



REPUBLIC OF KENYA



**Awiti alias Abdunajib Mohamed v Republic (Criminal Appeal  
E046 of 2024) [2026] KEHC 2510 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2510 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E046 OF 2024  
DK KEMEL, J  
FEBRUARY 27, 2026**

**BETWEEN**

**GEORGE OLUOCH AWITI ALIAS ABDULNAJIB MOHAMED ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence from the Judgment of Hon. L. Simiyu, SPM at Siaya Chief Magistrate's Court dated 26th August 2024 in Criminal Case No. E030 of 2022)*

**JUDGMENT**

1. The Appellant, George Oluoch Awiti alias Abdunajib Mohamed was arrested on 18<sup>th</sup> January 2022, charged and arraigned before the Chief Magistrate's Court at Siaya for three counts. The preferred charges under Count 1 were being a member of a Terrorist group contrary to Section 24 of the [Prevention of Terrorism Act](#) 2012. The particulars of the offence were that on or before the 18<sup>th</sup> January 2022, at Hawinga area, in Siaya County within the Republic of Kenya, he was found to be a member of terrorist groups, namely Al-Shabaab an Islamic State of Iraq also known as the Islamic State of Iraq and Sham (ISIS) in contravention of the said Act.
2. On count 2, the Appellant was charged with the offence of Collection of information contrary to Section 29 of the [Prevention of Terrorism Act](#) 2012. The particulars of the offence were that on or before the 18<sup>th</sup> January 2022, at Hawinga area, in Siaya County within the Republic of Kenya, he was found in possession of a mobile phone make Samsung Galaxy Note II LTE GT-N7 105 IMEI No. 354792058763024 fitted with Airtel mobile No. 0755993352 which he used to collect terrorism related information to wit videos namely [coded language] for the use in commission of terrorism act.
3. On Count 3, the Appellant was charged for being in possession of articles connected with the commission of a terrorist act contrary to Section 30 of the [Prevention of Terrorism Act](#) 2012. The particulars of the offence were that on or before the 18<sup>th</sup> January 2022, at Hawinga area, in Siaya County



within the Republic of Kenya, he was found in possession of a mobile phone make Samsung Galaxy Note II LTE GT-N7 105 IMEI No. 354792058763024 fitted with Airtel mobile No. 0755993352 which had terrorism related information to wit videos namely [coded language].

4. On 4<sup>th</sup> February 2022, the Appellant was arraigned in court. He took a plea of not guilty on all the three counts. In support of the Prosecution's case, three witnesses testified. The Appellant sought to be released on bond. In a ruling delivered on 3<sup>rd</sup> March 2022, the Hon. L. Simiyu, SPM issued orders inter alia; that the Appellant be released on a bond of Kshs. 5 Million with 2 sureties of the same amount and that the sureties should be civil servants working for the national government. It was further ordered that the securities offered should be properties with the geographical jurisdiction of Siaya High Court. The Appellant sought for revision of the bond terms in the High Court Siaya but R.E Aburili J. declined to revise the bond terms.
5. The case kicked off for hearing in earnest on 21<sup>st</sup> November 2022.
6. No. 236203, Ole Kilua the ACCIO/DCIO (PW1) Siaya stated that on 18<sup>th</sup> January 2022, they were informed that the Appellant was hiding at Hawinga mosque in Siaya. In the company of the police driver Anne Omuse, their informer guided them to the house where the Appellant was allegedly hiding. He stated that the house which had a sitting room and bedroom was semi-permanent. He stated that the Appellant opened the door for them and introduced himself as Abdul Najib Ahmed. He stated that the Appellant did not willingly identify himself as George Aluoch Awiti until when they searched and found an identification card number 239-03649. He stated that there was light into the house as it was before 2.00 pm and upon searching the house, they found a Samsung Galaxy Note 2(Black) which had two lines, IMEI 3532845055518378 and IMEI 354792058763024 with an airtel number 0755993324. He stated that the Samsung with one IMEI had white at the back and black face. He stated that he prepared and signed the inventory Form which was also signed and witnessed by Omuse. He stated that it was also signed by the Appellant. He stated that the information given was that the Appellant had been radicalizing the youth. On being cross-examined, he stated that PC Kariuki who took up the matter as an investigating officer passed away but that he was the DCI with powers to arrest. He stated that the informer was a person who was protected by law and whose identity could not be revealed. He stated that they found a lot of cups, plates and big sufurias which they were told were used to feed the Appellant's students of madrasa. He told the court that the investigating officer would come to link the phone with the charge. In re-examination, he stated that they took long questioning the Appellant before placing him in the cells. He stated that the house looked disowned because there was a hole below the window.
7. PW2 No. 10663 Pc Lucky Sanga, attached at DCI Siaya ATPU Busia and the investigating officer, stated that on 17<sup>th</sup> November 2022 he was instructed by Inspector Daniel Chul and OC ATPU document to take over the case which had already been investigated and in court. He stated that the Exhibit Memo date 24<sup>th</sup> January 2022 was done to ATPU Head-quarters in particular the ICT Lab seeking any evidence in relation to terrorism action for a phone that had been recovered from the Appellant. He stated that the phone forwarded was Samsung Galaxy Note 2 LTE IMEI No. 3538450555183738. He stated that the report from National Registration Bureau confirmed the identification card bearing the name George Aluoch Awiti was issued. He stated that the inventory of items record at the time of arrest contained Samsung Mobile GT-N 7105 and IMEI 354792058763024/02. He stated that the Appellant signed the inventory. He stated that on 2<sup>nd</sup> December 2022, he received a response for Airtel subscriber number 0755993352 whose sim card was in possession of the Appellant. He stated that the letter dated 2<sup>nd</sup> August 2022 had been sent to Airtel requesting for the subscriber's information. He stated that the response from Airtel was that the number had been registered to Ahmed Abdi of ID number 545012. He produced the Pc Jackson



