clear that the purpose for which the two grenades allegedly found in the possession of the appellant were manufactured was not established. And though Pw5 indicates that he weighed the grenades, he did not disclose their weight to court.

This is because apart from providing the certificate of purpose for which the grenades were manufactured the onus was upon the prosecution to shift the burden to the appellant to prove that he had possession of the said grenades lawfully and they did not exceed the authorized weight provided for in the Act.

Pw6, who also ought to have discharged this burden and shift the same to the appellant made no effort to weigh the grenades so as to inform court that the weights were beyond the one permitted by the Act. This burden remained with the prosecution and hence section 4 (4) of the Explosives Act could not have been invoked. This section provides;

“The burden of proof that any manufacture of any unauthorized explosive as solely for the purpose of chemical experiment or practical trial and not for sale, shall , in any prosecution under this section, be upon the accused”.

Section 6 (1) of the Explosives Act, under which the appellant was charged is meant to be read with

section 4 (1) (a) of the same Act.

The third aspect which the prosecution labored to prove was the issue of possession.

There is evidence that Pw1 and Pw2 boarded the same bus with the Appellant who they were tracking from Nairobi to Mombasa, where they all alighted. Thereafter, the appellant was arrested, searched and found with two grenades and many other items ( Exhibits P1-41) suspected to have been meant for preparation to commit a felony.

In his testimony, Pw1 stated that when the bus reached Mtito -Andei, the appellant alighted and was discreetly trailed by Pw2 as Pw1 remained in the bus. He had this to say in his own words;

“After about 20-30 minutes, the bus started its journey. The bus stopped at Mtito –Andei for about 15 minutes. The suspect alighted. My colleague followed him discreetly. I did not go out of the suspect”.

On the same facts, Pw2 testified;

“I was given a ticket for seat No 1A. I re-entered the bus and sat on seat No 8 B n the right side which was directly opposite the seat of the suspect. Thus I was able to monitor his movement.....”

On reaching Mtito -Andei, the bus had a stopover of about 15 minutes. Passengers alighted for a break, but the suspect remained in the vehicle. He looked restless. We continued with the journey.”

It is clear that these two witnesses contradicted each other on a key fact. The question then becomes, who of the two should be believed?

It is hard with this kind of contradiction to tell whether Pw1 and Pw2 were referring to the same suspect. Worse still, there was no attempt to cure the contradiction even doing cross examination of the two witnesses.

Apart from finding that the prosecution failed to prove the requirements of the charge against the appellant, there were other issues I found wanting in the entire prosecution’s evidence.

It was the prosecution’s evidence that upon, searching the appellant, a bus ticket ( Exhibit P15 (a) in the name of Onesmus was recovered. Also recovered was a KAP being a house receipt in the name of Idris Mohamed Ali and another from Mubura Ganter Hotel. There is no evidence of investigations which were conducted to establish that the appellant was also known as Onesmus or Idris Mohamed Ali or who these people were and their connection to the appellant.

I also scrutinized the evidence of the prosecution witnesses, who as the records will show were all police officers. They all admitted during cross examination that their statements were self recorded and it came out that the same were recorded either a day or two after the incident. It is worth noting that each of these witnesses, during cross examination admitted that most of what they told court during the hearing of the case in chief is not what was recorded in their statements. The question then become, were they giving a true version of what happened or what they did in the matter or was their evidence an afterthought?

Having examined the charge against the appellant in court vis a vis the facts of the case and the text of the law. I find that the prosecution in this case failed to discharge its burden of proof as required by the law. With regard to the offence in count 1. And because of the inconsistencies and contradictions that I have pointed out in the said evidence, a doubt is created in the same, the benefit of which should have been awarded to the appellant.

The appeal in respect of the offence in count 1 succeeds, the conviction quashed and sentence set aside.

The appellant was also convicted in count 4 where he was charged with resisting arrest contrary to section 253 (b) of the Penal code.

From the evidence of Pw1, Pw2 and Pw6, it clearly came out that they, were in civilian clothes and that they let alone. Pw2, did not introduce themselves to the appellant as police officers. Considering the hour they allege they arrested the appellant, is it possible that one may refuse to stop or even struggle with a person or people he does not know and cannot identify as people in a position to arrest him? How would the appellant have known that he was being stopped by police officers so that he would have formed the mensrea to escape?

Also, Pw2 told this court and was supported by Pw1 and Pw6 that he got injured in the course of struggle with the appellant. They all said that he was escorted to Coast General Hospital for treatment. However, although he identified treatment notes and hospital card ( Mf1-P27(a) and Mf1-27 (b), but there was no evidence by the doctor or medical practitioner to confirm this. In cross examination, he stated that he did not mention the name of the doctor who attended him and neither could he read what the doctor wrote in the treatment book.

Again, with this kind of evidence, I find that the prosecution's evidence against the appellant in respect of count 4 is also doubtful and proceed to find that the appellant should have been granted the benefit of this doubt.

I allow the appeal by the appellant in the fourth count, quash the conviction and set aside the sentence against the appellant.

In count 5, the appellant was charged with preparation to commit a felony contrary to section 308 (1) of the penal code. The offence in count 1 was the pillar upon which the offence in this count was hinged. The success of count 5 was to rely upon the authenticity of the grenade and possession thereof by the appellant. But after the prosecution failed to establish and prove the offence in count1, it would be an academic exercise to evaluate the evidence with regard to the offence in count 5; which is whether the objects the appellant was found with were capable of executing crime related to this.

The appeal in regard to this count 5 is also found meritable I proceed to quash the conviction and set aside the sentence of 8 years which was imposed against the appellant.

The appellant is accordingly set at liberty unless lawfully held.

Orders accordingly.

**Judgment read, signed and dated this 13<sup>th</sup> day of February 2017.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of

M/s Ocholla holding brief or Mr Ayodo for the state

Mr Chacha for the Appellant

C/clerk- Kiarie