



**Mahamud alias Twalib v Republic (Criminal Appeal E140 of 2023)
[2025] KEHC 1691 (KLR) (27 February 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E140 OF 2023
EM MURIITHI, J
FEBRUARY 27, 2025**

BETWEEN

ABDI MAHAMUD ALIAS TWALIB APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence by
Hon. L. Mutai CM in Isiolo CR. No. 491 of 2016 on 7/11/2023)*

JUDGMENT

1. The appellant herein, Abdi Mahamud alias Twalib, was charged with membership of a terrorist group contrary to section 24 of the *Prevention of Terrorism Act, 2012*. The particulars were that on 1/8/2016 at Isiolo township within Isiolo County, he and others were found to be members of a terrorist group namely Al-shabab which is an outlawed terrorist organization by the Kenya gazette notice number 2326 dated 7th April, 2015.
2. He faced a second count of being in possession of an article connected with an offence contrary to section 30 of the *Prevention of Terrorism Act*. The particulars were that on 2/8/2016 at Bulla pesa area within Isiolo County, he was found with a mobile phone make Techno Imei number 352644xxxxxxxxxx with two safaricom simcard serial numbers 8925402102xxxxxxxxxx and 89254021xxxxxxxxxx respectively and an 8GB memory card which had videos Allahu akbar, Beautiful Get it, Hatutaki utani, Jihad in Africa, Mali gardians of golden city, Must, Reraise mujahid, They are not dead, VID-20160712-WA0001, VID-20160721-WA0005, VID-20160723-WA0008, VID-20160811-WA0000, VID-20160813-WA0003, VID-20160813-WA0004, VID-20160813-WA0006, VID-20160816-WA0002, West AFRICA, which are articles for use in instigating commission of a terrorist act in contravention of the said Act.



3. He faced a third count of being in possession of an article connected with an offence contrary to section 30 of the *Prevention of Terrorism Act*. The particulars were that on 2/8/2016, in Isiolo Township within Isiolo County, knowingly was in possession of videos on Jihad materials About Rogo and ISIS radicalization videos news/media documents on ISIS and copy of Dabiq magazine used by ISIS for propaganda and recruitment for the use in instigating or preparing to commit or committing a terrorist act.
4. He faced a fourth count of collection of information contrary to section 29 of the *Prevention of Terrorism Act*. The particulars were that on 2/8/2016 at Bulla pesa area within Isiolo County, he was found with a mobile phone make Techno Imei number 352644xxxxxxxx with two safaricom simcard serial numbers 8925402102xxxxxxxx and 89254021014043191017 respectively and an 8GB memory card which had videos Allahu akbar, Beautiful Get it, Hatutaki utani, Jihad in Africa, Mali gardians of golden city, Must, Reraise mujahid, They are not dead, VID-20160712-WA0001, VID-20160721-WA0005, VID-20160723-WA0008, VID-20160811-WA0000, VID-20160813-WA0003, VID-20160813-WA0004, VID-20160813-WA0006, VID-20160816-WA0002, West AFRICA, which are videos with information for use in instigating commission of a terrorist act in contravention of the said Act.
5. He faced a fifth count of being a member of a terrorist group contrary to section 24 of the *Prevention of Terrorism Act*. The particulars were that on 2/8/2016 at bulla pesa area within Isiolo County he was found to be a member of a terrorist group namely ISIS which is an outlawed terrorist organization.
6. He faced a sixth count of operating a business of selling DVDS and herbs without a business permit/licence contrary to section 5(1) of the *Trade License Act*. The particulars were that on 2/8/2016 in Isiolo town within Isiolo County he was found carrying on the business of selling videos, books and herbs in Isiolo town without a license.
7. He faced a seventh count of being in possession of components of improvised explosive device contrary to section 12A of the *Prevention of Terrorism Act*. The particulars were that on 2/8/2016 at bulla pesa area in Isiolo township with Isiolo County, he was found in possession of components of improvised explosive device namely brownish powder, Ball bearings, nails, Radio mother board, radio mother board, Bicycle Chai-ring, Clear liquid in a five litre Gerican in his house for terrorism purposes.
8. He denied the charges but upon full trial, he was acquitted in respect to counts 1, 2, 3, 4 and 5 but convicted in respect to counts 6 and 7. He was ordered to pay a fine of Ksh.10,000 or in default to 6 months imprisonment for count 6 and sentenced to 25 years imprisonment for count 7.

The Appeal

9. On appeal, the appellant raised 3 grounds of appeal as follows:
 1. The Learned Hon. Trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant, for it was not justified to place him on his defence hence breaching his presumption of innocence.
 2. The Learned Hon. Trial Magistrate erred in law and fact in finding that the prosecution proved all the elements of possession while clothed with the relevant Mensrea & actus reus beyond reasonable doubt so as a return a verdict of guilt.
 3. The Learned Hon. Trial Magistrate erred in law and fact in meting out a harsh and excessive sentence under the circumstance and in disregard of the pre-sentencing report and the objectives of sentencing.



Duty of the Court

10. The duty of this court as the first appellate court is to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. (See *Okeno v R* [1972] EA 32).

Evidence

11. PW1 Pc Victor Museywa testified that, “I am working at Moyale Anti-Terrorist Police Unit. I was based at ATPU Isiolo until June, 2017. On 1/8/2016 we had been tipped that two suspects Remy Victor Odera and Abdi Mahamud who are the accused (identified were involved in terrorist activities including recruitment of young men to Alshabaab and teaching them radical. We were told they were based at Isiolo near the main mosque. I went with Corporal Chacha and Corporal Mbogo to the Kiosk where accused were selling drugs and CDs opposite Jamia mosque. We found 2nd accused in the Kiosk serving customers. We apprehended him. We found exhibits in the Kiosk which were drugs – herbal medicine and CD’s. 2nd accused had two mobile phones. The 2nd accused led us to his home within Isiolo town. He was staying with a lady called Sarah Golicha. We found more herbal medicine in a black bag. We took 2nd accused to Isiolo police station pending further investigations. The 1st accused came to the station complaining that among the exhibits were his properties. He said they were the CDs and DVDs. He was apprehended and investigations continued. On 2/8/16 we took him to his house within Bula Pesa. We searched it and recovered wires, electronic devices, brownish powder suspected to be explosive ball bearings, petrol in a five litre jerrycan. The items were suspected to be intended to make a bomb. We prepare an inventory and listed the items. It was signed by 2nd accused and my colleagues. The 2nd accused was given the original copy. We took the items to the station as investigations continued. I can identify the item. These are the wires – MFI- 1 found in home of 2nd accused. Small nails- MFI – 2. Improvised electronic devices- MFI – 3. Brownish powder – MFI 4. Soldering rod – MFI – 5. Brown powder in clear polythene – MFI – 6. Ball bearings – MFI – 7. Small electronic device – MFI – 8. Techno mobile phone of 1st accused – MFI – 9. (5 liters) petrol in jerrican – MFI – 10. Assorted herbal drugs in yellow paper bag – MFI – 11. We found 6 containers with herbal medicine in house of 2nd accused – MFI – 12. Herbal assorted medicine in black polythene bag – MFI- 13. Glasses for taking the medicine in a carton – MFI – 14. This is the black bag with the items from house of 2nd accused – MFI 15 with medical equipment and cotton wool, serviettes. We prepared three inventories Corporal Chacha prepared the one for 2nd accused when we searched his house dated 1/8/2015 – PMFI – 16. This is 2nd Inventory of 1st accused which relates to 1st related to Techno mobile phone- MFI – 17. This is the 3rd Inventory dated 2/8/2016 related to 1st accused following the search in his house at Bula Pesa – PMFI – 18. I did not know any of the accused before this case started. They were charged for the present offences.”
12. On cross examination, he stated that, “We were tipped about your activities in early January, 2016. We did not book it as it related to terrorist activities. We conducted investigations after arresting you. You were reported to be radicalizing youths. We did not manage to get any of the youths including the ones who were buying the CDs and DVDs. You had no business licence at the Kiosk. You had no machine used in playing the CDs. You were arrested on 1/6/2016. You had only the phone during your arrest. You did not resist arrest. On 2/8/16 you took us to your house. We had no search warrant. The Inventory was prepared by me – in your house. I also prepare the one for your phone. We found several phones but only one had the memory card. I did not record its serial number. It was in the Techno phone H5. It had 2 sim cards of Safaricom. The serial number is in the Inventory;



8925402102xxxxxxxxx. The 2nd – 8925402101xxxxxxxxx. We found petrol in 5 liters jerrycan. The bomb experts will give you details.”