- Kariuki, the investigating officer statement recorded on 29<sup>th</sup> January 2022. He stated that they took two phones to cybercrime but only one phone which was complete was exploited. He stated that there is no requirement for people who tipped the police of the suspect offender to be revealed to the accused.
8. PW3 No. 110102 Pc Gordon Ahako, attached at the ATPU Unit Digital Forensic in Nairobi stated that on 24<sup>th</sup> January 2022, exhibits were brought to ATPU Forensic Lab under the escort of Inspector John Njuguna and the exhibit Memo which contained a phone Galaxy Note 2, model GT-N7105, IMEI 353845055518378 and IMEI 354792058763024 and a sim card for number 0735993352. He stated that the Investigating officer requested them to retrieve any information in form of data for the offence of terrorism activity. He confirmed the details on the exhibits which matched the Memo. He stated that on 29<sup>th</sup> January 2022, together with Grace Kajuju, they subjected the phone to forensic analysis using a Cellebrite UFED 32 that successfully retrieved data from the exhibit as follows: Calonda-1; Call logs 380; instant sms-34; timeline-513; Data Files 264; Audi-93; Images-149; Videos-22. He stated that out of the analysis of the above data, they established that 7 videos and four audios contained information of extremism that can be used to encourage, listen and view to join outlawed Al shabaab terrorist groups or can be used to train, radicalize, motivate and convince persons to join the terrorist group and that the videos and audios were received to the phone through Xender file, a transfer app. He stated that the videos were sent on different dates. He stated that the videos were shared in a very shallow space showing that they were highlighted (selected) from a huge file and sent at once. He stated that it was an indication that they were videos of value and interest. He stated that the videos were 22 in number but they selected those with radicalization articles in relation to terrorism activities. He stated that there were 93 audios retrieved from the exhibits but out of them, only 5 audios had extremism beliefs.
  9. In video 1, there was a recital poem in Kiswahili stating ‘Amkeni msogope kufa’ and the person reciting the poem was holding onto a machine gun. The last recital stated that ‘we don’t fear being caught and being killed by hanging or being dropped in prison to die there. If we die in this war, God will give us rest in heaven.’ There was a long recital with the voice and face of the late Abdi Rogo encouraging that if you die in the war you shall inherit the virgins. On video 2 where the videos was asking all Muslims to join a war (Jihad) and fight pagan governance with a promise to get to reason and be granted a virgin woman. Video 3 starts with a song praising a fallen Alshabaab Martyr like Osama Bin Laden and all singers are seated in a circle wearing military jungles and holding guns and magazines. In video 4, the singer calls upon Muslims to arise. Military weapons are shown in the video and a voice is encouraging Muslims to arm themselves and finish non-muslims. The guns are raised and fired spontaneously above. Orders are made to extinguish any pagan who does not believe in Koran and the singers finish with a praise for Abdi Rogo. In video 5, it starts with recital in strange language where a man is praying asking for luxury and asking Muslims to join the war and go to heaven. A radical call from Abdi Rogo for young men to join Al shabaab by crossing to Somali to join Jihad war. In video 6, the East African members are being called to cross to Somali to join the war. That God will help Muslim defeat Europe and America who have spent money to fight Muslims. That the war is to defend Muslims who are in pagan countries which are not Islamic and those who will join the war shall inherit three houses in heaven. In video 7, a warning to Kenya of their wrath because of sending soldiers to Amisom to fight the Muslims. It warned Kenya that they are coming to Nairobi and Mombasa for revenge of the death of their Sheikh. That Kenya is being used by the White people and that Alshabaab had spared them but they are now coming. That Kenyan army shall be punished for the rape and mass killing happenings in Somalia. Abdi Rogo was asking Kenyans not to vote as by doing so they were legalizing what Islam is against. Regarding the audios, in audio 1, the speaker orally encourages the muslims to join Jihad and not to fear prisons. In audio 2, the speaker states that prison and death are sentence of God to the Muslims because of fighting pagans. It was stated that the war of America is not against terrorism but fight



