



Republic v Karim (Criminal Case 266 of 2016) [2019] KEMC 2 (KLR) (21 May 2019) (Judgment)

Neutral citation: [2019] KEMC 2 (KLR)

**REPUBLIC OF KENYA
IN THE LAMU LAW COURTS
CRIMINAL CASE 266 OF 2016
AT SITATI, PM
MAY 21, 2019**

BETWEEN

REPUBLIC PROSECUTOR

AND

ABDUL HARUN KARIM ACCUSED

JUDGMENT

1. The Accused person faced 6 Counts.

In Count 1, he was charged with being a foreign terrorist fighter contrary to Section 30D of the *Prevention of Terrorism Act*. The particulars were that on 09/5/2016 at Kiwayu Village in Lamu East Sub County within Lamu County being a Tanzanian national was found to have entered Kenya for the purposes of terrorist activities in contravention of the said Act.

In count II, he was charged with the presumption of travelling to a Country for Purposes of being trained as a terrorist Contrary to Section 30C of the *Prevention of Terrorism Act* 2012 as read together with legal Notice 200/2015.

The particulars were that on 09-05-2016 at Kiwayu Village in Lamu East Sub-County within Lamu County he was found travelling to Somalia a Country designated as a terrorist training Country without passing through the designated Immigration entry or exit points to receive training, in terrorism in contravention of the said Act.

In Count III the Accused person was charged with the offence of collection of information contrary to section 29 of the *Prevention of Terrorism Act*. The particulars were that on 09-05-2016 at Kiwayu Village in Lamu East Sub County within Lamu County in instigating the commission of a terrorist act was found holding an audio

recording namely Ayuha Shaheed which was in Huawei Mobile Phone Model 752C-U22 IMEI (1) 86672902158xxxx (2) 86672902162xxxx with Tigo Sim Card Serial



No.8925503209468516xxxxbeing information for the use in the commission of a terrorist act.

In count IV the Accused person was charged with the offence of collecting information contrary to Section 29 of the *Prevention of Terrorism Act* with particulars that on 09-05-2016 at Kiwayu Village in instigating the commission of terrorist act was found holding an audio recording namely Ghuraba in this Mobile Phone Huawei Model Y52C-U22 IMEI (1) 86672902158xxxx (2) 866 72902162xxxx with Tigo Sim Card Serial No. 8925503209468516 xxxx being information for the use in the commission of a terrorist act.

In Count V the Accused person was charged with the offence of collecting information Contrary to Section 29 of the *Prevention of Terrorism Act* with particulars that on 09-05-2016 at Kiwayu Village in Lamu East Sub County within Lamu County in instigating the commission of a terrorist act was found holding an audio recording namely O Brothers which was in his Huawei Mobile Phone Model Y52C-U22 IMEI (1) 866 72902158xxxx (2) 866 72902162xxxx with Tigo Sim Card Serial No.8925503209468516 xxxx being information for the use in the commission of a terrorist act.

In Count VI the Accused person was charged with the offence of collecting information Contrary to Section 29 of the *Prevention of Terrorism Act* with particulars that on 09-05-2016 at Kiwayu Village in Lamu East Sub County within Lamu County in instigating the commission of a terrorist act was found holding an audio recording namely YA Shaheedan which was in his Huawei Mobile Phone Model Y52C-U22 IMEI (1) 866 72902158xxxx (2) 866 72902162xxxx with Tigo Sim Card Serial No.8925503209468516 xxxx being information for the use in the commission of a terrorist act.

2. The Accused person denied all the charges. He was initially represented by Mr. Korir Advocate at some stage in the proceedings but the Accused person eventually opted for self-representation.
3. The DPP's case was conducted by Mr. Eric Mutua who called 8 Witnesses.

History Of The Trial.

4. The Accused person was arrested on 9th May, 2016 and then charged with the offence of being unlawfully present in Kenya. The charge was alongside the terrorism charges.
5. He pleaded guilty to the Immigration offence and was sentenced to 2 years imprisonment on 7th June, 2016 by my predecessor in the matter Hon. Njeri Thuku.
6. After his conviction and sentence for the immigration offence the case then proceeded with a total of 5 Witnesses being called by the DPP. These 5 were:
 1. F.NO.172965 PC Moses Mugendi Kimendero
 2. Clarkson Baya Karisa
 3. F.NO.96738 PC John Rono.
 4. F.NO.82274 CPL Zablon Auchu Atubwa .
 5. F.NO. 235270 IP Nicholas Waringa.
7. The Accused then applied that the case be tried by another Court. This application was rejected on 16/11/2016 vide a Ruling of that date in which the then trial Magistrate declined to recuse herself from the case as there was no bias in the matter.



