

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. E020 OF 2025

FARAH AHMED SAMBUL alias **FARAGON**.....**1ST**
APPELLANT

MINAJ HASSAN KHALIF alias **DAAR****2ND**
APPELLANT

VERSUS

REPUBLIC.....
....RESPONDENT

(Being an appeal against the conviction and sentence by Hon. J. Omwange - PM delivered on 30.06.2025 in Garissa CM's Court in Criminal Case No. E008 of 2023).

JUDGMENT

1. The appellants were jointly charged with several offences relating to terrorist activities as follows:

2. **Count I:** Committing a terrorist act contrary to section 4(2) of the Prevention of Terrorist Act: The particulars of the offence were that: on 12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Sub County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration number GK B277U make Toyota Land cruiser which resulted to the death of No. 72148 IP Humphrey Ong'oro Ombuch, a GSU Police Officer in contravention of the said Act.

3. **Count II:** Committing a terrorist Act contrary to section 4(2) of the Prevention of Terrorist Act. Particulars were that: on 12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Sub County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration number GK B277U make Toyota Land cruiser which resulted to the death of No. 84903 Cpl. Ronald Baya Mutana, a GSU Police Officer in contravention of the said Act.
4. **Count III:** Committing a terrorist Act contrary to section 4(2) of the Prevention of Terrorist Act. Particulars were that: on 12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Sub County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration number GK B277U make Toyota Land cruiser which resulted to the death of No. 97546 PC Dickson Nderitu Wanjohi, a GSU Police Officer in contravention of the said Act.
5. **Count IV:** Committing a terrorist Act contrary to section 4(2) of the Prevention of Terrorist Act. The particulars were that: on 12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Sub County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration

number GK B277U make Toyota Land cruiser which resulted to the death of No.102662 PC Peter Ng'ang'a Karami, a GSU Police Officer in contravention of the said Act.

6. **Count V:** Committing a terrorist Act contrary to section 4(2) of the Prevention of Terrorist Act. Particulars were that: on 12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Sub- County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration number GK B277U make Toyota Land cruiser which resulted to the death of No. 103956 PC Khalif Hussein Omar, GSU Police Officer in contravention of the said Act.
7. **Count VI:** Committing a terrorist Act contrary to section 4(2) of the Prevention of Terrorist Act. The particulars were that; on 12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Sub County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration number GK B277U make Toyota Land cruiser which resulted to the death of No. 109038 PC Kennedy Kinyua Murithi, a GSU Police Officer in contravention of the said Act.
8. **Count VII:** Committing a terrorist Act contrary to section 4(2) of the Prevention of Terrorist Act. The particulars were that; on

12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Sub County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration number GK B277U make Toyota Land cruiser which resulted to the death of No. 109149 PC Lewis Muturi Wanjohi, a GSU Police Officer in contravention of the said Act.

9. **Count VIII:** Committing a terrorist Act contrary to section 4(2) of the Prevention of Terrorist Act. The particulars were that: on 12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Sub County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration number GK B277U make Toyota Land cruiser which resulted to the death of No. 109219 PC Kennedy Murimi Njogu, a GSU Police Officer in contravention of the said Act.

10. **Count IX:** Committing a terrorist Act contrary to section 4(2) of the Prevention of Terrorist Act. The particulars were that; on 12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Sub-County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration number GK B277U make Toyota Land cruiser which resulted to

the death of No. 114541 PC Kevin Munene Kithinji, a GSU Police Officer in contravention of the said Act.

11. **Count X:** Committing a terrorist Act contrary to section 4(2) of the Prevention of Terrorist Act. The particulars were that; on 12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Su County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration number GK B277U make Toyota Land cruiser which resulted to the death of No. 114322 PC Langat Kipng'etich David, a GSU Police Officer in contravention of the said Act.
12. **Count XI:** Committing a terrorist Act contrary to section 4(2) of the Prevention of Terrorist Act. The particulars were that: on 12.10.2019 at Walburat Dam Area along Liboi Abdisugow Road in Dadaab Sub- County within Garissa County, jointly with others not before court, they committed a terrorist act by detonating an Improvised Explosive Device followed by sporadic gun fire aimed at GSU police officers on board a motor vehicle registration number GK B277U make Toyota Land cruiser which resulted to the death of No. 115802 PC Yusuf Omar Kazungu, a GSU Police Officer in contravention of the said Act.
13. **Count XII:** Being a member of a terrorist group contrary to section 24 of Prevention of Terrorism Act. The particulars were that; on 23.10.2019 at Harehare in Liboi area in Dadaab Sub County within Garissa County, they were found being a member

of a terrorist group namely Al- Shabaab which is an outlawed terrorist organization by the Kenyan gazette notice number 12585 of 2010 in contravention of the said Act.