against Islam. That criminalizing Al shabaab in Kenya is an offence but one can join all other illegal sects. The audio presents hatred for non-muslims, and asking Muslims to kill any non-Muslim and come out of captivity. In audio 3, the speaker encouraging and radicalizing persons to join Jihad stating that having a muslim name without joining is being pagan and called on all Muslims not to obey the laws in Kenya that are formulated by pagans. The Muslims were being encouraged not to participate in policy formation secular as the government is full of pagans. Audio 4 is giving history of Jihad in Madina City and in Macadi cities. It has a review of 40-60 minutes on doctrines of Islam teachings about the war. Audio 5 was teaching about pagans who betray Islam and the Islamic who don't believe in Jihad calls them betrayers of the Muslim faith.

10. He stated that all played videos are of a design to encourage Muslims to join Al Shabaab as all other groups and doctrines is for betrayers and should not have been followed. He stated that every video has a finish with the extremist vice and teaching scripts of Abud Rogo calling on killing of non-Muslims, and encourage them of the record in heaven. He stated that the vidoes can be used to radicalize because the listener can believe and become a member of Al Shabaab. He stated that it can be a means for the person to become a terrorist. He produced all the videos saved in CD Labelled 27/22 Abdul Najib as exhibit 14. He stated that it contained all the audios and videos played plus extraction report in PDF For that contains all date retrieved from the mobile phones. He stated that only one mobile phone was brought but had two numbers. He stated that they did not know who created the videos or which camera took the video but only establish that the videos were shared to the Appellant phone. He told court that the phone had other harmless videos but they retrieved what is of radicalization. In re-examination, PW3 stated that he only did forensic analysis and exploitation and had the report on the condition of the phones. He stated that he could not ascertain the device used to record the videos but the videos were shared to the exhibit.
11. At the close of the Prosecution's case, the learned trial magistrate held that the Prosecution had established a prima facie case and placed the Appellant on his defence. Section 211 of the Criminal Procedure Code was explained to the Appellant.
12. George Oluoch Awiti (DW1) in his sworn evidence, stated that he used to reside in Mwer in Uranga and that he wished to give an explanation concerning his life. That he is alias Abdul Najib Mohamed but he was raised in Siaya County and went to school together with his eight other siblings and that he was the youngest of the children. That he became a Muslim in the year 2008 after the death of his parents. That he is the only Muslim in his family and that he had lived with Muslims and non-Muslims peacefully. That he was arrested on 18/1/2022. That he had been asked to help teach at the mosque. That the house where he was found was not a shanty and had other occupants. He stated that it was in the house that the police officers took the phones. That he is not a terrorist. That he prays to the court and before God that God helps the court to render him a fair judgment.

On being cross-examined, he stated that he converted to Muslim faith in 2008 but a new mosque in Siaya was built in 2019. That it was the Chairman who made him run the prayers in the mosque after the Imam left which he did until the time of his arrest. That the expert selected in a biased way parts of the contents in his phone. That his phone number is 0755993352 and not 0755339952. He admitted that the phone and the sim card that was seized by the police officers belonged to him. He stated that there was a video of Abdul Rogo whom he did not know personally. He denied that he was collecting the videos and audios to indoctrinate or radicalize persons. That it was just a coincidence that the radical videos are in his phone. He stated that he never published the audios. He denied practicing anything that was in his phone. He denied being a member of the Al Shabaab group. He stated that the Respondent did not explain the type of camera used to take the videos. He stated that he was not offered a state advocate. It was DW1 testimony that it is not true that a tip, the police arrested him



since the person who issued the tip did not testify. In re-examination, he stated that he had no answer that could explain or give the source of the videos. He confirmed Abud Rogo teachings are extremist and not a Muslim.