13. PW2 P.C Yvonne Mulumbi testified that, “I am attached to DCI- ATPU ICT Forensic Laboratory in Upper Hill Nairobi. I am a computer expert. I am a forensic analyst now for the last ten years. I am a certificate of forensic digital analyst from Metropolitan Police UK. I have graduated with Bachelor in Criminology from Mount Kenya University. Sarah Muthoni is my colleague. She left ATPU to KRA Kisumu. I have worked with her for more than five years. I am familiar with her handwriting and signature. This is the exhibit memo dated 3/8/2016 at 2.00 p.m. We received it from Corporal Newton Mbogo of Isiolo ATPU. It was accompanied by a cellphone (MFI-0) IMEI No. 352644xxxxxxxxx with two sim cards and memory card of 8 GB. There were other phones but we worked on MFI -9. This is the exhibit memo - PMFI -1a. Corporal Mbogo wanted us to confirm if the phone had terrorist or criminal material. The memo mention named of suspect as Abdi Mohamud Hillow. I took photos of phone front and back, the sim cards and memory card. The details of the case are indicated in report page. Page 5 – Source extraction, start time end time and version of the machine used. I checked the memory card. We extracted information which included even deleted photos. Page 6 -image harsh details. Page 7 – contents including audios, documents, images text and videos. Page 8 – Photos from SD card in the phone and they vary and go up to page 18, 19, 20, 21, 22 and 23. Page 24 – We got different videos which were dealing with terrorism. We prepared a CD with different videos. 1st video – Tilted Hatutaki utani. 2nd video – Hadith of Ali. 3rd video – Abudhaleem Memritve. 4th Video – Albani suicide Bali. 5th video – Bomber. 6th Video – Martyrs. 7th video – for the sake of Allah. 8th video – Brigitish Mujhida. 9th video – Miracle in Jihad. 10th video – Must MP4. 11th video – Real Race Mujahed. 13th video – Syria Jihad. 13th Video – Role of Muslim Women. I can play one or two of the videos. The video is 12 minutes and 5 second. I will skip some bits and go straight to the main. The next video is the one called must MP4 (identified). (The video is played out – the same is in Kiswahili with a song playing in the background. The content is the persecution of Muslims and states that he narrator is in Somalia. The clarion call is for Muslims to rise up in arms against the kafirs and jihad to declared in Kenya). The next video is Real Race Mujaneed 7 minutes time (witness plays out the video. It has graphic materials. We prepared a certificate per the Evidence Act confirming that details of the machine used to test the cellphone. I used HP computer indicated which was connected to the indicated printer. This is the report – identified. I printed it from the exhibit provided which was not tampered with. The contents were left intact. I did the test to the best of my knowledge. The report is dated 2/4/2019. The other one dated 3/11/2016 by my colleague was confirm – MFI – 20. I produce it as P. exhibit 20. The certificate is part of the report. I do know the accused persons in the dock. (shown accused).”
14. On cross examination, she stated that, “The exhibit memo was received from Corporal Mbogo. You were to be supplied with the reports following the examination. I have no report from Corporal Kiragu. There was a cellphone make Techno. There was a memory card inside the phone. It has no serial numbers. Only sim cards have serial numbers. There were photos taken showing card in the phone. This was before the card and sim cards were removed from the cellphone. The videos came from the memory card. The phone was incompatible created date in the report. Sarah Muthoni left ATPU to KRA. I extracted the memory card to get the phone contents. I have only a report of information from the memory card. I have no evidence to prove that you distributed the videos but the same were shareable. I did not investigate this case. P. C Victor prepared the exhibits memo it referred to various items as per page 2 of the report. The items were presented for analysis on the 3/8/2016. You are showing me an exhibit memo by Sarah. P. C. Martin Kiragu presented exhibits for examination. The report – exhibits 2 bears the names of a different officer. I appeared in court because my colleague Sarah was not available. I do not know why Sarah indicated that another officer but kiragu presented the exhibits. I did make reference to a certificate – its signed by a Bernard Gitonga. P. C Sarah and Bernard



worked together. P. C. Sarah was the exporter of the exhibits and she worked with Gitonga. The techno mobile phone alleged to have a memory card is as per the report manufactured is indicated as mass storage device. As per report the examiner is P.C. Sarah Muthoni. P. C. Gitonga name is not there. There were two techno phones one had sim care. The one had Safaricom lines from the report a phone of Techno number 2 is thereon this is the one from which sim cards and memory cards were retrieved from. Nine exhibits were forwarded for exploitation. The report only touches on the exhibits found to contain relevant information. Techno number 1 had nothing useful. A Nokia phone too had no useful information. It must have been photographed and I saw the photos. It was marked B3. There was orange modem but it had nothing useful. A phone disco model had nothing useful. A U sim card had nothing useful in it. A CPU had nothing useful in it. The two Safaricom sim card bore information on ownership but only the investigating officer can state show. Memory card manufacturer was not involved in the verification. ICT department of ATPU was under a Cheruiyot contents of interest were stored in 8GB – memory card. I do not know about the 4 GB memory card. The 8 GB memory card was identified in the court before the court. I can tell when a memory card is firstly fitted in a phone. The memory card had contents. I can tell that the memory card was not slotted in the phone after the arrest of the accused persons. I played 13 (thirteen) videos which were in the memory card aforementioned. Our machines was able to retrieve deleted materials. It is true accused are charged for what was retrieved already deleted. It was not in line in the memory card. I used licenced gadgets to retrieve that information already deleted. The exploiter forensic analyst is the one who can retrieve such material and not accused. Once he deletes, he cannot retrieve them again but an expert. Page 24 of the report is screen shot of a video. Same with page 25, 26, 27 and 28 video 35 MP4 was created in August would mean same had not been created. It was assessed on 30/09/2016 long after accused arrest. The machines in use needed to be updated on the dates because sometimes it errors on the date. P. C. Sarah may not have done so. The modification of the video was on same date. There was nothing the exploiter wanted to hind. I will not agree with you that the memory card was not in phone number 2. The video Hatukaki utani, one can tell when it was created and assessed. On sharing the information in the memory card third parties our machines cannot pick that. The said memory card was not slotted in after the accused arrest. P. C. Kiragu is known to me. His statement with me. It reads on 31/08/2021 the following were escorted to the expert- Mobile phone techno Hs – 35264406 – 3402787. Exhibit 20- corroborated what I have said on the phone. He stated that it had 2 sim cards serial number 89254024xxxxxxxx and serial number 892541014xxxxxx this is different from what is in report exhibit 2. His statement does not mention the 8 Gb memory card source of the video before storage in the memory card was not revealed. The memory card has not photos of the accused. The phone storage capacity was not revealed. I believe it was the phone examined although no information on that is in the report. Page 7 of the report – exhibit 20 shows contents in the phone. Source extraction page is on the memory card. The phone was not exploited because it had nothing of interest. The expert saw no need to link phone and memory card. 15 materials were found deleted from the phone and that what forms basis of the charges. These were very many materials not deleted.”