14. They denied the charge and the matter proceeded to full trial. Consequently, they were convicted and sentenced as follows: Counts I- XI, each appellant was sentenced to 30 years' imprisonment to run concurrently under section 4(2) of the Prevention of Terrorism Act; `on count XII, each appellant was sentenced to 10 years' imprisonment to run concurrently with the above under section 24 of Prevention of Terrorism Act.
15. Being aggrieved by the finding of the court, the appellants preferred an appeal to this court via petition of appeal dated 09.07.2025 citing the following grounds:
 - i. The judgment by the learned magistrate was against the weight of evidence.**
 - ii. The learned magistrate failed to properly evaluate the evidence before him. The magistrate ignored the fact that the statement by the arresting officer that the accused persons were arrested in Kenya in possession of firearms was contradicted by other witnesses who testified that the accused persons were arrested in Dobley, Somalia and handed over to Kenyan authorities.**
 - iii. The learned magistrate failed to appreciate that if the accused persons were arrested in Dobley, Somalia and handed over to Kenyan officers, the**

- chain of custody of the items alleged to have been recovered at the point of their arrest was broken and thus possession of the firearms could not be proved.
- iv. The learned magistrate misdirected himself in the judgment by relying on the testimony of persons who were not witnesses in the case before him, specifically CI Ibrahim Mohamed and CI Okoth.
 - v. The learned magistrate misdirected himself by relying on items which were never mentioned by any of the witnesses, not marked for identification nor produced as exhibits in the case before him, specifically a black flag associated with al-shabab, communication equipment and mobile phones to convict the accused persons of being members of al-shabaab.
 - vi. The learned magistrate failed to evaluate the testimony of witnesses and the evidence on record and instead went on misadventure quoting persons who were not witnesses in the case and items which were not part of the evidence in the case before him.
 - vii. The learned magistrate failed to frame and determine the correct issues before him.
 - viii. The learned magistrate failed to properly evaluate the accused persons defence and totally ignored their submissions filed in the case.
 - ix. The sentence imposed on the accused persons was inordinately harsh.

16. This court was therefore urged to allow the appeal as prayed.
17. The appeal was canvassed by way of written submissions.
18. The appellants in their submissions dated 20.10.2025 urged that the appellants gave a clear account of their arrest in Doble Somalia by an officer by the name Haiba due to a property dispute. That the testimony by the appellants was independently corroborated by the testimony of a high ranking police officer, inspector Mohamed Hillow in the related matter, CR 940 of 2019. It was submitted that the said officer narrated how he exchanged messages with the OCS of Doble police station in Somalia on the firearm serial number 54256467 an AK 47 rifle. That the said firearm was produced as Pex 1 by PW1 in this case.
19. It was contended that the only evidence linking the appellants to the charges herein is a ballistic report that links a firearm serial number KE KP 54256467 to a spent cartridge collected from the scene of the attack. That the said firearm was not shown to belong to the appellants in as much as the prosecution alleged that upon their arrest on 23.10.2019, eleven days after the attack, and as stated by C.I. Tonui, that the said rifle was found with them. It was argued that the testimony of C.I. Tonui on the arrest contradicted that of Cpl. Oyago who is named by C.I. Tonui as one of the arresting officers.
20. That the firearm was not finger printed to show that indeed the appellants handled the firearm nor any independent evidence

other than that of C.I Tonui linking the appellants to the said firearm.

21. Additionally, that the trial court failed to consider that an arrest in Kenya by Kenyan police officers is quite different from an arrest in Somalia followed by handing over of the appellants to Kenyan authorities in terms of recovery of exhibits attributed to the accused persons and the chain of custody. That if indeed, the appellants were arrested in Somalia and were handed over to Kenyan authorities as per PW9, the arresting officer in Somalia had to be called to testify to the circumstances of their arrest and how the firearms were recovered from them and the chain of custody from recovery of the firearms to handing them over to Kenyan police officers. According to the appellants, noting that this was not done, the same was detrimental to the prosecution's case.
22. That without credible and consistent evidence that the appellants were arrested in possession of firearms linked to a terrorist act, there was no basis for convicting the appellants.
23. The trial court was also faulted for including witnesses who were not part of the case and as such, questioning the outcome of the entire determination. Similarly, that the trial court failed to consider the appellants' defence which was solid. That the sentence meted out by the court was equally harsh and therefore, ought to be set aside. In the end, the appellants urged this court to allow the appeal as prayed.