13. In his judgment, the learned trial magistrate held that the evidence concerning the arrest of the Appellant did not explicitly show that he was a member of any terror group but flowing from the fact that some of the material recovered from his phone contained information that advocated for terrorist activities and the Appellant did not offer defence as to why such materials were in his phone was sufficient ground from which the court would infer the Appellant's membership in the Al Shabaab group. The Learned trial magistrate held that the information contained in all the 8 videos were clearly meant to instigate, counsel, encourage and/or facilitate commission of a terrorist act. According to the learned trial magistrate, possession and intended use were proved. Regarding Count II, the learned trial magistrate found that all the videos were shared through Xender app in a short span to the device owned by the Appellant but the Appellant failed to explain why the same had been sent to him or why he assembled them, thus the Appellant was responsible for that collection of the terrorist materials. The learned trial magistrate was not convinced by the Appellant's contention that the prosecution had failed to establish which gadget was used to shoot the videos since the offence is couched in disjunctive manner such that if any of the acts is shown, then the offence is complete. It was observed that the Appellant admitted the phone and sim card that were exploited belonged to him and that all the videos and audios complained about were on the phone but could not explain why such information was in the phone, leading to a plausible conclusion that the same were so collected and stored for commission, instigation and promotion of terrorist activities. In the end, the learned trial magistrate held that it was clear that all the contents was of extremist Islamic doctrine orientation, thus all the three counts had been proved beyond reasonable doubt. The Appellant was convicted on all the counts. Upon considering the Appellant's mitigation, Pre-sentence report, nature and gravity of the offence, the learned trial magistrate, sentenced the Appellant to serve 10 years imprisonment in each Count. The sentence in Count 2 and 3 to run concurrently while Count 1 to run consecutively, leading to a total of 20 years imprisonment to run from 18<sup>th</sup> January 2022.
14. Dissatisfied with the decision, the Appellant has filed a Petition of Appeal, contending that;
  1. There was no direct evidence of membership to the Al Shabaab terrorist group and the available circumstantial evidence could not lead to the same inference.
  2. The possession of information per se is not a crime under Section 29 of the *Prevention of Terrorism Act* and that it must be proved that the information is to be used for the commission of a terrorist act by a member of a terrorist group or any other person.
  3. The Prosecution did not adduce any evidence to prove that the article or information in question was to be used in instigating the commission of a terrorist act contrary to Section 30 of the *Prevention of Terrorism Act*.
  4. The trial Court erroneously engaged in speculation and drawing adverse inferences in circumstances where those were not the only inference to be drawn.
  5. The trial Court erred in convicting the Appellant when the totality and weight of the evidence is against conviction.
15. On the Supplementary Grounds of Appeal dated 19<sup>th</sup> June 2025, the Appellant contends that he remained unrepresented throughout the trial and was never informed about the right to legal representation. The Appellant urges this court to quash the conviction and set aside the sentences.



16. The appeal has been disposed of by way of written submissions. Both parties duly filed and exchanged submissions.
17. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. See *Okeno vs. Republic* [1972] EA 32; *Shantilal M. Ruwala -vs- R* (1957) EA 570.
18. Section 354(2) of the Criminal Procedure Code provides that an appeal to the High Court may be on a matter of fact as well as on a matter of law. The appeal herein arises from the Chief Magistrate's Court at Siaya, thus a first appeal.
19. I have considered the grounds of appeal set out in the Petition of Appeal, supplementary grounds of appeal, submissions, the authorities cited and the applicable law. The issue for determination is whether the Respondent proved the charges against the Appellant beyond reasonable doubt.
20. It is trite law that the burden of proof in criminal cases rests upon the prosecution. This principle is firmly anchored in the constitutional imperatives of the presumption of innocence and the right against self-incrimination. The burden of proof always rests with the prosecution and never shifts to the defense. In *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR, Justice R. Nyakundi held as follows: -

“As to what constitutes the burden of proof beyond reasonable doubt, the case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373 provides as follows in a passage alluded to Lord Denning, considered the greatest jurist of our time:

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence ‘of course it is doubtful’ but nothing short of that will suffice.”

The same position on the burden of proof was also stated in the case of *Woolmington Vs Dpp* [1935] Ac 462.