8. Upon the refusal of the magistrate to recuse herself from the case, the defence Counsel Mr. Korir asked that the trial be stayed pending the lodging out prosecution of the defence's appeal against the ruling declining recusal.
9. The outcome of the proceedings before the High Court at Garsen was inconclusive – no serious steps were taken to have the appeal prosecuted.
10. As a result, the present case stayed in limbo from 05-12-2016 to 18-07-2018 – a total of 20 months. In July 2018 the previous magistrate Hon. Njeri Thuku was transferred to a new court station whereupon the undersigned took over the case.
11. When the Court invoked the provision of Section 200 (3) of the Criminal Procedure Code Cap 75 of the law of Kenya, the Accused person then being represented by Mr. Njuguna Advocate opted for a recall of all the Witnesses who had testified before the previous magistrate.
12. This prayer was allowed. Section 200(3) aforesaid states
200
(1) ...
(2) ...
(3) Where a succeeding Magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the Accused person may demand that any Witness be re-summoned and reheard and the Magistrate shall inform the Accused of that right.”
13. There upon the DPP proceeded to call their 8 Witnesses as laid out hereunder.

THE DPP'S Case

14. PW 1 F.NO.231148 Superintendent Of Police William Ndirangu told the Court that he was the Recording Officer for the Confession made out by the Suspect before him on 12th May, 2016.
15. SP Ndirangu added that on 12-05-2016 Inspector Opagal called on him to record the Confession of one male Suspect who was then in the custody of IP Opagal following the Suspect's arrest at Kiwayu. PW1 obliged.
16. Before recording the Confession, PW 1 called for Mr. Kenneth Njuguna Advocate to act for the Suspect on a pro bono basis. The said Counsel obliged and made an appearance at PW 1's Office when the male Suspect was brought in.
17. PW 1 then asked the Suspect to identify himself. The Suspect identified himself. He added that he was from Tanzania and was headed to Somalia to join Al Shabaab Militants.
18. At that point PW 1 requested the Suspect to allow PW 1 to record his statement. The Suspect agreed. PW 1 then asked him if he had another person whom he wished to be present at the recording exercise and the Suspect said that he had none. The Suspect asked for glass of water.
19. PW 1 affirmed that the Suspect was not under any duress, threats or promise. Further, before recording the statement from the Suspect, PW 1 stated that he cautioned the Suspect that PW 1 was going to record the statement and that the said statement could be used against the Suspect in a Court of law as evidence. He warned the Suspect that whatever would be said by the Suspect would be recordable in a Video Clip. To all these, the Suspect agreed.



20. PW 1 then informed the Suspect of the charges that the Police were lining up against him-that the Police had suspected him of traveling to a terrorist designated Country namely Somalia for terrorist training or terrorist activities. The Suspect thus began to give PW 1 his statement.
21. PW 1 added that in his statement the Suspect disclosed that his full name was Abdul Harun Karim from Tanga County in Tanzania. He told the recording Officer that he was travelling to Somalia after leaving Tanzania on 4th May, 2016.
22. The Suspect told the Officer that he had no travel papers but decided to travel nonetheless. He had boarded a Tahmeed bus from Tanzania up to Mombasa in Kenya.
23. He claimed to have obtained a temporary pass into Kenya but he did not show it to PW 1.
24. Upon arriving in Mombasa on 4th May, 2016 he lodged for the night before taking a Nissan Matatu to Malindi and thereafter a Tawakal bus to Lamu.
25. Along the way he eluded the Police inspections at Minjila and Witu Police Road blocks.
26. On arrival in Lamu he spent the night at Yumbi Guest House on Lamu Island. While at Yumbe Guest House, he asked the Caretaker to lend him a Safaricom line so that he could log into Facebook. The Caretaker lent him the Safaricom since the Suspect had convinced him that he only had a Tanzanian line only.
27. Using the Caretakers Safaricom line, the Suspect logged into the Internet and surfed the Google Map for the Kenyan Coastline feature. The Suspect added that after he had done so, he realized that he could make a direct trip to Kiunga border point from Lamu.
28. The next day, he took a public boat to Siyu Island then proceeded to Faza and Kizingitini using Motorboats and sometimes Motorcycles. The Suspect further disclosed to PW 1 that he went to Kiwayu Island where he then got stranded.
29. While at Kiwayu Island, the Suspect raised suspicious against himself by asking the locals for directions to Mambore. The said locals pounced on him and took him to Kiwayu Police Post under Citizens' arrest. The Officers at Kiwayu Police Post re-arrested him and handed him over to the Anti-Terrorism Police Unit.
30. When he was made to appear before PW 1, the Suspect went ahead to disclose his family background. He pointed out that his brother by name Khalif was already in Somalia as an Al'shabaab fighter. He told PW 1 in his statement that his intention was to join his brother as an Alshabaab fighter in Somalia.
31. The Suspect informed him tht he held a Certificate in Medical laboratory but that he did not want to follow through this career since his preference was to lead an Islamic way of life in Somalia. The Suspect added that his friends had wished to travel with him from Tanzania to Somalia but could not due to lack of money.
32. After making these disclosures, PW 1 recorded them in a Video form and written Pro forma for Confessions.
33. The Suspect and his advocate Mr. Kenneth Njuguna then signed on the Pro forma for Confession and the Confession statement. PW 1 then produced the said statement as exhibits:
 1. 1 Proforma for Confessions.
 2. 2 Confession statement by the Suspect duly signed.