15. On re- examination, she stated that, “The deleted videos and images forms basis of the charges herein. In the deleted materials, all of them were in regard to the offences which accused were facing. Techno phone 2- correlated with memory card. There was no evidence that the said memory card was slotted in phone number 2. I earlier tendered report on behalf of P. C. Sarah Muthoni. It is the same report before the court. An officer will escort materials to the relevant lad and other persons takes over. One Gitonga and Sarah are based in the same office as colleagues’ forensic experts infact, the 8 G.B. memory card is what was exploited. There was nothing in terms of evidence retrieved from the phone showing presence of 4GB memory card. On accessing modification and creation, our machine always need to be updated but that does not affect the accuracy of the results. There is no evidence to show that P. C. Sarah entered or interfered with the exhibits her report is conclusive.”



16. PW3 Dennis Owino Onyango testified that, “I am an analyst with Government Chemist in Nairobi and a graduate of Jomo Kenyatta University with Bachelor of Science in Biology and Chemistry, a holder of analytical skills in chemical weapons from university of Helsinki in Finland under program OPCW I am ongoing masters student at university of Nairobi. I am gazetted officer vide gazette notice 6434 dated 12/7/2007. On 25/11/2016 under escort of P. C. Fredrick Juma number 79226 I received for analysis some brown substance through ATPU in brown envelope. I was to ascertain if the substance contained explosive substance. I analyzed the material using FTIR method using a machine and another method called wet chemistry using sulphuric acid, ammonium sulphate and dicymine. The two tests confirmed that the submitted powder contained RDX and PETN which are explosive material. I made a report and signed it on 27/09/2018 reference number L21 of 2016. This is the exhibit memo -PME1- 21 dated 25.11.2016. This is the report. PME1 – 22. This is the substance which I analyzed I – PME1- 4. I produce my report as P. exhibit 22.”
17. On cross examination, he stated that, “I am an employee of Government Chemist. I have not produced anything to support neither have I produced my qualifications. I am a gazetted officer. The information is not in the report. We do not normally include it. At the government chemist the analyst called anyone received the memo and exhibit in this case. He signed for them. The receipt was on 25/11/2016. I dated my report September 2018. I did not tell the court the date which I conducted the analysis. The date was not in the report. I cannot tell how the substance was recovered. The government chemist can conduct a DNA test. That was not requested scientifically I cannot prove that it was Onyango who brought the substance from his procedure and I used two methods to analyze the substance. My report indicates one method but I used two which are captured through titration in the report. I used a machine. I did not give you opportunity to test my finding. The test is a process not a one day thing. The practice is not to provide the notes which are used in the process. I detected RDS and PETN I did not capture the volume as it was not requested. I did not quantify the volume. In chemistry and biological labs, the machines use very little substances one needs just a few grams to get the whole substance. I can give an example of covid test where a small amount of blood is used.”
18. On re-examination, he stated that, “The substance was received by my colleague Anyona who I have known for 15 years. Anybody in the lab can receive the sample I was not asked to identify any DNA test of the substance provided. I prepared a report for the analysis which I conducted. I have final product. The notes are not required. I analyzed the substance which were provided. The sample can still be tested by the defense counsel and similar results will be found. There was no request made by the defence to conduct another test. An independent test is possible and my assistance will not be required by the independent analyst. I was not asked for volumes of the substances. My report is clear. That there were explosive substances in the sample.”
19. PW4 Senior Sergeant David Chege, a trained police officer and bomb expert testified that, “I am based at Nyeri county. I hold diploma forensic criminal investigation. I am trained on bomb and crime scene at USA by FBI in Germany and in Kampala Uganda and DCI Academy in Kenya. I am a gazetted officer by AG no. 10284/2006 bomb expert and forensic expert. As an expert P. C. Kiragu of ATPU Isiolo brought some exhibits to me for examination accompanied by exhibit memo address to me. The exhibits were Brownish substance marked B1, Small nails in brown paper bag marked as B2, Black Plastic ring B3, Transformer – B4, Marathon switch marked B5, Soldering Gadget B6, Ball bearings and bicycle B7, Assorted electric wires marked B8. The exhibits requested me to ascertain whether B1 – B8 can be used to make improved IED and whether B3 contained explosive substances the memo was 3/8/2016 I was able to do the examination and I found as follows: it is usually made from locally assembled materials and is meant to harm, Kill or destroy properties. The local materials are electronic components from computer, TVs and radio and other electricity. The material before me was duly



examined. B4, B5 and B8 are electronic components that can be used to make IED. B2 and B7 can be used to as scrap panels in an IED. Scrap Panels are small pieces of Exhibit B6 is soldering materials meant to join electronic components. B3 was beyond my examination. I took a small sample which I handed over to the Investigating Officer to forward to the government chemist for further analyst. Exhibit B1 brownish my analysis. I herded it over to the investigating officer the forward to the government chemist for analysis. I prepared my report on 10/11/2016 which I wish to produce as exhibit in this case Exhibit 23. An average person can assemble materials before the court to make IED. Exhibit B5 – B6 and other exhibits with me can come up with IED. B3 had irritating smell like that of tear gas. My report is conclusive. The exhibit memo of 3/8/2016, MFI-24.”

20. On cross examination, he stated that, “The gazette notice not with me. I am a bomb technician and not an expert I don’t know the nature the allegations accused are charged with as per exhibit memo victor the recovery. PW1. As per the exhibits memo I was to ascertain 2 issues i.e. whether B3 contained explosive substance and 2 B1. From victor, the substance passed to a Kiragu. I have nothing with me to show that B1 and B3 handed over to the investigating officer. The book I used is not with me. From the particulars of the offence, the accused persons were in possession of exhibits before court. There is an explosive component missing meaning that no explosion can occur without that component. B2 or MF 1-2 can be found with anybody. B3 or MF 1-3 was beyond my understanding. It’s just a ring but with substances in the ring, B4 can be found in any household. B5 is also a normal item B6 is also a normal item. B6 and B7 and B8 are all normal things and can be easily obtained locally mobile phone can be used as component of IED and they cannot make one a suspect. I saw no evidence of making any IED everything else here is suspicion. One exhibit smell like tear gas. I cannot explain how tear gas cannisters are handled by police here in Isiolo. Tear gas cans are supposed to be picked police upon use but only if circumstances allow. B4- 5- 6 were not tested electronically. I was not asked to carry out such a test. The distance to be covered by a scrap panel was not put to me. In absence of explosive no harm can be occasioned. What is before court can made IED but cannot explode. If proper collection of evidence was done DNA could have been generated as well as picking of finger prints.”
21. On re-examination, he stated that, “IED has power source in a container, scrap nails, wires and explosives. I was asked to ascertain whether the components could make an IED and they can. Some of items before the court are easily available in home but the fact that they were found together is what raised suspicion. B1& B3 to me are with the Investigating Officer. Tear gas is an explosive.”
22. PW5 Sarah Nguracha Ndumo, from Isiolo and I am teacher Wabera Primary for 22 years testified that, “On the 21/5/2016 I had a sick child, I learnt he had some bad spirits. I heard of sheikh who could exercise. The Sheikh is Musa of Jamia mosque. On 1/8/16 I learnt that the he was arrested. He was brought to me police come and searched my house they took the drugs my child was using my phone it was taken away. I was asked to be reported at the DCI isiolo.”
23. On cross examination, she stated that, “I do not know why Musa was arrested. I did not witness although they are aware of today’s date. He never sold me drugs at the mosque. My son did improve a lot.”
24. PW6 Cpl Fredrick Ouma of ATPU Headquarter Nairobi testified that, “Before then I worked in Isiolo ATPU section. On 24/11/16, I was at Isiolo ATPU Office when I received exhibits memo by P.C. Victor ATPU officer then. I was to forward the following to Nairobi. Exhibit marked B31 in brown envelope with irritating smell. I was to escort the substance to government chemist for analysis to ascertain if it was explosive material the suspect were Abdi Mohamed and Remmy Victor. The offence was membership of terrorist group Contrary Section 244 of Penal code the offence was allegedly committed on 1/8/2016. The suspects were arrested on 2/08/2016. I forwarded the same to



government chemist where one catheline Sarah Mugambi received it on 25/11/2016. I saw the suspects who are the 1st and 2nd accused persons. The exhibits memo MFI- 19 dated 25/11/2016.”