21. As regards the first count, the same indicates that on or before 18<sup>th</sup> January 2022, the Appellant at Hawinga area in Siaya County within the Republic of Kenya, was found to be a member of a terrorist group namely Al Shabaab and Islamic State of Iraq and Sham (ISIS) in contravention of the said Act. I have no doubt that Al Shabaab is a terrorist group. The Courts in *Abuod Rogo Mohamed & Another v Republic* Criminal Case No. 793 of 2010 92011 eKLR; *Muslims for Human Rights (Muhuri) & Another v Inspector-General of Police & 4 others* Petition No. 19 of 2015 [2015] eKLR; *Oluseye Oledaji Shittu v Republic* Misc. Criminal Application No. 130 of 2016 (2016) eKLR took judicial notice of the existence of the Al Shabaab group and its associated terrorist acts in Kenya. The group then qualifies to be found as a terrorist group within the definition provided for under Section 2 of the *Prevention of Terrorism Act*. The Kenya Gazette Vol. CXVIII—No. 25 of 14<sup>th</sup> March, 2016, Gazette Notice No. 1618 by the Minister for Interior and Coordination of National Government declared the following to be specified entities pursuant to section 3 (3) of the *Prevention of Terrorism Act* (1)



Al-Shabaab, (2) Al-Qaeda, (3). Boko Haram, 4. Islamic State of Iraq and Syria (ISIS), 5. Mombasa Republican Council (MRC) among others.

22. The basis of finding the Appellant to be a member of the terrorist group by the learned trial magistrate, was on the fact that some of the materials found on the Appellant's phone contained information that advocated for terrorist activities such as calling on the Kenyan Youth to go to Somalia to fight the Kenyan government and exalting the Al Shabaab a terrorist group and its leaders Osama and people considered martyrs of the illegal group such as Aboud Rogo. According to the learned trial magistrate, the Appellant failed to offer a rebuttal to the Prosecution's testimony as why such videos with extremist message related to terror activities were in his phone.

23. The Appellant contends that there is no direct or circumstantial (indirect) evidence to link him to the offence. PW1 stated that they were tipped by an informer who told them that the Appellant was hiding in a house beside Hawinga mosque in Siaya. According to the informer, the Appellant was radicalizing the youth. The Court of Appeal in *Ahamad Abolfathi Mohammed and Another vs Republic* [2018] eKLR stated:

“However, it is a truism that the guilt of an accused person can be proved either by direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances of facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.”  
See *Makau & Another v. Republic* [2010] 2 EA 283

24. Lord Heward CJ in *R vs Taylor, Weaver and Donovan* [1928] Cr. App. R 21 stated:

“It has been said that the evidence against the applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

25. In *Sawe v. Republic* [2003] KLR 364 the Court of Appeal explained the circumstances under which circumstantial evidence may be relied upon to found a conviction as follows:

- i. The inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.
- ii. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstance weakening the chain of circumstances relied on.
- iii. The burden of proving facts, which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypotheses of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

26. The Supreme Court in *Republic vs Mohammed & Another*, [2019] KESC 48 (KLR) summed up the above principles as follows:

“(55) The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is “indirect (or) oblique evidence ... that is not given by eye witness testimony” It is “(a)n indirect form of proof permitting inferences from the circumstances surrounding disputed questions



of fact.” It is also said to be “(e) evidence of some collateral facts from which the existence or nonexistence of some facts in question may be inferred as a probable consequence ....

59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, “the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established....” As was stated in the case of *Kipkering Arap Koskei & Another v. R* (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence, “...the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, ...
68. As was further stated in the case of *Musili v. Republic* CRA No.30 of 2013 (UR) “to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt.” The chain must never be broken at any stage.<sup>16</sup> In other words, there “must be no other co-existing circumstances weakening the chain of circumstances relied on” and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. “Suspicion however strong, cannot provide a basis for inferring guilt.”
27. The question to ponder is “did the Prosecution establish that the Appellant was or is a member of the Al Shabaab group?” Section 24 of the *Prevention of Terrorism Act* provides what membership of terrorist groups is in the following terms:
- A person who is a member of, or professes to be a member of or associates with or professes to associate with a terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years.
28. It follows therefore that its either you are a member of or profess to be a member of or associate with or profess to associate with it. The word ‘profess’ is defined under the Black’s Law Dictionary 9<sup>th</sup> Edition at page 1328, as: ‘to declare openly and freely; to confess. The Appellant did not profess to membership and actually denied being a member of the Al Shabaab group. According to the learned trial magistrate, the Appellant failed to offer a rebuttal to the Prosecution witnesses’ evidence. In his evidence, the Appellant stated that he had no answer that could explain or give the source of the videos that the learned Magistrate placed reliance on to find the Appellant was or is a member of the terrorist group.
29. In *Mohammed Haro Kare v Republic* [2016] eKLR, G.W Ngenye J.(as she was then) stated that:
- “Determining membership to an outlawed criminal group would involve a consideration of several sets of circumstances. In ordinary circumstances, membership in an organization is easily determinable due to existence of well-known formal structures or by the person’s direct actions of professing to be a member. However, membership to a terrorist group may not be so easily determinable, thus, use of circumstantial evidence that points to a person’s association with such a group. Several considerations would come into play and supported by relevant evidence that would point to such a conclusion. Terrorist organizations, expectedly, operate underground, and use covert means to recruit persons as