24. The respondent in submissions dated 28.10.2025 urged that the determination by the trial court was proper and therefore, this court ought to uphold the same. That it was required to prove the following: whether the appellants committed a terrorist act; whether the appellants were members of a terrorist group; whether prosecution proved its case beyond reasonable doubt and whether the defence raised any reasonable doubt.
25. It was submitted that from the witnesses and the evidence, it was not in contention that on 12.10.2019 at Abdisugow, along the Liboi - Damagale road, a land cruiser motor vehicle carrying 11 officers was blown up with an IED. That in as much as there was no witness who saw the incident, the circumstantial evidence was so strong as to leave no doubt that the appellants were the perpetrators of the terrorist act. It was urged that the place where the appellants were arrested and the crime scene were approximately 15 kilometers apart. That the evidence against the appellant was circumstantial. To that end, reliance was placed on the case of **Chiragu & Another vs Republic [2021] KECA 342 (KLR)** where the court stated that:

'Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court...it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly

established; ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person.'

26. That in count XII, the appellants were found in possession of a black flag associated with Al Shabaab, a terrorist group. To support the foregoing, reliance was placed on the case of **Abdirizak Muktar Edow vs Republic, [2019] KEHC 9241 (KLR), where** possession of a flag associated with a terrorist group was found to be sufficient to prove association or membership to that group.
27. Additionally, that the purported defence of alibi by the appellant did not hold any water as it was strongly discredited by the prosecution's evidence. That the circumstantial evidence was too strong and definitely placed the appellants at the scene of crime. On sentence, this court was urged not to interfere with the trial court's discretion and uphold the sentence by the trial court as the same was within the law.
28. PW1, C.I. Tanui Burno stated that on 23.10.2019 at about 7.00 a.m., while previously serving as the OCS Dadaab Police Station, he had been assigned patrol duties covering Hamey, Damayale, Kulan and Liboi areas. He explained that during the patrol, he received information that two persons were hiding in a makeshift camp within a thicket at Harhar, near the Kenya-

Somalia border, an area where a GSU vehicle had earlier run over an IED killing eleven officers. He said that upon receiving the intelligence, he called for reinforcement from Liboi Police Station, and Cpl. Oyago together with his team joined him. He narrated that they cautiously approached the suspects who were asleep, challenged them to surrender, and arrested them without resistance.

29. He reported that the first accused was found with two AK-47 rifles, one strapped on his chest and another in his hands, together with five magazines. One of the rifles bore serial number KEP54256467, identified as a Kenyan rifle, while the other bore serial number SOM A44756-250. He added that the accused also had a Tete pistol serial number 49005997 loaded with 8 rounds of ammunition, 5 magazines, 7 AK-47 magazines, and 117 rounds of ammunition. The second appellant was found with one AK-47 rifle serial number 19744884, a magazine, and a single round of ammunition.
30. He stated that both suspects were arrested and taken to Garissa Police Station. He clarified that he did not interrogate them due to language barrier and that the matter was subsequently handed over to the ATPU Garissa for further investigation.
31. On cross-examination, the witness stated that at the time he was the OCS Dadaab and that there was no working relationship with officers across the border. He stated that he could not disclose the source of the information about the suspects being sighted near the place where an IED had exploded. He explained

that they were about ten police officers in total, though he could not recall all their names. He added that from a distance they saw the suspects asleep, one lying head down and the other on his side, and on approaching they could see the rifles. He said they challenged the suspects in Kiswahili, which the suspects understood, hence surrendered. He further stated that he only came to know their names during the booking process. He estimated that the distance from the place of arrest to the site where the motor vehicle had been blown up was about fifteen kilometres, and that the suspects were taken straight to Garissa.

32. He went on to state that he could not clearly see the serial number of the Somali AK-47 marked 56-250, but he could read Serial No. KEKP 54256467 (MFI-1). For MFI-2, he told the court that the serial number inscribed on the body of the rifle was 562502958529585. He stated that at the time of handing over the rifles he had written down the serial numbers, but he could not account for the difference between the number on the body and the one on the paper attached to it. He confirmed that the pistol bore serial number 449005997. For purposes of identifying the ammunition, he said PMFI-3(g) to (n) were identified and counted to be eight. He added that PMFI-5 comprised 111 live rounds, three test-fired rounds, and two bullet heads, and that another recovered bullet could be one of them. He concluded that this brought the total to 118 rounds of ammunition for the AK-47. He further noted that the investigating officer would provide clarification.

33. On re-examination, the witness stated that the area where the motor vehicle had been blown up was within Liboi and that the accused persons were also found within Liboi. He said that they were arrested shortly afterwards and that it was highly possible they had been involved. He explained that one of the rifles appeared slightly new, while the others and the pistol had been in use for some time, which could account for the serial number not being clearly visible. He added that the serial number recorded on paper was consistent and confirmed that he personally recovered the rifles and the pistol from the accused persons.