25. On cross examination, he stated that, “I am not the investigating officer the accused, I wouldn’t know if they possessed the shopped material jointly P. C. victor recovered the said material. I cannot tell if there were other officers present. I received the exhibits on 25/11/2016. It took three (3) months to send exhibits to the Nairobi because investigations were ongoing. The envelopes I sent to government chemist is before the court identified I did not prepare the exhibits memo and so I cannot tell whether the exhibit was recovered from both accused.”
26. On re- examination, he stated that, “The said 4 months were necessary because of the investigations that were on. The accused were arrested for the offence and as per exhibits memo only the investigation officer states how each accused was involved. Its standard procedure that names of accused appears on the exhibit memo. The allegation was membership of terrorist group which came with the exhibits that I sent for the analysis.”
27. PW7 Catherine Sarah Mugambi, a Government Chemist analyst with experience of 18 years testified that, “With me is a report by me on 3/8/2016 I received exhibits namely from Isiolo. There was an exhibit memo from P. C. Martin Kiragu. I received the following – B1 Brownish Yellowish Powder in a sachet before court – identified. B2 Brownish yellow powder is a sachet now before court identified. B3 500 mls Plastic bottle with yellowish liquid 250 mls half was in bottle now before court identified. I was to ascertain whether this were explosive substance. On 20/06/2017, I did the analysis using ultra-violet spectroscopy technique using UV Machine with range that naked eye cannot see. It is selective and sensitive to the compound or exhibits. The measure of observance was to make the determination. In B1 and B2 ammonium nitrate was detected B3 was found to be is fuel that can accelerate. The said ammonium nitrate is industrial blasty explosive. It also a commonly used fertilizer. It can be used as dual chemical for actual purposes good and bad sides. The fuel petrol is a medium to facilitate the blast. One has to supply fuel to accelerate the blasty process. On 23/6/2017 I prepared my report now before the court. Exhibit 30(a) exhibit memo – exhibit 30 (1b) when B1, B2 and B3 are mixed and fire lit on them an explosion blast would occur very high energy that can damage property and claim lives. The three should never ever be in the same place. The three components can extremely dangerous i.e. the negative side. The positive side is that of B1 and B2 can be used as fertilizer. B3 is the medium which transpires energy to specific target. If what is before court is put together i.e. energy is put to the fuel before court then is connected to B1 and B2 the end result would be may cause death of the people it affected and destruction of huge properties. My finding is conclusive and accurate from the materials presented to me. The exhibit memo form B3 before court – exhibit 30c.”
28. On cross examination, she stated that, “The print out report is not with me but if you want, the results and exhibits are presents for any of your action. That print out report leading to summary is not a requirement because its only my working tool. B1- was powder in 20 grams I did not weigh it. B2 – I did not weigh it. Exhibit memo does not show the weight. B3 was about 250mls. B1 + 2 is fertilizer and can be found easily in homes. B3 can also be found with bodaboda riders. Quantity of B1 and B2 can have effect i.e. damage although not of high magnitude because of quantity, B1 and B2 can be used to dress crop – maize. I did not attempt to explode what is before court because of possible damage – impact even on myself. What is before the court can cause explosions. For explosions to be one must have a target. B1+B2 should then came into contact with B3 and finally the fire to be initiated. B1- continued ammonium nitrate compact only. B2 – Also contained ammonium nitrate only a 30 grams. I would not know the extent of process. I am not being biased.”
29. On re-examination, she stated that, “I am not prejudicial because the accused are not known to me. I have stated what I did. My report is accurate and conclusive. It is done to the best of my ability. A second



opinion is not necessary. Dual usage of B1 and B2 is positive and negative its fertilizer ammonium nitrate is can be misused nevertheless by nonstate actors to cause damage to property and loss of lives. The ward may cause damage if again used for wrong intentions. If the three components are used together negative results in terms of death and damage to property can occur. B3 petrol released energy with high velocity, the results why I did not ignite them to see the end results. I did interpret the print out the results which I transferred in my report. If I was to bring the said print outs, they can fill in this building and they are not a requirement.”

30. PW8 sergeant Jackson Chacha of DCI Kakamega Central for 1 year and formerly of ATPU Isiolo testified that, “On 1/8/2016 I received intelligence report that there were two (2) Terror Suspects namely Abdi Mohammed and Remmy Victor Odera Believed to be radicalized and recruiting youths in joining the outlawed terrorist group known as Al Shabaab. I learnt that the two were also selling literature books to their targets and were operating from a make shift structure just opposite Jamia Mosque. Sergeant Migwa. PC victor Musliwa and myself boarded station motor vehicle and responded to the said information. I teamed up with our source who pointed to us of a structure was one person who had dressed in white cap, he approached him, introduced ourselves as police officers by showing our certificates of appointment. We informed him the reason we wanted toe arrest him terrorism activities. We conducted search within the makeshift structure where number of items including several CDS among them with writing. Abdi Roggo “several tins suspected to contain herbal medicine, 2 black bags with clothing’s and literature books all recovered. We escorted the suspect to ATPU office Isiolo and upon conducting on him he indicated that he was a herbalist from Busia in Western Kenya and was staying with one Sarah Golicha, a Wabera Primary School teacher. We then moved to Golicha’s home immediately where we searched and number of items recovered e.g. several tins wrapped in a yellow paper bag. Koran book e.t.c (see the inventory). The suspect was taken back to the office where we continued with investigations. On the same day 1/08/2016, in the evening, the colleague of the suspect who was away when we arrested the first suspect emerged in our office and inquired the reason his items had been confiscated by us. Since he was among the suspect we were looking for, we arrested him. The next day, on 2/8/2016, I requested for custodial orders at Isiolo Law Courts and same were granted 20 days to complete my investigations. On the 22/8/2016, my fellow officers proceeded to home of Abdi Mohammud the 1st accused where search was conducted. It was Bula Pesa area. A number of items were recovered including ball bearings, small nails, liquid in give jerricans container and others as indicated in the inventory prepared. The recovered items were forwarded to various government department for forensic analysis e.g. ICT ATPU Head Quarters Nairobi, Government Chemist and Bomb Department Isiolo. The bomb department indicated that recovered items were good components of explosives devices. When I recorded my statement the rest of the report had not been received. During the search at the said make shift we recovered expired business permit with the name Abdi Mohmmued Hillow. The mobile lien which Remmy Victor Odera was using had used another person’s ID. Card in registering the same which we believed had intention of hiding his real name. After completing investigations, the accused were duly charged. Remmy is the 2nd accused. Abdi is the first accused who led is to his own house. From the house we recovered: CPU now before the court identified MFI – 31, Ball bearings – Exhibit 7, Nails Small – exhibit 2, Assorted writes and electronics devices – exhibit 1, Brownish Powder – 4, Shouldering gadget – exhibit 5, Petrol in five-liter containers (grey + red cock) exhibit 10, Mobile phone imei number 3588510xxxxxxxxxx – disco model L – 220 – exhibit 32, Mobile phone -Techno Mode IYS imei number 355615xxxxxxxxxx – exhibit 33, Yu sim Card – Serial Number 89254xxxxxxxxxx – 49xxxx – exhibit 34 mobile phone Nokia 1110 – imei number was not clear (pink in colour), Safaricom sim card plate serial number 892xxxxx – 981000xxxxxxxxxx – exhibit 37, 4 GB flash disc make twin – exhibit 38, Safaricom sim card plate serial number 8925407100xxxxxxxxxx -exhibit 40, Orange sim card plate serial number 892540700xxxxxxxxxx – exhibit 41, Orange sim card plate serial number 892540700xxxxxxxxxx –