34. PW 2 F.NO.72965 Police Constable Moses Kimansio of Kiunga Police Station at the material time told the Court that on 09-05-2016 at 3.30p.m the DCIO to re-arrest the male Suspect who had been brought over by Police Officers from Kiwayu Police Post.
35. Upon questioning the Suspect the Suspect immediately disclosed that he was a Tanzanian national enroute to Somalia to join Alshabaab militant group.
36. At this disclosure, PW 2 immediately alerted Inspector Opagal who then instructed CPL Atubwa to escort the Suspect to Lamu using a Kenya Navy boat. He handed over the Suspect to Cpl. Atubwa together with the Suspect's property as follows:
 1. Huawei Mobile Phone.
 2. 2 Sim cards.
 3. 1 Memory Card.
 4. Hand over note listing these items.
37. PW 3 Clarkson Baya, the Caretaker of Yumbe Guest House told the Court that on 05-05-2016 he was on duty at the House when a Client walked in the company of a beach boy called Musa. The Client identified himself as Abdul Harun Karim. It was the normal practice for beach boys to take guests to guest houses.
38. As procedure demanded, he gave the said male Client the Client Registration Form. The Client duly filled in his names as Abdul Harun Karim but did not provide his Identity Card or Passport numbers claiming that he had lost them when his luggage containing the identification paper got lost enroute to Lamu.
39. The Client added that he had passed through all road blocks after fully explaining himself out to the Military Police manning the road blocks. PW 3 reasoned that if the Police had accepted him through he also could let him spent the night over in the guest house pending the tracing of the missing luggage. The Client paid Kshs.1, 500/= for the night and went to his room.
40. In the evening, the Suspect asked PW 3 for a Phone claiming that his (Suspect's) Phone had a technical issue and could not access the Internet. At his request, the lodge Caretaker gave him his Phone with which the Suspect surfed the internet before returning it to PW 3. The Suspect had bought a Kshs.50/= airtime card with which he bought data bundles for internet surfing.
41. The Client left the next day at 2p.m after being escorted from the guest house to the Jetty by a beach boy called Farouk. He told PW 3 that he was headed to Kiunga for a business trip.
42. PW 4 F.NO.87647 Police Constable Hassan Bunu Muntet a translator and analyst with the Anti-Terrorism Police Unit told the Court that he received some audio recording in Arabic language for his translation.
43. In total he listened to 4 audio recordings in Arabic language. He then translated all 4 into Kiswahili. He stated that the recordings were Arabic poems encouraging the slaughtering of other people under Jihad which was the pretext used by terrorists. He pointed out that the poems had been extracted from the Suspect's mobile phone by Inspector Waringa of the Cybercrime Police Unit.
44. In support of his evidence, P.C Muntet produced the following as exhibits:
 1. 5 – Certificate of PW 4's competency in Arabic language.



2. 6 Compact Disc (CD) recording of the Poems (Shairi).
 3. 7 Certificate of Translation prepared by PW 4 after duly translating the 4 poems.
45. PW 5 F.NO.235270 Police Inspector Nicolas Waringa told the Court that at the material time he was at the ATPU Forensic Lab in Nairobi. PW 5 added that on 20-05-2016 he received an Exhibit Memorandum Form signed by FNO.82274 CPL Zablon Atubwa of Lamu. He requested IP Waringa to examine the Huawei mobile phone model Y 52C – U22 with IMEI No.86672902158xxxx and 86672902162xxxx with 1 TIGO Micro Sim Card No.8925503xxx 68516xxx and 2 Zantel Micro Sim Cards and 1 Micro S.D Card of 128MB.
 46. Using a Cellebrite machine No.5922520 PW 5 extracted all the data from the various devices that he had been given.
 47. The Cellebrite machine enable the Officer to generate a Computer Forensic Report dated 02-08-2016. He also saved the extracted data in a Compact Disc (CD) format.
 48. Of interest to the examiner were the 4 Islamic poems namely Shahid, Guraba, Jihad and one for All Brothers. They were in audio format. He downloaded them and asked PC Muntent (PW 4) to then translate them into Kiswahili an exercise which PC Muntet completed successfully. The extracted data showed messages that confirmed his Physical presence at the Tanzania border as he entered Kenya.
 49. IP Waringa listed all the extracted messages in his Forensic Report. He identified the listed messages that were of importance to the case as message numbers 123, 124, 18, 21 and 24.
 50. One message as was captured on page 15 of the report had stated in draft:

“Mimi niko Kiwayu
Nimezuiliwa na Polisi
Nilikuwa naenda Mambore
Kuchukua mzigo.”
 51. IP Waringa considered this to be a coded message.
 52. Also extracted and reflected on page 19 of the report was a screen shot by the taken showing that on 6th May, 2016 at 9:51:04 p.m. he took a screenshot image of a Google Map of the search results for Kiwayu.
 53. All the extracts tracked his physical movements from Tanzania to Kenya upto Lamu and Kiwayu.
 54. PW 5 produced the following as exhibits in support of the case.
 1. Huawei Phone Model Y52C – U22 IMEI 8667290215xxxxAND 86672902162806.
 2. Tigo Sim Card.
 3. Zantel Sim Card.
 4. 5 Micro SD Card
 5. Computer Forensic Report.
 55. PW 6 F.N.100703 Police Constable Anthone Khaayo formerly of Kiwayu Police Station told the court that while on duty the police facility 2 young men from Kiwayu Village made a report at the Station. In their company was a middle aged man who then identified himself as Abdul Harun Karim.



56. The 2 young men told PC Khaayo at the Report Office that after Harun had alighted from the boat at Kiwayu he had approached the 2 young men asking for directions to Mwambore. This made them suspicious. PC Khaayo interviewed the Suspect at Kiwayu Police Post. He had no identification papers.
57. PW 6's suspicion grew when the Suspect said to him that he was headed to Mwambore to collect an unknown precious cargo. Since PW 6 had worked in that region for long, he understood his destination as deserving of the attention on the ATPU as Mwambore was only used by deep sea fishermen and Mwambore had only 4 houses for the fishermen.
58. PC Khaayo was shown a Google Map by the Suspect. It showed a route of Siyu to Kizingitini bypassing Ndau up to Kiwayu whereat the Suspect was then.
59. In the Suspect's pockets was Kshs.2, 000/= in cash. It was handed back to him as it was deemed to be okay.
60. PW 7 FNO.82274 Police Corporal Zablon Atubwa told the court that his Superior Inspector Opagal instructed him to escort the suspect from Kiunga to Lamu. This he did. He re-arrested the suspect from PC Kimansio and collected his personal items as captured in the Hand over Note prepared by PC Kimansio and took them to Lamu Police Station.
61. He then prepared an Exhibit Memorandum Form forwarding the electronic devices and electronic cards – Sim Cards – on 20/05/2016 to the Cyber Crime Police Unit for analysis. He produced this Exhibit Memo Form as P.Ex. 11 and the Hand Over Note as P.Ex.12.
62. The Suspect then disclosed to PW 7 that he was then enroute to join Al Shabaab. This disclosure made CPL Atubwa to hand him over to a senior officer for the purpose of recording the confessions.
63. PW 8 F.NO.235271 Inspector Eric Opagal testified as the Investigating Officer (I.O.). He told the Court that it was PC Kimansio of Kiunga Police Post who alerted him of the arrest of the Suspect at Kiwayu.
64. IP Opagal instructed PC Kimansio to process the suspect while PW 8 made arrangements for their transportation to Lamu. Cpl. Atubwa led the effort to deliver the Suspect to Lamu Police Station.
65. When the Suspect was brought over, IP Opagal interviewed him. The moment the Suspect began making a Confession IP Opagal alerted his Superior Chief Inspector William Ndiragu (as he then was) to take down the Confession. His superior obliged and recorded the confession. In it, the Suspect disclosed his entire movements from Tanga Tanzania to Kiwayu enroute to Somalia to join Al Shabaab.
66. PW 8 contacted the Immigration Department to check if there was any entry record for the suspect but found none.
67. This made the Police charge him with being unlawfully present in Kenya.
68. From the collected evidence by the various officers involved, IP Opagal had the Suspect arraigned before the Court and charged as presently. Of concern were messages of killing of Islamic Sheikhs by non-Muslims, messages from radical Muslim preachers in whom he believed in and a collection of messages and information related to terrorism activities.
69. At the end of his testimony, the DPP closed their case. The Court then ruled that the Accused person had a case to answer on each of the 6 counts. He was put to his defence.