34. PW2, No. 212221, Cpl. Mohamed Omar Ali, serving with the Administration Police in Liboi recalled that on 12.10.2019 at about 5.00 p.m., Sgt. Dakane called and informed him that a motor vehicle had been blown up. He stated that they took two vehicles while the army also took two vehicles and proceeded to the scene at Abdisugow, where they found a GSU Land Cruiser had been destroyed and all eleven officers aboard had died. He explained that they collected the eleven bodies together with eleven guns and later recorded his statement, adding that he did not know what had caused the motor vehicle to be blown up. On cross-examination, he stated that he knew where Harhar was, describing it as being at the border. He explained that Abdisugow was within Kenya, about 30 to 40 kilometres from Harhar.

35. PW3, Lucas Njogu Macharia, a farmer residing in Kirinyaga - Mwea area recalled that on 13.10.2019 at about 9.00 a.m., he

received a call informing him that his son had been killed by a bomb and had passed on. He said the son was called Kennedy Murimi Njogu, his first born, who had been serving as a GSU officer in North Eastern. He explained that he was requested to go the following day to Kenyatta University Mortuary to identify the body, which he did together with his wife. He confirmed that a postmortem was conducted and that the report produced was that of Kennedy, marked as PMFI-9. He added that thereafter they took the body for burial.

36. PW4, Ann Nyawira Muteithya, a farmer residing in Karatina, Nyeri County recalled that on 13.10.2019 she was informed of the death of Dickson Nderitu Wanjohi, who was a driver. She said that on 14.10.2019 they went to Kenyatta University Mortuary where they collected his body for burial. She explained that the motor vehicle he had been driving had run over a bomb and was blown up. She confirmed that the postmortem report produced was that of Dickson Nderitu Wanjohi, marked as PMFI-10.

37. PW5, Robert Wachira Muteithya, a driver residing in Nyeri also recalled that on 13.10.2019 at about 8.30 a.m., Madam Joyce of the GSU called and informed them that Dickson Nderitu Wanjohi had died after being blown up by a bomb and that all those in the motor vehicle had perished. He said that they were requested to go the following day, 14.10.2019, to identify the body, which they did, and thereafter collected it for burial. He confirmed that Dickson Nderitu Wanjohi had been a GSU officer

in Liboi and identified the postmortem report marked as PMFI-10.

38. PW6, No. 258718, PC Mwatate Charo, attached to Liboi Police Station told the court that on 12.10.2019 at about 9.00 a.m, he boarded a motor vehicle top liner from Garissa, and at around 12.30 p.m. when they reached Kulan area, PC Emmanuel Boru also boarded the vehicle. He said that the driver took Abdisugow-Damanjale route because the main road was impassable due to rain. He explained that after passing Abdisugow, he saw a car ahead that had been blown up by an explosive. On reaching the vehicle, they saw the bodies of police officers scattered all over. He stated that they instructed the driver to proceed to the border patrol unit at Abdisugow where they reported the matter. It was his testimony that at the scene, he did not alight from the motor vehicle.

39. PW7, No. 117009, PC Emmanuel Boru, currently attached to Dadaab Police Station and previously stationed at Liboi, where he performed general duties stated that having returned from leave, he boarded a motor vehicle from Garissa to Dadaab and then proceeded to Kulan to wait for a bus. He stated that the bus arrived at about 11.30 a.m. hence boarded the same; That because the main route was impassable due to rain, they used the alternative route of Kulan-Abdisugow-Liboi. He explained that after several kilometres, they came across a motor vehicle which, on arrival, they found had been blown up and there were bodies at the scene. He said the bus turned around and they requested the driver to take them to the Border Patrol Unit

camp, from where police officers went to the scene. He added that he did not see any weapons because the location was a bit far.

40. PW 8, No. 231710, SSP Alex Chirchir, currently attached to the DCI headquarters in Nairobi at the ballistic section as a firearm examiner testified that his main duties involved the examination and identification of firearms, ammunition, their component parts and other related matters, which he had been doing for the last 16 years. It was his testimony that he held a certificate in ballistics and forensic casework from Moscow University in Russia, having undertaken both basic and expert courses in shooting incident reconstruction in the USA, and also held a Bachelor of Arts degree from Moi University.

41. He recalled that on 20.11.2019, he received five cartridge cases marked G1 to G5 from CI Shadrack Kisono of ATPU Garissa, accompanied by an exhibit memo. He said the exhibits had been recovered on 12.10.2019 along the Liboi-Abdisugow road and he was required to ascertain whether they were defined under the Firearms Act, their calibre, and whether they had any connection with firearms marked F1 to F3. On the same day, he also received three AK-47 assault rifles marked F1 to F3, a Tokarev pistol marked exhibit T, 191 rounds of ammunition marked TL1 to TL40 and B1 to B151, and twelve magazines marked TM1 to TM5 and M1 to M7.