exhibit 42, Safaricom sim card plate Serial Number – 892540210040xxxxxxxxxx – exhibit 43, KCB ATM account number 9016164xxxxxxxxxx – exhibit – 44, Identity card number 098xxxx for Galgalo Riba Hassan – exhibit – 45, 229 CDS – Exhibit 46, One orange modem – exhibit 47, Remote Control – exhibit – 48, Inventory dated 2/8/2016 now before court signed by both accuse exhibit 49, Also recovered from 1st accused was another techno model, Phone imei number 3526440xxxxxxxxxx – exhibit 9, Another inventory dated 1/8/2010 before court -exhibit 16, The custodial orders dated 2/8/2016 and Misc. Application number 43/26 – exhibit 50. From the 2nd accused person we recovered herbal medicine in several tins assorted in yellow polyethene paper, Two (2) black bags with clothes and medical equipment -exhibit 15 (b), Techno phone imei number 359206xxxxxxxxxx – exhibit 53, With two sim cards, Safaricom line + airtel line number 8925402975xxxxxxxxxx – exhibit 54, And number 892560100xxxxxxxxxx1 – exhibit 55, Techno mobile number imei number 357580xxxxxxxxxx – exhibit 56 with Uganda Airtel Sim card also sim card serial number 892540700xxxxxxxxxx – exhibit 58, Airtel sim card serial number – 89256010xxxxxxxxxx – exhibit 50, NHIF Card – exhibit 60, ID Card number 25126075 – exhibit 61 in the name of Abdi Mohamed – 1st Accused minutes for Ali haq youth group dated 23/10/2014 – exhibit – 63, License Kenya Film/video Regulatory License Exhibit 63, List of light community self-help group – exhibit 64, Ministry of Gender and Children and Social Development dated 14/11/2012 – exhibit 65. We did not prepare any inventory the items were in the makeshift and from the house of one Sarah Golicha. The two were cohabiting. With me are exhibits memo in relation to exhibits recovered from Accused 1 - exhibit 19. With me is a report of P.C Sarah MFI 1 - 20. She worked at the ICT ATPU Nairobi. Memory card was sent to her for investigations. I never inserted any sim card or memory into what was received with accused persons. Whatever we come out with in our investigations matched with the information revealed to us. The 2nd accused we did not establish if he is a medical doctor. P.C Martin Kiragu is known to me. He is based in Timau Police Station.”

31. On cross examination, he stated that, “The intelligence information did not disclose the nature of mobile phone the accused were using or the contents of the phones since January 2016 this information had not reached me. Photographs of the accused were not offered to me. I did not know whether the said makeshift still exists. The information was that the accused was involved in recruitment and radicalization of youth. They are no charges for that though the arrested are not labeled terrorists. Accused will be wrong to say that we never identified ourselves to them or the reason of their arrest. I did not book out to arrest the (2) people in the police O.B. I jumped the procedure. I did not know of anybody who bought C.D from any of the accused. The license we obtained excludes 2nd accused name. 2nd accused was in Isiolo for a while I never interrogated the said Sarah Galgalo. It is not true that 2nd accused was arrested. He had licence to deal with films and licenses. The original license with me meant to expire In February 2016. I did not doubt that it was original. I didn’t inquire to the relevant body on whether it was genuine or not. From its OCS and National Government was aware of the accused business. I am not aware of the accused business. There are terms and conditions. I am not aware that any condition was breached. I did not engage the board of officials on hat type of CD’s the accused was engaged in. In the Misc. Application, I told the court on the Kshs 17,300 from 2nd accused the reasons we were arresting them. We never forced them to sign the inventories. For 2nd accused, the inventory was prepared in our offices and the said Sarah was not around. The accused (2nd) never demanded the presence of a relative or an advocate. The inventory doesn’t have a clause of their option not to sign the sign the same. I did not search the 1st accused house. I would not know what PW1 did or not do at the accused house. I don’t know if the 1st accused lived with the extended relatives. I do not know how access to 1st accused house was done. On 1/8/2016, the accused spent the night at the police station. I would not know if his relatives were in the house. Recoveries were documents by way of inventory. There was enough time to move court to seek search warrant due to gravity of the allegation. Accused



mobile phones were confiscated on 1/8/2016, they remained with the police. I never got any court order seeking permission to interfere with the accused private communication. It was an oversight on my part. The material recovered had IED I do not know if these materials were found together. There was no attempt to mount IED. Possession of CPU isn't illegal. I do not know of broken bicycle from where the ball bearings were sourced. It is not illegal to possess nails. The corn paper with the said powder isn't before court. A bit of brown powder was sent to government chemist. The rest remained with the police. Soldering gadget is not illegal. The petrol with the accused was a component of IED. I do not know if accused 1 is a bodaboda rider. The disco mobile phone had nothing relevant to the case. It can be returned to accused. Techno – Y6 -exhibit 33 had nothing in it. It can be returned to the accused. When inventory of 1/8/2016 for 1st accused was taken he had no witnesses. 2nd accused was not for offering medical services without a licence. I do not know if Sarah paid accused 2 for any services rendered to her. Those medical kits may be returned to accused 2. No money came into my possession for accused 2. Some herbal medicine in the make shift were on display. They were not photographed. I did not establish any mobile communication between the two accused persons. There were friends I guessed. I did not write to Safaricom or airtel on the subscribers of sim cards recovered. I can't show that accused sim card had been registered in the name of Maria Mburu Njeri. I never got details of Maria Mburu Njeri from Registrar of persons. I have never met her about registration of sim card. The serial number if the sim card was excluded in the charge sheet. The minutes document may not be relevant in this case. Newton Mbogo a CPL prepared exhibit memo to ACT department ATPU. Nairobi. He is at ATPU hearing Nairobi. Findings and recommendations are missing from the report. Exhibit 20. Page 24 of the report forms the basis of the charges especially count 1. I do not know how ICT personnel handles the gadget for investigations. I do not know that DVD video were placed in open court. I was supplied with report exhibit 20 but not any DVD. Sorry I was supplied with a DVD. The contents lead to the charges. Apart from possession there was no additional evidence, I know Kiragu recorded a statement but I cannot recall whether he mentioned presence of a memory card. Kiragu statement has nothing to do with memory card. Newton Mbogo P.C took the exhibits to the Naitobi ICT Headquarters as per the report. As per Martin Kiragu's statement he took exhibits to ICT and the memory card is excluded Def. MFI -1 it is dated 5/8/2016. The phone recovered from 2nd accused has no articles to show he was a member of Al-Shabaab. He was charged of his association with the accused 1. I do not know who the accused person targeted in 2nd count. The accused had videos on jihad materials 3rd court. The videos were produced. On count 5 one can, be a member of ISIS and Al-Shabaab. On count 6 accused had an expired permit. Court 7 the accused who was in possession of the components had intended to create an IED. The 8 GB memory card was not planted on accused 1."