members and to advance their operations. Thus, it is upon the prosecution to set out clearly acts that point clearly of a person's membership to in this case, the Al Shabaab. This may vary from one case to another. It must be shown that the actions alleged against the accused show a nexus with operations associated with the outlawed group as to enable the court reach a conclusion to his membership. Due to the nature of the group's operations, there is not yet standard test that would apply as a checklist to a person's membership to Al Shabaab. However, certain actions may provide a useful guide, such as a person being trained by the group on the use of weapons, possession of weapons and articles associated with the group, travelling to the known operations of the group, and being associated with members of the group, or being together with members of the group or taking part in activities of the group. These are by no means exhaustive considerations, and each element must be applied to the circumstances of the case.

30. It follows therefore that there is no set standards to establish membership but each case is to be looked at on its own peculiar facts. PW1 told court that they were tipped on the whereabouts of the Appellant by an informer who also told them that the Appellant was radicalizing the youth. In re-examination, Appellant admitted that he could not give an explanation on the source of the videos sent to his phone. In my view, the presence of the videos in his phone may not be conclusive evidence that he is a member of the terrorist group. PW2 stated that the Airtel confirmed number 0755993352 belonged to the Appellant. Discharge or otherwise the burden of proof in criminal trials is that enunciated by Court of Appeal in *Sekitoleko versus Uganda* [1976] EA53 that:

“As a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else” See *Ajwang vs Republic* [1983] KLR337.

31. I find that despite denying that he was a member of the Al Shabaab, the Appellant failed to offer any materials of rebuttal as to how extremist nature of materials had been sent to his phone. The Appellant having admitted that the phone belonged to him, the inculpatory facts on record are incompatible with the innocence of the Appellant. He could not offer any explanation on the source of the videos. The evidence on the phone leads to a plausible conclusion that he was or is a member of the terrorist group. It is a common fact that where membership of Al-Shabaab is not confessed and or conceded, the court may infer such membership based on the conduct of the accused. I find the Appellant's ground of appeal on this aspect fails.

32. As regards the second count, it is noted that the Respondent recovered a mobile phone make Samsung Galaxy note 11 LTE GT-N7105 with IMEI No. 354792058763024 fitted with airtel simcard number 0755993352 which was used to collect terrorist related information which comprised of several videos for the use in the commission of a terrorist act contrary to section 29 of the Act. Section 29 provides as follows:

A person who is a member of a terrorist group or who, in committing or in instigating, preparing or facilitating the commission of a terrorist act, holds, collects, generates or transmits information for the use in the commission of a terrorist act commits an offence, and is liable, on conviction, to imprisonment for a term not exceeding thirty years.

In *Mohammed Abdi Adan Vs. Republic* [2017] eKLR at Pg 16 the court held that the prosecution was mandated to prove various elements;

- a. Firstly, that the accused was affiliated to a terrorist group in which capacity he either held, collected, generated or transmitted information and that this



information was used in instigating, preparing or facilitating the commission of terrorist acts;

- b. Secondly, that the accused in any other capacity other than being a member of a terrorist group held, collected, generated or transmitted information and that the information in question was used in instigating, preparing or facilitating the commission of the terrorist acts.

It is instructive that the mobile phone which contained the material was recovered from the Appellant who, in his defence confirmed that indeed the mobile phone belonged to him. All the videos recovered from the mobile phone contained terrorism related materials which ostensibly was being used by the Appellant who was then acting as the in charge of the mosque. No explanation was rendered by the Appellant as to how the material ended up in his mobile phone. In his defence, the Appellant admitted that most of the videos had excerpts from teachings of the deceased one Aboud Rogo whose teachings were well known to be extremist. Indeed, the plethora of videos found in the Appellant's phone left no doubt that they were dear to him and that he used them to propagate the teachings and instructions to those who attended his madrasa and which invariably were meant to radicalize the said audience. I find that he had stored such material for the purpose of promoting terrorist activities.