The Defence Case

70. Abdul Harun Karim gave sworn defence. He called no Witnesses.



71. Karim denied all the charges preferred against him. He added that after graduating with a diploma in a laboratory technician course from St. John's University in Dodoma, Tanzania he opted to come to Lamu in Kenya for religious studies.
72. He thus travelled on 5th May, 2016 and lodged in Mombasa before proceeding to Lamu on 6th May, 2016.
73. On 7th May, 2016 he met a beach boy called Farouk who gave him a guided tour of the Schools and places in Lamu. The said Farouk also told him about some Islands where he could find other religious Schools.
74. This made him to take a boat to Faza on 8th May, 2016. After touring Faza, he opted to return to Lamu on 9th May, 2016 but got lost and was surprised to discover that the fishing boat that he had boarded was actually headed to Mkokoni.
75. This discovery prompted him to disembark at Kiwayu Island with a view to return to Lamu. After getting off at Kiwayu, he met 2 young men to whom he explained his predicament of his loss of direction to Lamu.
76. The 2 young men told him that no boats were available to go back to Lamu. They advised him to use Police or Security agencies' boats which were ready available.
77. He agreed to their advice.
78. When he got to Kiwayu Police Post he discovered that he had left his small bag in the fishing boat that he had disembarked from as it was heading to the wrong direction of Mkokoni Islands. The Accused person added that the 2 young men told him that the said boat had already left with his small bag.
79. At Kiwayu Police Station, he tried to explain himself out to the Police Officers at Kiwayu Police Post but they were unhelpful. They then took him to Kiunga Police Station for further processes.
80. PC Moses Kimansio questioned him at Kunga Police Station before the Anti-Terrorism Police Unit (ATPU) Officers escorted him to Lamu Police Station and handed him over to Inspector Opagal and Chief Inspector Ndirangu.
81. Karim added that the 2 Officers told him that they had had many young men like him heading to Somalia only to be arrested by the Police. The 2 Officers then threatened him they would likely force his disappearance due to his lies about his true mission to Kenya. Then the 2 Officers brought him to Court and drew up the present charges. At the end of his defence, the Accused person closed his case.
82. It is the duty of the Honourable Court to determine if the DPP has proved the 6 Counts beyond any reasonable doubt as required by Section 107 of the [Evidence Act](#).
83. Before making that determination the Court noted that the following facts are common to both the Prosecution and the Defence and are undisputed:
 1. The Accused's name is Abdul Harun Karim.
 2. He is a Muslim man from Tanga, Tanzania.
 3. The accused person entered Kenya illegally on or about 5th May, 2016 through an unknown entry point.
 4. The Accused person lodged in Mombasa.
 5. The Accused person then made his way to Lamu by road.



6. He passed through the various security road blocks manned by officers from the Kenyan Military and the Kenyan Police undetected by both security agencies.
 7. The Accused person has no identification papers – and had no identification papers at the time of arrest.
 8. 2 unknown young men led the Accused person to Kiwayu Police after suspecting him of criminal intentions.
 9. Kiwayu Police Post was the place that he got arrested at.
 10. At the time of arrest, the Accused person was found with the following personal items:
 - i. Huawei Mobile Phone P.Ex.2.
 - ii. Tigo Sim Card P.Ex.3A.
 - iii. Zantel sim Card.
 - iv. Micro SD Card.
 11. The Cybercrime analyst IP Waringa as P.W. extracted all the data from the recovered devices as per the Computer Forensic Report dated 02-08-2016 produced as P.Ex. 8 with its Certificate under Section 106B as P.Ex. 7.
84. The disputed issues for determination are:
1. Was Abdul Harun Karim a terrorist fighter?
 2. Where to was the Accused person headed?
 3. Did the Accused collect any information that would instigate a terrorist act?

Count I Issue: Being A Terrorist Fighter

85. Section 30D of the *prevention of Terrorism Act* No.30 of 2012 provides as follows:

30D. Foreign Terrorist Fighters.

“A person who is not a Kenyan citizen who enters or passes through Kenya for purposes of engaging in terrorist activities in Kenya or elsewhere commits an offence and shall be liable to imprisonment for a term not exceeding thirty years.”

86. The Accused person herein was a Tanzanian national – he still is. From the following direct and overwhelming evidence the Court arrived at the irresistible conclusion that he was a terrorist fighter at the time that he left Tanga, Tanzania and ended up in Kiwayu, Lamu County in Kenya.
1. His voluntary and properly taken confession. The relevant parts are:
 - i. On page 4 line 6 where he states that he logged into Google search engine and searched for his current location and the direction to Somali
 - ii. Page 4 line 10 where he reveals that he logged onto Facebook and alerted his brother Halfan that he was on his way to Somalia,
 - iii. Page 5 lines 10 and 11 where he asked some boys about the direction to Mambore – Mambore is towards Somalia;



iv. Page 5 paragraph 4 where he explained as follows:

“When I left Tanzania my intention was to join Al shabaab So that to live a true Islamic life.”

2. The flurry of SMS's that he exchanged with one Athu a month or a few weeks before embarking on this fateful travel towards Somalia via Kenya. These text messages are reflected in the Cybercrime Forensic Report produced in Court by Inspector Waringa. The most important text messages were:

i. From Athu sms No.137 at 1.30p.m on 17-4-2016 “Jana nikuw na Ustadh Tukaj'di mamb machach nkamfikishia nay al ulyonfkshia” (I was with Ustadh yesterday. We discussed a few things. I delivered to him whatever you had delivered to me).

ii. From Accused to Athu SMS No.36 at 1:31:19 in reply to SMS No.136:

“Sawa ye kasemaje” (Ok. What did he say?)

iii. Further SMS No.136 at 1;32:12p.m “Kwnz kakup hongr kwa kwnd kuisom dn” (He congratulates you for going to study religion).

iv. This was followed by SMS No.135 at 1:35:30p.m.