42. He stated that his examination revealed that G1 to G5 were cartridge cases of calibre 7.62 x 39mm. Through comparative microscopic analysis, he found that they had been fired from

four different firearms: G1 and G4 from one AK-47 rifle, and G2, G3 and G5 from different AK-47 rifles hence 4 different firearms fired G1 -G5. He stated that further comparison showed that G1 and G4 had been fired from F1, an AK-47 rifle serial number KEKP 54256467, identified as a Kenya Police rifle, while G5 had been fired from F3, an AK-47 rifle serial number 4882 with Russian markings. He added that the Tokarev pistol, serial number 49005997, had no connection with the fired cartridge cases.

43. He explained that in a second report dated 8.09.2019, lab reference 816/19, he examined F1 to F3, the Tokarev pistol, 191 rounds of ammunition, TL1 to TL40 and B1 to B151. He said TL1 to TL40 were of calibre 7.62 x 25mm and that three rounds tested were fired in the Tokarev pistol. He added that nine rounds from B1 to B151 were tested in F1 to F3 and other AK-47 rifles. He confirmed that MFI6 fired G5, PMFI-1 fired G1 and G4, and that PMFI-3 and PMFI-12 were firearms capable of being fired under the Firearms Act. He said TL1 to TL40 appeared to have been fired from PMFI-3A, while B1 to B151 were fired from PMFI-1, PMFI-6 and PMFI-12, and all were ammunitions under the Firearms Act. He confirmed that TM1 to TM5 were magazines for use in PMFI-3, each with a capacity of eight rounds, while M1 to M7 were AK-47 magazines with a capacity of thirty rounds each, all in good working order and suitable for use in PMFI-1, PMFI-6 and PMFI-12.

44. He concluded that PMFI-1 had fired G1 and G4, PMFI-6 had fired G5, and therefore both were connected to the murder incident, while PMFI-12 and PMFI-3 had no connection. He said his findings were contained in reports marked PMFI-13 and PMFI-14.
45. PW9, No. 91524, Cpl. Michael Oyango, currently attached to Mowlem Police Station but at the material time stationed at Liboi Police Station where he was in charge of the armoury recalled that on 12.10.2019 at about 4.00 p.m., he was called by PC Emanuel Boru, who informed him that while travelling back to the station in a bus with other passengers, they came across a motor vehicle that had been destroyed and bodies of police officers in uniform scattered in the bush.
46. He said that he immediately called Captain Emano and together with ATPU officers proceeded to the scene at Liboi junction. On arrival, they found the wreckage of a motor vehicle which they identified as belonging to GSU Harhar and which had been moving from Harhar to Damajani. He explained that the bodies of eleven police officers were scattered in the nearby bush and that it was evident the incident was a complete attack since ammunition had been used, noting that the driver had been fatally shot in the head and the commander, IP Abudi, had been shot and his eyes gouged out. He said cartridges were recovered at the scene, the eleven bodies were taken to Liboi Police Station for airlifting to Nairobi, and the officers were identified, including Inspector Ombach by his rank insignia. He confirmed that all the officers had died during the attack and had sustained gunshot injuries. He added that the accused persons were

arrested at Doble, and that he saw them during the process of transport, and that he positively identified them in court.

47. On cross-examination, he stated that the accused were arrested at Doble in Somalia and that his role was only to escort them after they had been handed over to Kenya. He said he was part of the operation at Harhar which led to their arrest, explaining that Harhar and Doble are very close and that the arrests took place at the border between the two. He confirmed that at the time he was working at Liboi and was in charge of light and armoury. He added that there was a working relationship between Somali and Kenyan authorities at the border and that in some cases suspected terrorists were handed over by Somali authorities to Kenya, as had happened with the appellants herein.

48. PW 10, No. 236092, CI Shadrack Kineli Kisono, in charge of the ATPU Migwi detachment and responsible for investigating terrorism-related cases, having previously served at the Dadaab detachment recalled that on 14.10.2019 he was instructed by Abdnego Kilonzo, then in charge of ATPU North Eastern Region, to investigate the incident of 12.10.2019 in which a GSU section based at Liboi, led by Inspector Humphrey Abotch, had been on patrol along the Liboi-Kamachani road. He said that while travelling in motor vehicle GKB 277U, a Toyota Land Cruiser, the team reached Decko junction where the vehicle ran over an IED.

49. He explained that the blast was heard in Liboi and that KDF and police officers rushed to the scene, finding the vehicle

extensively damaged and all eleven officers dead. That some of the bodies were in pieces and others with gunshot wounds to the head. He added that five empty cartridges were recovered and the bodies taken to Liboi Police Station before being airlifted to Nairobi the following day for postmortem.