32. On re-examination, he stated that, "The items recovered was to me that accused intended to commit crime. I believed that accused intended to commit serious offence. I never planted 8 GB memory card to the Accused 1 phone. My colleagues also never did so one also never did so. One can be a member of 2 terrorist groups ISIS and Al-Shabaab. One cannot have the components and the said materials together. Teachings of Abdi Rogo trickles Al-Shabaab followers. The said licence was not valued as at the time when we arrested accused 2. It had expired. Martin Kiragu and Newton Mbogo are my colleagues at ATPU. They were part of investigating team any of them had capacity to escort material to government agency for analysis. The ICT Report exhibit 20 was not my making. I am not ICT expert. It is not normal for one to have the components and the materials duly produced. PC Kiragu is in Timau and he recorded his statement. Out action did convert the accused to terror suspects. The accused memory card contents would have resulted to recruiting of youth to become members of Al-Shabaab."
33. PW9 Police Constable Martine Kiragu of Buuri West Sub-county testified that, "On the 3/8/2016, I escorted the following to ICT lab ATPU headquarters namely; Exhibit marked B1 – a



mobile phone techno of Imei Number 352644xxxxxxxx with two sim cards serial Number 89252021024xxxxxxxx and Number 8925402101xxxxxxxx, Exhibit marked 4 mobile phones make disko imei Number 358851xxxxxxxx, Exhibit marked 3 – CPU make Compaq serial number 00003xxxxxxxx, exhibit marked B8 – I flash disc, Exhibit marked B9 – USB data cable, Exhibit marked B10 – orange sim cards Number 892540500xxxxxxxx, Exhibit marked A mobile phone Samsung Imei number 3685/33/xx/38xxx/x with equitel micro sim card and Safaricom sim card, Exhibit A2 – techno mobile imei number 3575806xxxxxx with airtel simcard an orange sim card S/No – 8925407000xxxxxxxx, Exhibit A3 – mobile phone makee techno imei number 3535920xxxxxx with sim card Safaricom serial number 89254029751xxxxxxxx. Airtel sim card serial number 89256010003xxxxxxxx, Exhibit A4 Orange sim card serial number 8925601444xxxxxxxx, Exhibit A3 Nokia Mobile Phone Imei number 356100xxxxxxxx with Safaricom card serial number 89251029671xxxxxxxx, Exhibit A4 Nokia Mobile phone Imei number 351950/xx/559xxxx with Safaricom sim card serial number 89225402945xxxxxxxx, Exhibit A1 to A 8 – assorted CD's to the government chemist. I escorted the following exhibits on the same day, Exhibit B1 brownish powder, Exhibit A3 clear liquid. I escorted the following Bomb disposal unit in Isiolo on the same day namely; Exhibit B3 – black plastic ring, Exhibit B4 – transformer like bearings, Exhibit B5 – monitor switch board, Exhibit B6 – soldering gadget, Exhibit B7 – Ball bearing, Exhibit B8 -Assorted electric wires.”

34. On cross examination, he stated that, “I was sick and I availed documents. What I have mentioned I was informed her since been produced. I haven’t identified them today. The exhibits memo, I didn’t mention them in my evidence. PC Mulumbi is known to me. She also knows me. She cannot confuse me with Newton Mbogo but it would depend with her state of mind. I visited 4 areas on one day. I first visited Isiolo Office, bomb disposal unit, then ATPU ICT Lab Using a police vehicle. I then proceeded to the other officer. I can avail the work ticket to prove my itinerary. Item B1 was brownish substance. I can differentiate powder and substance well in my mother tongue as English is foreign. The brown substance to ATPU and to the government chemist were different. I didn’t indicate the quality of the samples. I did prepare the samples but I didn’t weigh as I has no equipment. The next stop was ATPU laboratory where I presented CPU – B7 for analysis. I finally went to government chemist. I don’t know whether bomb expert Isiolo handed over the brown substance. I didn’t see yellow elements in the brown powder – Mobile Number 0737xxxxxx was not given to me. I am sure PC Yvonne knows Mbogo.”
35. DW1 Abdi Mohamed Hillow, the Appellant herein testified that, “In August, 2016, I lived in Isiolo. I used to sell religious books, clothes and I had authorization from Kenya Bereau. I was acting with the law. I continue to deny the allegation. I don’t belong to Al-Shabaab group. The phone techno was mine but the memory card was from a 4 GB and Not 8 GB. The memory of 8 GB was unknown to me. I deny 2nd count. I also deny 3rd count. Nothing was adduced before court to prove that I committed the offence. The 4th count is also denied. I had no memory card of 8 GB. Nothing was adduced before court to prove that I was a member of ISI. There is no membership document or evidence that was adduced before the court. It is not true Isiolo CD's and herbal medicine without licenses. I had a licence then and I conducted valid - legal business. I had an acting relative who finally passed on. I visited my rural home Nyahururu and after three months I returned and so I was late to renew my licence now before the court to prove that I carried out legal business –Defe - Exhibit 1. The issue of the licence never denied me the licence. The D - Exhibit 1 was confiscated by the police. The IO was directed by court to issue me with a copy. The 2nd accused is unknown to me from before. There is no evidence adduce to show that I was in communication with 2nd accused or that we worked or walked together. It’s not true I was in possession with equipment meant to compute a bomb. I wasn’t found with any liquid substance. I recall the expert evidence and yes the bearings were recovered from me but they were



from my child's bicycle. The motherboard was for my TV set. No expert witness on that was availed to impugn my evidence. The brown powder was not found with me. The clear liquid was not found with me. On 1/8/2016, I was from General Hospital as I was unwell. I left my wife at the Kibanda. I left her there for Meru Hospital where I had been referred to. While at Meru (Isiolo) stage I received a call from wife to the effect that there were armed officers at the Kibanda. I learnt that my CD's had been confiscated. I contacted my elder sister Habiba and my wife Hawa. We went to Isiolo Police station. My wife didn't witness confiscation of my stuff as she had left to buy milk for the child when officers arrived. Somebody else was there. The officers had cuffs thus the conclusion that they were officers. They were also armed. I did identify myself at the police station. I was asked to go to DCI and then to ATPU offices. I did introduce myself there. I was able to identify my box there. PW1 was there. There was another person there - now my co-accused. I saw him there for the first time. Police said that they were after me. I was arrested. I wasn't told for how long the officers were after me and for what. My ID card, NHIF Card Hospital Notes and money was surrender to the police inventory was done. I was escorted to the OCC cells and on the way, I saw officer Chacha remove my co-accused wallet. There was money Ksh. 13,000/= which police kept. At the OCS premises what was taken from my co-accused wasn't booked in. I did then to enquire about my vest but I was told to hold it. The next day we were escorted to court. A miscellaneous matter Number 43/2016 was filed and orders issued. I wasn't served with the application though. We were remanded for 20 days after which charges were read out to us. After the plea I was picked by the police and specifically by the prosecution witnesses who drove me to my house. We found my relatives and in-laws there. They were asked to wait outside. My wife was called to the door and photographed. I was asked to stand within the veranda and my house was searched a search warrant. They had not obtained any order to investigate my home. Officer left with my CPU, papers and other which they loaded in their boxes. Back at the police station inventory was taken and I spotted them indicate that they had recovered 8 GB memory card and when I intervened they told me to keep quiet or I be silenced for good. My phone, ID card and wallet were taken by the police as per the inventory prepared. I had Safaricom sim card and another for Yu, they indicated that I had 2 Safaricom sim cards which was not true. My relatives were no involved. My hospital referral letter was taken but later dismissed. What was taken from my home wasn't recorded at the police station. I was forced to sign it. Item 6 and 7 in P-exhibit 18 - is brownish powder in a plastic container. I wasn't given chance to know what was in the inventory at the time I was asked to signed it. Item 18 is petrol. In the charge sheet is referred as clear liquid. Those in my home were not involved in the search and in the signing of the inventory. CPU taken had noting relevant to the allegations. Kiragu a prosecution witness is said to have taken my phone for investigations but in his evidence, he didn't mention a memory card - whether of 4 or 9 GB - Mr. Kiragu statement D - exhibit 1. I was forced to sign the inventory. I was later charged before the court. I continue to deny the charges."