“pia akatoa tahadhr kdg juu ya elim ya K unayoitaft”.

(He also issued a small caution over your education that you are searching for.”

v. The Accused's reply thereto was SMS No.33 on 17-4-2016.

“Kwa kuona na kusoma ww. Sasa mbona husemi hiyo tahadhar.”

(As you can see and read, why are you not saying that caution?).

vi. After exchanging SMS's No.s 126, 125, 124Vis 9, Vis SMS's No.32, 31, 30 and 29 the following stood out (SMS 123 at 2:26p.m.

“Unajua abd rog kaongelea san kuhu jhad na ksheria jhad inaruhusiw bt ye Hajafundish sharia zak ikiw kam ibada mbn tunajua ibda ya swala na sheria zak na ukiacha hta mjo bc huna swal huy huy ktk jhad zamn jihd wat walkuw wanpgan wenyenguv wacwe itt wanawek na wazee lkn jhad ya sas linalipuliw bom Wankufa wamam wazee and ht wtt pia je mpk hap haijavunjw sharia)

(You know that About Rogo has spoken a lot about jihad. In the law jihad is allowed but he does not teach the law as a sermon. Why do we know about his sermons and law? If you deviate from even one piece of law then you have no prayer. In the past jihad was done by each strong person whether Women, Children or Men. But in these modern times jihad is about using bombs to kill Women, Men and Children. So up to that point don't you see that it is just not the law that has been broken?”

87. The warning that was being conveyed to the Accused person who held the counsel and advice of About Rogo was as clear as the day.



88. The Court under Section 60(1) (0) of the *Evidence Act* takes judicial notice of the radical preaching's and sermons by the late Sheikh Aboud Rogo whose messages were used to radicalize Muslim youth in Mombasa and the East Africa Coastal region. His intention is laid at in the confession, to willingly join the notoriously violent Al Shabaab, a Somali based militant group.
89. In Republic –v- Elly Waga Omondi (201) eKLR the High Court of Kenya (S.N. Mutuku J.) held that the conditions for taking down a Confession must be strictly adhered to for the confession to be admissible.
90. In the present case, and in compliance with the requirements of section 25A of the *Evidence Act* Cap 80 Laws of Kenya the Investigating team strictly complied with the law by:
1. Having the designated rank officer take down the said confession – it was Chief Inspector William Ndirangu who was not the investigating Officer. The Investigating Officer was Inspector Opagal.
 2. Allowing the suspect to opt for his preferred language namely Kiswahili.
 3. Avoiding any form of coercion, threats, torture, duress or any other form of cruel or inhuman or degrading punishment or treatment. He was given a bottle of water.
 4. Informing him of his right to legal representation and permitting Mr. Kenneth Njuguna Advocate to be present pro bono on behalf of the Suspect.
 5. Giving him the necessary breaks and rest in the 1hr 37 minute interview session when the confession was being recorded.
 6. Permitting the Suspect and his Counsel to voluntarily sign on the Confession Pro Forma.
 7. Permitting the said Suspect to narrate freely his account of events.
91. The Court is thus satisfied that the confession was properly taken down and is free from any taint of illegality. The Accused person admitted as such when he was being cross-examined on his sworn defence.
92. The contents of the confession left no doubt in the Court's mind that the Accused person was indeed a terrorist fighter.
93. Section 25 of the *Evidence Act* states:
25. A Confession comprises words or conduct or a combination of words and conduct, from which whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.
94. The record reflects that before the closure of the DPP's case no retraction of the said confession was made by the defence.
95. It was at the defence stage that the accused person attempted to retract the confession by alleging that he was threatened by the Police.
96. His attempted retraction was inconsequential based on the answer that he gave during his cross-examination by Prosecution Counsel Mutua.
97. In answer to the specific question by the DPP during that cross-examination, the Accused person conceded openly that no threat or undue illegality was exerted on him before or during the recording of his confession. With that answer the Court did not deem it necessary to hold a trial within a trial



since, in any event the DPP had already closed its case after establishing the strict adherence with the rules for recording confessions.

98. His defence that he was in Lamu as the final destination is not true as per his own confession that he was headed to join Al shabaab. Even his confession that his brother back in Tanga by name Halfan wished him well after the Accused had confirmed to Halfan that he was headed to Somalia corroborates the position that his true destination was Somalia, not Lamu.
99. Religious studies was just a false pretext that the Accused person was using to justify his planned exit from Tanzania. He had been congratulated for seeking religion but was cautioned that the type of pursuit that he was making under the teachings of Aboud Rogo were not the true religion. Even the contents of the poems and collected information betrayed his purported religious interest.
100. The Court finds that he was determined to go to Al shaabab training grounds in Somalia where he had revealed that there was a brother of his called Khalif.
101. The Court noted that he was a freshly minted Laboratory technician. This gave him unique skills that could easily have been exploited by the militants to have him as a bomb maker or a maker of improvised explosive devices.