33. As regards the third count of possession of articles connected with the commission of a terrorist act contrary to section 30 of the Act, the Appellant contends that mere possession of the articles is not and cannot constitute an offence in that the said material could not be said to constitute such things as a bomb for terrorist activities. Section 30 of the Act provides as follows:

A person who knowingly possesses an article or any information held on behalf of a person for the use in instigating the commission of, preparing to commit or committing a terrorist act commits an offence, and is liable, on conviction, to imprisonment for a term not exceeding twenty years.

It is not in dispute that the mobile phones recovered belonged to the Appellant and which contained material of a terrorist nature. The Appellant's contention that the videos and audio files were merely sent to him and that he lacked knowledge of their contents is not convincing. The Appellant had been in possession of the phones for long and that he had the option of deleting the materials but he did not do so which implied that he required the same for the sole purpose of promoting terrorist activities. During the hearing, the Appellant candidly admitted that the material was stored in his devices, alongside other content he deemed non-incriminating. He had custody and control of those devices from 17th December 2021. Possession, in the legal sense, was therefore clearly established. The evidence on record unequivocally demonstrates that the Appellant was in possession of radicalized videos and audio material, as comprehensively analyzed by the expert witness, the content of which was extremist in nature and indicative of affiliation with Al-Shabaab. Upon establishing both that nexus and the fact of possession, the statutory ingredients of the offence were fully satisfied and the burden resting upon the Respondent was discharged. No credible rebuttal was offered at trial, nor has any substantive challenge been mounted to displace the Respondent's evidence and hence the finding by the learned trial magistrate was proper and must be upheld.

34. The Appellant has raised some other two complaints namely that he exhibits were produced in contravention of the legal procedures and that he was not accorded legal representation during the trial.



It is noted that the Appellant has raised the complaint that PW3 was an “imposter” and ought to have not testified as the prosecution should have called inspector Njuguna who had handled the exhibits. However, the record shows that the witness properly identified himself as an officer attached to the Digital Forensic Laboratory in Nairobi, the unit that prepared the impugned report. The Appellant did not challenge the contents of the report and that his objection is merely as to its presenter. The record indicates that after repeatedly complaining about delay, he later agreed to have an officer from that unit produce the exhibit and that he cross-examined him at length, and raised no objection to its production at trial. It is therefore quite strange that the Appellant is now raising the complaint quite late in the day. I find that no prejudice or miscarriage of justice has been demonstrated by the Appellant to warrant overturning the eventual decision of the trial court. I am satisfied that the proceedings were conducted in accordance with the law of evidence and the requirements of a fair trial, and hence this ground of appeal is devoid of any merit.

35. As regards the Appellant’s contention that he was denied legal representation, the record shows that the Appellant indicated to the court that he was reading to proceed when the matter came up for hearing in earnest on 21/11/2022. Having voluntarily chosen to proceed in person, he cannot now be heard to complain that he was denied a right he consciously waived. It is instructive that the Appellant proceeded with the matter to conclusion and robustly cross-examined all the witnesses. I find that he did not suffer any prejudice. The Supreme Court in *Petition No 5 of 2015 Republic -vs- Karisa Chengo & 2 others* [2017] eKLR stated as follows;

“... However, a distinction must always be drawn between the right to representation per se and the right to representation at State expenses specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provision of *Legal Aid Act*, various other factors which include:-

- (i) the seriousness of the offence;
- (ii) the severity of the sentence;
- (iii) the ability of the accused person to pay for his own legal representation;
- (iv) whether the accused is a minor;
- (v) the literacy of the accused; and
- (vi) the complexity of the charge against the accused.”

Indeed, the right to legal representation, though constitutionally safeguarded, is not automatic in the sense now contended by the Appellant. He was furnished with the committal bundles and that he understood the nature and particulars of the charge, and was accorded adequate time and facilities to prepare his defense. He actively participated in the proceedings, cross-examined witnesses, and made both oral and written submissions, demonstrating sufficient literacy and comprehension of the process. In those circumstances, it is evident that the Appellant voluntarily elected to represent himself. There is nothing on record to suggest indigence or any request for State-funded counsel. Having consciously waived that right and competently conducted his defense, he cannot now impugn the proceedings on that ground. I find the complaint rather belated and without any merit.