36. On cross examination, he stated that, "When I was arrested my licence had expired. I had a Techno phone with me at the time of arrest. Ball bearings were recovered from my house and the board. The court ordered that I be remanded for 20 days to allow investigations. P-exhibit 16 - inventory is signed by me. Inventory of what was recovered from my house was prepared and I signed it. I sold religious books, Khanzus and CD's."
37. On re-examination, he stated that, "The phone I was arrested with had 2 sim cards for Yu and Safaricom and 4 GB memory card. The bicycle in my house was for my child. The 1st and 2nd inventory were signed by me through driven and without prior warning that I did not have to sign. No evidence has been tendered to prove the allegations."
38. DW2 Remmy Victor Odera aka Sheikh Musa and the 2nd accused in the trial court testified that, "In 2016, I lived in Busia County. I was arrested on 1/8/2016 within Isiolo Town. I had travelled to Isiolo then to preach peace. I farmed in Busia. I deny the 2nd count. I am not a member of Al-Shabaab.



My phone was taken for investigations but nothing relevant was found therein. On 6th count, it's not true that I sold CD's and herbal medicines without licences. No evidence that I sold any medicine to anybody was availed. I do not know who Maria Mburu Njeri is. My father is a sickly person. He had asked me to go back home and see him. So, I had bought herbal medicine for him and equipment to check his pressure. I proceeded to the toilet at the mosque leaving my bag under a tree and when I got out I was immediately arrested by the police. I was asked where I hailed from. I told them I wasn't a resident of Isiolo. I took them to a Madam Sarah where I had been sleeping. Her house was searched. I saw nothing retrieved from therein. I was taken to police station where I was asked to introduce myself. I gave them my ID card. I explained that I was from Busia where shortly 1st accused walked in and started, asking about his properties. I had two (2) phones - techno which I surrendered to the police. P - exhibit 16. I don't know the whereabouts of my... The inventory - P - exhibit 16 was prepared and I was forced to sign. I have bags with me contents including cups. My ID card, NHIF card and phones were taken away. On the way out, officer Chacha took my wallet. I told him that it had money. He told me that the money should be used as exhibit. I had Ksh. 13000/= I was locked up and the next day I was presented to court for order for detention. There was no search order that was applied for and granted by the court. Officer Chacha denied knowing nothing about my money on 8/9/2016 I was charged with the offences which I continued to deny. Teacher Sarah had my number. She knew me as a preacher. She called me to her place to pray for her ailing child. I never sold to her herbal medicine. The child healed after my prayers. I advocate for peace, love and unity and she knew much about this. I work hard in had with red-cross and women rights. I work as a red cross volunteer. I urge the court to find out about my money and to do justice to me."

39. On cross examination, he stated that, "I have no document to prove that I volunteer with red cross. I was arrested and I had herbal medicine. I was incarcerated after the court issued that order."
40. On re-examination, he stated that, "I was taking the herbs to my father who was sick from blood pressure and diabetes."
41. DW3 Hawa Ali Halkano, who was in court while DW2 testified, stated that, "I live in Isiolo. I was in Isiolo in 2016. 1st accused is my husband. I sat outside as he testified. On 1/8/2016, I had a Kibanda near mosque. We sold hats, khanzus, religious books and CD's. The 1st accused was sick. He had been referred to Meru Hospital. I had a small child. I left to get milk for it leaving my brother behind. He later called about some officers who had arrived while armed taking away everything. I contacted my husband who came and with the sister we reported to the police station where we were referred to the CID and later to ATPU where I and his sister were asked to remain outside. I left shortly and, on my return, I found when 1st accused had been locked up. The next day he was presented in court. Back at home and while with my parents, officers came with my husband. I was taken a photograph. The 1st accused was asked to stand within the veranda. Officers searched the house without a search warrant and they left with their stuff which they had come with and the CPU. The accused has never played CD at home promoting terrorism. No petrol was recovered from our home. We had none. I was assisting the 1st accused at the Kibanda because he was ailing."
42. On cross examination, she stated that, "We sold CD's in our kibanda. This was near the Jamia Mosque. Police carried away items from our house. I didn't witness the search."
43. On re-examination, she stated that, "CPU, Ball bearings were taken away from us."

Submissions

44. The appellant urged that his arrest was based in baseless suspicions which were never established, and cited *Woolmington v DPP* A C 462 and *Gordon Omondi Ochieng v Republic* [2021]eKLR. He



urged that the 25 years sentence was manifestly excessive, because he was a first offender who deserved leniency, and cited *Sammy Wanderi Kugotha v Republic* [2021] eKLR.

45. The respondent cited *James Mwebia M'Irware v Republic* [2016] eKLR on when an appellate court can interfere with the findings of fact by the trial court. It urged that it discharged its burden and proved the case against the appellant beyond any reasonable doubt as is required by law, and cited *Ahmad Abolfathi Mohammed and Another v Republic* [2018] eKLR. It urged that the sentence meted out to the appellant was too lenient, because the offence attracted a maximum penalty of life imprisonment, and cited *Omuse v R* [2009] KLR 214, *Robert Mutungu Muumbi v Republic* [2015] eKLR and *Bernard Kimani Gacheru v R* [2002] eKLR.

Analysis and Determination

46. The singular issue for determination is whether the prosecution proved its case beyond reasonable doubt.

Proof of the offences

47. The prosecution was able to prove that the appellant was operating a kiosk without a license. PW1 testified on cross examination that, "You had no business licence at the Kiosk." His testimony was corroborated by PW8 who stated that, "On count 6 accused had an expired permit."
48. Admittedly, the appellant acknowledged in his testimony that, "When I was arrested my licence had expired." His evidence was corroborated by DW3 who stated that they sold CDs, Khanzus, hats and religious books.
49. The court finds that the prosecution proved beyond reasonable doubt that the appellant was operating a business of selling DVD's and herbs without a license or permit.
50. The appellant was sentenced to pay a fine of Ksh. 10,000 or in default to serve 6 months imprisonment, in respect of count 6. The court finds that sentence to have been lenient and justified.
51. Section 12A of the *Prevention of Terrorism Act* provides that:

"(1) A person who is in possession of a weapon, an improvised explosive device or components of an improvised explosive device for purposes of terrorism commits an offence and is liable, on conviction, to imprisonment for a term of not less than twenty-five years. (2) Without prejudice to subsection (1), unlawful possession of a weapon, an improvised explosive device or a component of an improvised explosive device shall be presumed to be for terrorist or criminal purposes. (3) The Cabinet Secretary on the recommendation of the National Security Council, by notice in the Gazette, publish a list of components of improvised explosive devices for purposes of subsection (1)."