Knowing well about the military and Police checkpoints' existence, the Accused person slipped through these nets stealthily like a night predator, a leopard no less, lurking in the dark. How he eluded Police detection speaks volumes about his stealth nature and characteristics.

102. All these activities were being pursued in the name of Allah.
103. The Court thus rejects his made up defence and finds him guilty of Count I of being a Tanzania foreign terrorist fighter as charged. He is convicted of Count 1 under Section 215 of the Criminal Procedure Code.

Count II: Issue II Presumption Of Travelling To A Country For Terrorism Purposes

104. The evidence on this Court was also direct and overwhelming. He was headed to Somalia via Kenya to join Al Shabaab Militant group. It was false for him to state that he was in Lamu in search of Islamic religious education and studies.
105. He is guilty as charged based on the direct and overwhelming evidence produced by the DPP against him. He is also convicted under S.215 CPC

Counts III, IV, V and VI: Collection Of Information For Terrorism Purposes.

106. For these counts, the DPP relied on the extracted data from the Accused person's Huawei Mobile Phone. There were 4 poems (Shairi) in total. These were extracted using a Cellebrite machine at the Cybercrime Police Unit, Nairobi under the direct action and supervision of Inspector Waringa. After he extracted the data and saved it, he handed it to PC Muntet to translate from the Arabic version to Kiswahili for ease of understanding. The 4 poems were:
 1. Shaheed: It speaks of spilling blood and the joy of being engaged in spilling blood.
 2. Ghuraba which speaks of being a soldier and fighter who do not fear rebellious people, who do not fear imprisonment or jail who will fight to the end.
 3. Enyi Ndugu (oh brothers) which speaks of heeding the call to unite and achieve their goals.



The clear message from these poems that the terrorist fighter had was to instigate direct murderous violence against their targets in the name of Islamic religion. He had saved all these poems in his Phone. This amounted to collection.

4. The same recordings relating to the poems for Yalshaheedan.
107. His aim was to join his brother Khalif who was already in Somalia as an Al Shabab Fighter. Somalia is a designated terrorist County – L.N.200/2015.
108. Although Clarkson Baya (PW 3) gave direct evidence of how he received a client whom he had not seen before, and also how he gave the client his Phone for surfing the Internet, the said Baya's evidence was inconclusive because the investigating
109. Officer Inspector Opagal did not subject the arrested Suspect to a Police Identification parade for the Witness (Baya) to confirm if the person that Inspector Opagal had arrested was the same person that Baya had earlier accommodated at Yumbe Guest House. The failure by Inspector Opagal to organize a Police identification was a negligent omission because it deprived the Court of the necessary confirmation as to enter positive or negative identification of the Accused person. The Court therefore is not convinced that Baya accommodated the suspect. This omission was exacerbated by the failure to produce any receipt issued to the said suspect when he took up a room at Yumbe Guest House.
110. But these omissions were overshadowed by the flood of strong evidence that was extracted from his Huawei Phone and Sim Cards, Micro SD Card plus his voluntary written Confession.
111. The Court is convinced that the saved SMS and Arabic audio poems which were recorded and saved in his phone as translated by PC Hassan left no doubt that those messages in totality could be used to instigate the commission of terrorist acts by the recipients or holders of the said messages.
112. The Court thus finds the Accused person guilty as charged and convicts him of Counts III, IV, V and VI finding no reasonable doubt created in the mind of the Court by his shaken sworn defence. These convictions are under Section 215 of the Criminal Procedure Code.
113. Right of Appeal against Judgement and conviction is 14 days.

DATED, READ AND SIGNED AT LAMU THIS 21ST DAY OF MAY, 2019.

T. A. SITATI

PRINCIPAL MAGISTRATE

LAMU LAW COURTS

Present:

Accused person.

DPP – Kiongo

Faiza Court Assistant/Interpretation in Kiswahili.

T.A. SITATI – P.M.

21/5/2019

COURT: Judgement delivered.

T.A. SITATI – P.M.

21/5/2019



DPP: We have no previous records of the Accused.

T.A. SITATI – P.M.

21/5/2019

COURT:

Has DPP contacted Interpol for his previous records?

T.A. SITATI – P.M.

21/5/2019

DPP:

As far as the Kenyan jurisdiction is concerned he has no previous records except the Immigration offence that he was convicted for in 2016 when he pleaded guilty.

T.A. SITATI – P.M.

21/5/2019

MITIGATION, KISWAHILI

I ask the Court to consider my future. I am a young person who has many plans in my life. I want to advance my education and also to start a family of my own like other young men.

I have been in custody. This is my 4th year in Prison. I had pleaded guilty to being found unlawfully present in Kenya.

I ask that the court notes that I have not seen my family for the last 4 years. I ask the Court to consider these factors in arriving at its fair decision.

T.A. SITATI – P.M.

21/5/2019

COURT: File placed aside for 30 minutes for the Court to draw up an appropriate sentence.

T.A. SITATI – P.M.

21/5/2019

Later 12:49p.m.