36. The Appellant has also raised a complaint that the “24-hour rule” was not complied by the police while investigating him and later arraigning him in court. I find that even though the “24 hour rule” ought to be observed by the police, the same does not in any way alter or impeach the correctness of a trial court’s findings. The issue, if it is to be pursued, lies within the domain of constitutional remedies, where the Appellant may seek declaratory relief or claim damages. It has no bearing on the lawfulness or propriety of the conviction and sentence imposed at trial. This position was held by the Court of Appeal in *Fappyton Mutuku Ngui v Republic* [2014] eKLR where it held;

“The correct position in law was set out in *Julius Kamau Mbugua v Republic* (2010) eKLR where the Court stated that the violation of the appellant’s right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights.”

Again, in *Hussein Khalid And 16 others v Attorney General & 2 others* [2019] eKLR the Supreme Court held as follows;

“[122] Consequently, without downplaying the Appellants’ allegations of infringement, we find that they have recourse under Article 22 against the specific violations they may have undergone in the manner of their arrest, detention and arraignment. They may seek damages or other reliefs available to them. We do not think that such violations in themselves should warrant the vitiating of the trial processes. There exist constitutional safeguards that extend to the right to fair trial and the attendant mechanisms to protect the Appellants. We are persuaded by the holding in *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69 where it was stated that:

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.”

Based on the foregoing authorities, the Appellant’s claim over the non-observance of the 24 hour rule by the Respondent, I find that the same does not warrant an interference with the conviction arrived at by the trial court. The Appellant is at liberty to exercise his rights by lodging the appropriate application for redress before the relevant court. In the final analysis, the finding on conviction by the learned trial magistrate was sound and must be upheld.

37. As regards sentences, the trial court imposed a sentence of ten years imprisonment on each count and further ordered that the sentences in count two and three to run concurrently and thereafter to run consecutively with count one so that the cumulative sentences were to be twenty (20) years imprisonment and which were to run from the date of arrest namely 18/1/2022. It is instructive that the sentences provided for under sections 24, 29 and 30 of the *Prevention of Terrorism Act* is that they each should not exceed thirty (30) years imprisonment. The trial court imposed a sentence of ten years (10) imprisonment on each count. It is instructive that offences which occur at the same time and in the same transaction ought to be allowed to run concurrently. In this regard, the order by the trial magistrate that counts two and three were to run concurrently and then do run consecutively with count one was in error. Section 14 of the Criminal Procedure Code vests discretion in the sentencing court but that discretion must be exercised judiciously and that where offences arise from the same transaction, the general rule is that sentences should run concurrently. In the case of *Ondiek v R*, (1981)



eKLR and in the case of Simiyu v Republic (Criminal Revision No. E320 of 2024) [2025] KEHC 5159 (KLR) 29 April 2025) (Ruling) the court emphasized thus:

“The general principle of law under our penal system is that sentences should only run consecutively where the offences are committed separately. However, if sentences are committed in the same transactions, or a series of transactions, and within a short period of time, the trial court should order the sentences to run concurrently. Similarly, a court will be entitled to order the sentences to run concurrently when it is clear if they are ordered to run consecutively, they will result in an extra ordinarily excessive sentence.”

Indeed, the Appellant was a first offender and did present his mitigation. I find the sentences imposed by the trial court to be reasonable and commensurate with the offence and that they are not excessive in the circumstances. It is noted that the Respondent’s counsel vide his submissions has sought to be permitted to lodge a notice of enhancement of sentence. Indeed, the said request is being made late in the day and further that the Respondent’s counsel has not pitched tent for enhancement of the sentence in his submissions. In fact, the said counsel has urged the court to uphold the conviction and sentence. I am of the view that all the sentences ought to run concurrently from the date of arrest namely 18/1/2022.

38. In view of the foregoing observations, it is my finding that the Appellant’s appeal on conviction lacks merit. The appeal on sentence succeeds to the extent that the trial court’s order that the sentences to run consecutively is hereby set aside and substituted with an order that all the sentences shall run concurrently from the date of arrest namely 18<sup>th</sup> January 2022.

**DATED AND DELIVERED AT SIAYA THIS 27<sup>TH</sup> DAY OF FEBRUARY 2026.**

**D. K. KEMEI**

**JUDGE**

In the presence of:

George Oluoch Awiti alias Abdul Najib Mohamed.....Appellant

Chacha Mwita.....for Appellant.

Soita ..... for Respondent.

Maureen..... Court Assistant.

