



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL OF NO.19 OF 2016**

**HAMIDU SAID LIGOLI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Garissa Chief Magistrates Court Criminal Case No. 316 of 2016 – M . Wachira)**

**JUDGMENT**

The appellant was charged in the magistrate's court with two counts. Count 1 was for travelling to a terrorist designated county without passing through designated immigration exit points contrary to section 30B(2)(a) and 30b (2)(a) as read with section 30C(1) of the Prevention of Terrorism Act 2012. The particulars of the offence were that on 16<sup>th</sup> March 2016 at Hare area near the Kenya- Somali border in Liboi within Garissa County, knowingly and without lawful authority, was found on his way to Somalia, a terrorist designated county. Count 2 was attempting to depart from Kenya through a place that has not been specified as a point of entry or exist contrary to section 59 of the Kenya Citizenship and Immigration Act 2011, Regulation 15(2)(b) as read with Regulation 57 of the Kenya Citizenship and immigration Regulation 2012. The particulars of the offence were that on the same day and place attempted to depart from Kenya to Somalia through Liboi, a place that has not been specified as a point of exist.

He pleaded guilty to both counts. He was convicted and sentenced to serve 10 years imprisonment on count 1 and 1 year imprisonment on count 2. The sentence to run concurrently.

He has now come to this court on appeal through counsel Chacha Mwita & Company. The petition of appeal is worded like written submissions. The grounds of appeal I can identify from it are two-

1. The learned magistrate erred in convicting the appellant on plea that was equivocal.
2. The learned magistrate erred in sentencing the appellant excessively and harshly under the circumstances.

At the hearing of the appeal the advocate for the appellant was represented by Mr. Nyaga who held his brief. Mr. Nyaga submitted that in similar cases his court had held that section 30(B) and (C) of the Prevention of Terrorism Act did not create an offence such as count 1 herein. Secondly that the Legal Notice declaring Somalia a terrorist county not having been cited or disclosed in the charge, the charge is defective. With regard to count 2, counsel did not challenge the conviction. Counsel urged the court to

release the appellant as he had served more than 1 year in prison.

The Principal prosecuting Counsel Mr. Okemwa conceded to the appeal with regard to count 1. Counsel also stated that the appellant had already served the 1 year sentence in count 2.

I have perused and considered the proceedings, the charges and the submissions of counsel on both sides. The convictions were on plea of guilty. However even in a plea of guilty the plea has to be unequivocal. That is why courts have adopted an elaborate procedure for recording a plea of guilty as clearly stated in the case of ADAN VS REPUBLIC [ 1973]EA?

One of the requirements for determining whether a plea of guilty is unequivocal is whether the charge discloses an offence or whether the charge is defective. If an offence is not disclosed by the charge then a plea of guilty cannot be unequivocal as the accused will not have pleaded guilty to any offence. If the charge is incurably defective the plea of guilty will also not be unequivocal because it will not be clear beyond reasonable doubt that the accused knew what he pleaded to. In both cases, such plea of guilty and conviction cannot stand on appeal.

In the present case, no known offence in count 1 was disclosed by the charge. His plea was thus not a plea to committing an offence. He should not have been convicted and sentenced on count 1. The prosecuting Counsel was right in conceding to the appeal on count 1. I will quash the conviction and set aside the sentence on count 1.

With regard to count 2, the conviction is not challenged. Having perused the record, I am of the view that the conviction was proper. I will thus uphold the conviction. The sentence is within the law and I also uphold it. The appellant was sentenced on 30<sup>th</sup> March 2016 which is more than one year now, and has thus served in prison term. The order for his repatriation or removal to Tanzania after serving the prison term is upheld.

In the result, I allow the appeal on count 1 and quash the conviction on count 1 and set aside the sentence of 10 years imprisonment. I however uphold the conviction on count 2 and also uphold the 1 year imprisonment on that count, which period has now been served. I uphold the order that the appellant will be repatriated or removed to Tanzania after completion of service of sentence in count 2.

**Dated and delivered at Garissa this 11<sup>th</sup> July 2017.**

**George Dulu**

**JUDGE**