Coram as earlier.

SENTENCE, KISWAHILI

The Offender is youthful late twenties or early thirties. No previous conviction apart from the conviction on a guilty plea for being unlawfully present in Kenya.

In his favour is that he truthfully confessed to the Police the scope of his activities. He had been dutifully warned about the implications of such a Confession. He was also with an advocate Mr. Kenneth Njuguna as he made his Confession.

The aggravating circumstances were that

1. Prior to coming to Kenya, a friend of his namely Athu had persistently warned him to change radical views and move away from his plans to travel to Somalia but the Accused person failed to heed those warnings.
2. The Accused person was so determined to be the terrorist fighter with Al Shabaab that he raised his own money to travel to Somalia.



3. He used unknown entry points to enter Kenya on his way to Somalia.
4. He was unlawfully present in Kenya which is an immigration offence by itself. He was convicted and penalized for this offence with a 2 year imprisonment which he has completed recently.
5. The convict subscribes to the radical brand of Islamic teachings by notorious radical Islamic preachers as Kassim Mafuta, Aboud Rogo and others against whom he had been warned in his messages exchanged between him and his friend.
6. Violence, murder and killings of Women, Children and Men indiscriminately are the beliefs that he subscribes to.
7. The Convict abandoned the straight and narrow way of life that his parents had given him in taking him to college for a laboratory technician's course to pursue Islamic Militant activities in a foreign country.

Although he is young and has asked the Court to consider his age, the nature of the offences are serious carrying each up to 30 years imprisonment.

The fact that he evaded Police and Military check points are elements that show he is a slippery and tactically evasive person. It only took the keen attention of 2 other young men to stop him in his tracks and thereby bring him under the operation of the laws of this land. He is a threat to the national security of this Country; like a leopard that hunts stealthily and without detection, the convict is a person of great stealth which is a deadly asset that gives a terrorist extreme advantage against the national security operations in this Country. It means that if he is released for a non-custodial sentence, the convict will have been awarded a certificate to freely roam for terrorist activities and thereby directly threaten the national security interests of the Country –

A custodial sentence is therefore the appropriate sentence to not only deter him from furthering his plans but also deterring other likeminded youths from pursuing similar criminal approaches.

Somalia alongside Syria, Yemen, Afghanistan and Iraq were designated as terrorist training Countries vide L.N 200/2015 by the Cabinet Secretary for interior and Security. His brother Khalif is already an Al Shabaab terrorist fighter in Somalia. He was determined to join his brother and used all means to go there. His Confession showed a consistent commitment and devotion to join the militants in Somalia.

The fact that he had 4 terrorist audio recording that spoke of use of explosives to kill Children, Women and Men cannot be forgotten.

This was to be taken all the more seriously because as a trained lab technician he would easily be deployed by the militants as an explosives and bomb maker.

In those premises the Court passes a custodial sentence as follows:

1. Count I: 30 years imprisonment for his singular determination and devotion towards terrorism and militantism.
2. Count II: Legal Notice No.200/2015 as read together with Section 30(c) of *Prevention of Terrorism Act* No.30/2012 is sentenced to 20 years imprisonment (Twenty years).
3. Count III, Count IV, Count V And Counts VI on each of them the Convict is sentenced to an imprisonment of 15 years imprisonment as the collected information propagated murder violence and unjustified killings of their targets.
4. The sentences for Counts 1 and 2 shall run concurrently because these occurred in one transaction.
5. The sentences to Counts 3, 4, 5 and 6 shall be consecutive to Counts 1 and 2.



6. Meaning that after completing the concurrent sentences in Court 1 and 2, the sentences in Court 3, 4, 5 and 6 shall begin to run but these 4 sentences shall be concurrently running consecutive upon the completion of Courts 1 and 2.

For avoidance of doubt, the Court's sentences are:

1. Count 1 And Count 2 – 30years imprisonment and 20 years imprisonment are concurrent.
2. After completing the 30 years and 20 years concurrent imprisonment he shall serve an additional concurrent 15 years sentence in each of the 4 counts i.e. Counts 3, 4, 5 and 6. This is because the offences of counts 3, 4, 5 and 6 were committed separately and advance of the ones in Counts 1 and 2.

Upon completion of his sentences he shall be repatriated to Tanzania.

Right of Appeal 14 days.

T. A. SITATI

PRINCIPAL MAGISTRATE

21/5/2019

COURT: The total consecutive sentence are 45 years. (30 maximum + 15 years).

T. A. SITATI

PRINCIPAL MAGISTRATE

21/5/2019

ACCUSED: Pray for the certified typed Judgement.

T. A. SITATI

PRINCIPAL MAGISTRATE

21/5/2019

DPP: Same for us.

T. A. SITATI

PRINCIPAL MAGISTRATE

21/5/2019

COURT: Certified typed Judgement shall be provided to the parties.

T. A. SITATI

PRINCIPAL MAGISTRATE

21/5/2019