50. He stated that on 23.10.2019, officers on patrol in Liboi arrested two suspects believed to be part of the terrorist group responsible for the attack. He identified them as Farah Ahmed Sambul alias Faragon and Minach Hassan Khalif alias Daar. He said the first suspect was found with two AK-47 rifles, one bearing serial number KEP 54256467 loaded with 30 rounds of ammunition and another rifle bearing serial number SOM 56-25029585 with an empty magazine. That he was also in possession of a jungle belt with Tokarev pistol serial number 49005997, pouches with a military water bottle, 5 magazines, 40 rounds of 9mm ammunition and a pistol loaded with 40 rounds of 9mm ammunition and a pistol loaded with 8 rounds of ammunition. According to his evidence, ammunitions were 147 rounds of 7.62mm plus 30 rounds in the magazine hence a total of 147 ammunitions.

51. He added that the second suspect was found with one AK-47 rifle serial number 19746P4882 and a magazine with four rounds, making a total of 151 rounds of 7.62mm ammunition. He confirmed that the cartridges recovered at the scene were documented and forwarded to ballistic experts, and that he prepared an inventory of all recovered items. He referred to the exhibits before court, including the rifles, pistol, magazines,

cartridges, ammunition and jungle belt, and confirmed that the AK-47 ammunition were 151 rounds. He concluded that the accused persons were positively identified.

52. On cross examination, he stated that he was the investigating officer in the matter and had been assigned to it on 19.10.2019. He explained that the suspects were not in custody at Garissa Police Station and that he was not aware of any notice of wanted persons published on that date, adding that the officers were searching for the perpetrators of the attack. He clarified that he was not among the arresting officers, identifying CI Tanui, then Deputy OCS Liboi, together with his patrol team as those who effected the arrests.

53. He stated that he recorded statements from CI Tanui as the arresting officer and from other officers who had visited the scene, confirming that the attack had indeed occurred. He noted that Michael Oyango was in charge at Liboi and had accompanied KDF officers, and that the accused persons were arrested within the Liboi area. He added that CI Tanui had mentioned Cpl. Oyango in relation to the arrests, but he did not obtain Oyango's statement since Oyango had been attacked and injured on the way. He acknowledged that Oyango later testified in court but said he was not aware of what he had stated.

54. He testified that he did not obtain corroborative evidence from CI Tanui regarding the place of arrest, but emphasized that other witnesses placed the accused at the scene. He said two officers recorded statements and that there was other evidence

linking the appellants, particularly the five cartridges recovered from the scene. He confirmed that he had recorded a statement from Oyango about the scene, but Oyango had been attacked when he was coming to record a statement about the arrests and later feared for his life, which prevented him from recording further details. He concluded that he forwarded the file to the ODPP after about one month and maintained that the evidence available was sufficient.

55. DW1, Farah Ahmed Sambul from Liboi Sub-county, stated that he was a Kenyan pastoralist and that on 23.10.2019 he was arrested at Doblely in Somalia by Somali police officers, one of whom had married his sister. He explained that there had been a disagreement between the officer and his sister over a plot, which he believed was the reason for his arrest and subsequent charges. He said he was handed over to Kenyan police but insisted that he did not have a rifle when arrested and that he was being framed. He could not recall where he was on 12.10.2019. He added that he only learnt about the killing of police officers from the charges and denied committing any of the offences, killing any police officer, or being a member of Al-Shabaab.

56. On cross-examination, he stated that he had not mentioned his sister's name because he had not been asked and that she would not be his witness. He said that he had been present in court during the proceedings but had not heard it mentioned that he was armed. He explained that he had not given details of how he was brought to Kenya and charged because he had not

been asked. He confirmed that he was neither a police officer nor an army officer and that he did not have a licence to hold a firearm. He denied being found in possession of a rifle. He added that he carried out pastoral work with others but had not mentioned their names.

57. On re-examination, he stated that he had been handed over from Somali police to Kenyan police and reiterated that he did not have a rifle when arrested. He said he knew other pastoralists, including his brother, but added that his sister was a Somali national based in Dobley and therefore could not testify in Kenya.

58. DW2, Minaj Hassan Khalif from Liboi, stated that he was a pastoralist and that on 23rd October 2019 he was arrested, though he could not recall the exact date. He explained that the sister of the first accused's mother, Rahma Ahmed, had died and that Rahma's husband was claiming her land owing to disagreements. He said that since the first accused was his cousin, they went to Dobley to deal with the issue, but Rahma's husband, Hibe, who was a police officer at Dobley, arrested and handed them over to Kenyan police officers while making false allegations against them. He insisted that he did not have a rifle or ammunition when arrested and that none of the rifles produced in court belonged to him. That he had no knowledge of the incident of 12th October 2019 in which police officers were killed. He denied involvement in the attack and stated that he was not a member of the Al-Shabaab terrorist group.