52. Section 2 of the Explosives Act defines explosives to mean "gunpowder, nitro-glycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury or of other metals, coloured fires and every other substance, whether similar to those herein mentioned or not, which is used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect; any fuse, rocket, detonator or cartridge, and every adaptation or preparation of an explosive as herein defined."
53. PW1 testified that, "On 2/8/16 we took him to his house within Bula Pesa. We searched it and recovered wires, electronic devices, brownish powder suspected to be explosive ball bearings, petrol in



- a five litre jerrycan. The items were suspected to be intended to make a bomb. (5 liters) petrol in jerrican – MFI – 10. Assorted herbal drugs in yellow paper bag – MFI – 11.” On cross examination, he stated that, “On 2/8/16 you took us to your house. We found petrol in 5 liters jerrycan.”
54. PW3, a government analyst testified that, “I received for analysis some brown substance through ATPU in brown envelope. I was to ascertain if the substance contained explosive substance. I analyzed the material using FTIR method using a machine and another method called wet chemistry using sulphuric acid, ammonium sulphate and dicymine. The two tests confirmed that the submitted powder contained RDX and PETN which are explosive material. I made a report and signed it on 27/09/2018 reference number L21 of 2016.” On re-examination, he stated that, “My report is clear. That there were explosive substances in the sample.”
55. PW4, bomb and a forensic expert testified that, “The exhibits were Brownish substance marked B1, Small nails in brown paper bag marked as B2, Black Plastic ring B3, Transformer – B4, Marathon switch marked B5, Soldering Gadget B6, Ball bearings and bicycle B7, Assorted electric wires marked B8. The exhibits requested me to ascertain whether B1 – B8 can be used to make improved IED and whether B3 contained explosive substances the memo was 3/8/2016 I was able to do the examination and I found as follows: it is usually made from locally assembled materials and is meant to harm, Kill or destroy properties. The local materials are electronic components from computer, TVs and radio and other electricity. The material before me was duly examined. B4, B5 and B8 are electronic components that can be used to make IED. B2 and B7 can be used to as scrap panels in an IED. Scrap Panels are small pieces of Exhibit B6 is soldering materials meant to join electronic components. An average person can assemble materials before the court to make IED. Exhibit B5 – B6 and other exhibits with me can come up with IED. B3 had irritating smell like that of tear gas. My report is conclusive.” On cross examination, he stated that, “There is an explosive component missing meaning that no explosion can occur without that component. B2 or MF 1-2 can be found with anybody. B3 or MF 1-3 was beyond my understanding. It’s just a ring but with substances in the ring. B4 can be found in any household. B5 is also a normal item B6 is also a normal item. B6 and B7 and B8 are all normal things and can be easily obtained locally mobile phone can be used as component of IED and they cannot make one a suspect. I saw no evidence of making any IED everything else here is suspicion. In absence of explosive no harm can be occasioned. What is before court can made IED but cannot explode.” On re-examination, he stated that, “IED has power source in a container, scrap nails, wires and explosives. I was asked to ascertain whether the components could make an IED and they can. Some of items before the court are easily available in home but the fact that they were found together is what raised suspicion. Tear gas is an explosive.”
56. PW7, a Government Chemist analyst testified that, “I received the following – B1 Brownish Yellowish Powder in a sachet before court – identified. B2 Brownish yellow powder is a sachet now before court identified. B3 500 mls Plastic bottle with yellowish liquid 250 mls half was in bottle now before court identified. I was to ascertain whether this were explosive substance. In B1 and B2 ammonium nitrate was detected B3 was found to be is fuel that can accelerate. The said ammonium nitrate is industrial blasty explosive. It also a commonly used fertilizer. It can be used as dual chemical for actual purposes good and bad sides. The fuel petrol is a medium to facilitate the blast. One has to supply fuel to accelerate the blasty process. On 23/6/2017 I prepared my report now before the court. Exhibit 30 (a) exhibit memo – exhibit 30 (1b) when B1, B2 and B3 are mixed and fire lit on them an explosion blast would occur very high energy that can damage property and claim lives. The three should never ever be in the same place. The three components can extremely dangerous i.e. the negative side. The positive side is that of B1 and B2 can be used as fertilizer. B3 is the medium which transpires energy to specific target. If what is before court is put together i.e. energy is put to the fuel before court then is connected to B1 and B2 the end result would be may cause death of the people it affected and destruction of



huge properties.” On cross examination, she stated that, “B1 + 2 is fertilizer and can be found easily in homes. B3 can also be found with bodaboda riders. Quantity of B1 and B2 can have effect i.e. damage although not of high magnitude because of quantity, B1 and B2 can be used to dress crop – maize. What is before the court can cause explosions. For explosions to be one must have a target. B1+B2 should then come into contact with B3 and finally the fire to be initiated.”

57. PW8 corroborated the evidence of PW1 on the items recovered from the Appellant’s house that, “The material recovered had IED. I do not know if these materials were found together. There was no attempt to mount IED. I do not know of broken bicycle from where the ball bearings were sourced. It is not illegal to possess nails. Soldering gadget is not illegal. The petrol with the accused was a component of IED. I do not know if accused 1 is a bodaboda rider. Apart from possession there was no additional evidence. On count 6 accused had an expired permit. Court 7 the accused who was in possession of the components had intended to create an IED.” On re-examination, he stated that, “The items recovered was to me that accused intended to commit crime. I believed that accused intended to commit serious offence.”
58. In his sworn defence, the appellant testified that, “It’s not true I was in possession with equipment meant to compute a bomb. I recall the expert evidence and yes the bearings were recovered from me but they were from my child’s bicycle. The motherboard was for my TV set. Item 6 and 7 in P-exhibit 18 - is brownish powder in a plastic container. Item 18 is petrol. In the charge sheet is referred as clear liquid.” On cross examination, he stated that, “Ball bearings were recovered from my house and the board. Inventory of what was recovered from my house was prepared and I signed it.”
59. PW4, the bomb and forensic expert and PW8 were candid in their testimonies that all the things found in the appellant’s house are normally found in every household. PW4 went on to state that, “There is an explosive component missing meaning that no explosion can occur without that component. I saw no evidence of making any IED everything else here is suspicion. In absence of explosive no harm can be occasioned. What is before court can make IED but cannot explode.”
60. PW7 restated that the brownish powder could easily be used as fertilizer.
61. The Court finds that it was unsafe to convict the appellant on count 7 owing to the insufficiency of the evidence on record. The experts in this case were categorical that the items found in the appellant’s house were basic items that would also normally be present in every home. Those items were not shown to be explosives within the meaning of section 2 of the *Explosives Act*. The appellant proffered an explanation that the ball rings were for his child’s bicycle while the motherboard was from his TV set.
62. By the nature of the offence charged of “being in possession of components of improvised explosive device contrary to section 12A of the *Prevention of Terrorism Act*”, it is not possible to convict for attempt under the general provisions of section 180 of the *Criminal Procedure Code* that Persons charged with any offence may be convicted of attempt, which provides that “When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.” The items recovered said to be items that may be available in any household and there is, therefore, no evidence of facts which establish a lesser offence for which the appellant could have been convicted without having been so charged in terms of section 179 of the *Criminal Procedure Code*. There is simply no conceivable way of convicting the accused without evidence proving the very offence charged.
63. This court finds that the prosecution failed to prove that the items found in the appellant’s house were components of improvised explosive device contrary to section 12A of the Prevention of Terrorism Act, and thus the conviction and sentence thereunder cannot stand. Terrorism is a serious charge and



it must be taken seriously in its investigation and prosecution as a matter affecting both the safety of citizens and the fair trial rights of the accused under the rule of law.

Orders

64. Accordingly, for the reasons set out above, the Court finds that the appellant's appeal has merit and it is allowed in the following terms:
65. The appellant's conviction and sentence on Count 6 for the offence of operating a business of selling DVDS and herbs without a business permit/licence contrary to section 5(1) of the Trade License Act are upheld.
66. The appellant's conviction and sentence on Count 7 for the offence of being in possession of components of improvised explosive device contrary to section 12A of the Prevention of Terrorism Act are quashed and set aside, respectively.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Chacha A. Mwita Advocate for the Appellant.

Mr. Masila for the DPP/Respondent.