59. On cross-examination, he stated that he had been in court and heard the testimony of DW1 but did not know if the witness had explained that they were together. He said that at the time of his arrest he had a wife and four children and relatives in Liboi, but nobody knew that they had gone to Doble. He added that he could not call any other evidence to support his claim. He confirmed that he had never worked as a police officer or a GSU officer and that he did not have a certificate to hold a rifle, and that he was not arrested in possession of one. He maintained that he did not know the officers who took them after being handed over.
60. During the hearing of the defence case, counsel for the appellant applied for leave to produce further evidence being proceedings in criminal case No. 940 of 2019 Rvs Farah Ahmed and Minaj Hassan. The defence was particularly concern with evidence of pw4 IP Mohamed Hillow which could be produced without necessarily calling the witness. In its short ruling the court did allow the application.
61. IP Mohamed Hillow pw4 in criminal case number 940 of 2019 told the court that on 20-9-2019, chief Dagahaley Loc. called him seeking for more security to apprehend people who were cutting trees. That he gave the chief 15 NPR led by NPR Ip Muhamed Dellow who proceeded to the scene but unfortunately were attacked and one officer Haret Aden died. That on 24-09-2019 they commenced search. They got in touch with the OCS Doble in Somali who later call him confirming that they had apprehended two people with guns. That the OCS Doble sought

for particulars of the Kenyan missing guns which Hillow gave as S/N.54256467 which the OCS Doble confirmed it was in his custody. That he informed the Habaswein commander for necessary action.

62. Apparently, the two people are the appellants who are also charged of six terrorist related activities in which a similar gun as criminal case number 976 of 2019 the subject of this appeal is involved.

63. Having considered the grounds of appeal, record of appeal and submissions by both the prosecution and the defence, the Court identifies the following issues for determination:

- i. Whether the prosecution proved its case beyond any reasonable doubt that the appellants being members of Al - Shabaab were responsible for the murder of the eleven GSU officers.
- ii. Whether the sentence by the trial court was harsh.

64. It is a settled principle of law that a first appellate court is mandated to reconsider and re-evaluate the evidence on record and make a determination of its own without losing sight of the fact that, it did not see nor hear the witnesses testify so as to be able to assess their general demeanour. See **Pandya v R (1957) EA 336, Ruwala v R (1957) EA 570 and Okeno vs R [1972] EA. 32.**

65. It is trite that in criminal cases, the general principle in law is that the burden of proof always lies with the prosecution. See

WOOLMINGTON V DPP [1935] A.C 462 pp 481 where Lord Viscount stated the law on legal burden of proof in criminal matters, as follows;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

66. From the evidence on record, there is no doubt that on 12-10-2019, MV GK B277U ferrying security personnel while on duty was blown off by an improvised explosive device leading to the death of 11 officers on board. It is also not in dispute that nobody witnessed the attack. In other words, there was no eye witness hence no direct evidence.
- 67.** Therefore, the prosecution entirely relied on circumstantial evidence based on alleged recovery of some of the suspected used rifles from the accused persons during arrest and that some of the spent cartridge recovered from the scene revealed that they were fired from the alleged recovered rifles. In order circumstantial evidence to succeed, there has to be a clear and unbroken chain of events which leads to the undoubted verdict of guilty. See **Abanga alias Onyango v Republic, Cr. App**

No. 32 of 1990 where the Court set out the conditions to be satisfied in circumstantial evidence as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

(See also Sawe v. Republic (supra) and GMI v. Republic, Cr. Ap. No. 308 of 2011.

68. On whether the appellants were connected to the IED attack of 12.10.2019, and whether the chain of custody of the alleged items recovered from the accused was unbroken, prosecution was duty bound to tender evidence that is so consistent right from; documented handling of exhibits from recovery to production in court. The greatest contestation in these proceedings, is the place of arrest of the appellants and whether they were found in possession of the alleged rifles and ammunitions.

69. In this case, PW1 stated that while on patrol he received intelligence of two suspects hiding near Harhar soon after learning of a GSU vehicle that had run over an IED killing eleven

officers, and with reinforcement from Cpl. Oyago he arrested them without resistance. That he found the first appellant with two AK-47 rifles, a Tete pistol, several magazines and 117 rounds of ammunition while the second appellant had in his possession one AK-47 rifle, a magazine and a single round.

70. The key question is, when were the accused arrested? Where were they arrested? were they arrested while in possession of any rifles?.
71. PW1 C.I.Tanui stated that on 23-10-2019 he was on patrol when he was informed of two persons who were in a makeshift in a thicket at Harhar along Kenya-Somali border. He sought reinforcement thus proceeded to arrest the appellant while in possession of the rifles and ammunitions in question. Pw2 is a formal witness who assisted in collecting bodies of the victims. Pw3, pw4 and pw5 are formal witnesses who merely as victim's relatives identified their bodies.
72. Pw6, and pw7 are also formal witnesses who were travelling in a bus but came across a GK mv which had been blown up by attackers and occupants who were police officers dead. They basically reported to the police on duty who swung to action. Pw8 one Alex ballistic expert merely examined the firearms and ammunitions thus confirming that the 5 cartridges recovered from the scene were fired from the various rifles allegedly recovered from the appellants.

73. Pw9 CPL Michael Oyango was on 12-10-2019 attached at liboi police station when a report of the attack was made. He got information from one Boni and later informed capt. Emano. With other officers they proceeded to the scene. At the scene they recovered cartridges and assisted in collecting bodies. He stated that, later the appellants were arrested at Doble and then escorted to custody. On cross examination he said that his role was only to escort the appellants after they were handed over to kenya. That they were handed over by Somali authorities to Kenyan authorities.
74. PW10 is the investigating officer who preferred the charges before court and merely told the court what he was told of the attack and produced exhibits. He did not witness the attack nor arrest. On cross examination he stated that he did not get any evidence to corroborate the evidence of CI Tonui over the place of arrest. He further stated that the appellants were arrested within Liboi contrary to pw9 CPL oyango who said the arrest was done at Doble in Somali.
75. However, the evidence of IP Hillow pw4 in criminal case number 940 of 2019 does contradict the testimony of CI Tonui who claimed that the appellants were arrested within Kenya and that they had no working relationship with Doble in somali. Equally, the testimony of pw9 one CPL Oyango is in sharp contradiction with the testimony of CI Tanui. CPL Oyango said that the appellants were arrested in Doble Somalia and that the authorities from Somalia handed them over to Kenyan authorities. Obviously, there is material contradictions as to how

and where the appellants were arrested. None of the witnesses told the court as to who recovered the exhibits in question or how they were received from Somali authorities.

76. The key witnesses who alleged to have recovered the rifles from the appellants seems not to be in agreement on recovery. In his evidence in chief Tanui stated that”

“when I got info, I called for reinforcement from Liboi police station where Cpl Oyago and his team came. We cautiously approached where the two were, and they were a sleep. We challenged them to surrender which they did and we arrested them”

77. On his part CPL Michael Oyango stated in examination in chief that;” **the accused persons were arrested at Doble and we escorted them”**. On cross examination he said that;” **the accused were handed over to kenya authorities by the somali authorities”**.

78. **If pw1 was with pw9 during the purported arrest, how come pw9 is stating the opposite oof pw1? It is clear from Hillow’s testimony in criminal case number 940 of 2019 that the appellants were arrested in Doble a fact which corroborates Oyango. In this case, it would appear like Tanui and Oyango are not reliable and credible witnesses. There are gaps left on how the arrest was done by who and what was recovered.**

79. Tanui's evidence is not supported by oyango whom he claimed he was with during the arrest. Given this material contradictions, it is not enough to state that the cartridges recovered at the scene marches the rifles recovered from the appellants yet no corroborative evidence was adduced to connect the appellants with the same. It would appear like even the investigating did not know where exactly the arrest was effected. According to him the arrest was effected at Liboi within Kenya. This is contrary to pw1 and pw 9's evidence.

80. It is trite that when there is material contradictions and doubt, the same should go to the accused's benefit. This is a case that should have been handled with care given the number of lives that were lost. PW1, PPW9 and pw10 are totally not in agreement on how the appellants were arrested. If you go by the fashion of pw1, then pw9 is wrong. If you adopt pw9's fashion, then, pw1 is wrong hence proof of recovery of the rifles he allegedly recovered in doubt. Who should the court trust? There is a lot of doubt in the prosecution case which must be resolved in the appellant's favour.

81. Besides, the trial court was faulted for making reference to non-existent witnesses. I note from its judgment at page 77 of the record of appeal at the top, the court made reference to pw10 being CI Ibrahim Mohamed and Pw9 as CI Okoth. From the record, pw9 is Michael Oyango and pw10 CI shadrack Kineli Kisono. Where did the trial court get these other witnesses from yet they did not testify?

82. Equally, the court stated in the same page that it was the said non-existent witnesses who recovered Alshabaab flag, communication equipment and mobile phone items that were never produced in this case and no evidence tendered regarding them yet the court relied on their recovery to convict on count XII. I do agree that to some extent, the court relied on extraneous evidence to convict the appellant on unproven charge.

83. In a nutshell, I do not find sufficient evidence to find a conviction in this case. Prosecution case is full of contradictions which must be held in favour of the appellants. Accordingly, the appeal succeeds and the conviction quashed and sentence set aside. Accused shall be set free unless otherwise lawfully held.
ROA 14 days.

Dated, signed and delivered this 20th day of January 2026

J.N.ONYIEGO
JUDGE