



**Abdi & another v Republic (Criminal Appeal E033 of 2020)
[2024] KEHC 8021 (KLR) (Crim) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8021 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E033 OF 2020
GL NZIOKA, J
JUNE 28, 2024**

BETWEEN

MOHAMED AHMED ABDI 1ST APPELLANT

HASSAN HUSSEIN MUSTAFA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against decision of Hon. Andayi W. Francis, Chief Magistrate (CM) delivered on 7th October 2020 vide Criminal Case No. 1750 of 2013 at the Chief Magistrate’s Court at Milimani Nairobi)

JUDGMENT

1. On 21st September, 2013, the people in Kenya woke up as usual and went attend to their affairs in several places with full hope and expectation that they would return to their respective places of abode safe and secure. However, for the people who went to Westgate Shopping Mall, (herein “the Mall”) in Nairobi, that was never to be. It was a dark day not just for them, their family members and/or people of Kenya but the entire world.
2. On that day, a group popularly known as “Al-Shabaab” attacked the Mall, allegedly as retribution following the Kenya Military deployment of security forces dubbed “Operation Linda Nchi” from 2011 to 2012 in their home country of Somalia.
3. As a result of the attack, sixty-two (62) persons named in the list attached to the charge sheet were killed, scores injured and the Mall extensively damaged.
4. The investigations into the terror attack commenced and several people were arrested. However, only four (4) suspects including the appellants herein were on 4th November 2013, arraigned before the



Chief Magistrate's Court at Milimani, Nairobi charged vide Chief Magistrate Criminal Case No. 1750 of 2013 with different offences, in a total of twelve (12) counts.

5. All the accused persons were charged in count (1) with the offence of commission of a terrorist act contrary to section 4(2) of the *Prevention of Terrorism Act* 2012 (herein after "the Act").
6. The particulars are that on or before 21st September, 2013 at the Westgate Shopping Mall in Westlands within Nairobi County jointly with others not before court carried out a terrorist attack at the said Westgate Shopping Mall which resulted in the deaths of some sixty-two (62) named persons as per the list attached list showing the name, mortuary number, nationality, age and next of kin.
7. In count (2) all the accused were charged with the offence of; conspiracy to commit a terrorist act contrary to section 23 (4) of the Act.
8. That on or before the 21st September, 2013 at an unknown place within the Republic of Kenya jointly with others not before court conspired to commit a terrorist act at the Westgate Shopping Mall within Nairobi.
9. The 1st accused (herein "the 1st appellant") was charged alone in count (3) with the offence of giving support to a terrorist organization contrary to section 9(1) of the Act.
10. The particulars thereof are that, on or before the 21st September, 2013 within the Republic of Kenya jointly with others not before court knowingly supported Mohamed Abdinur Said, Hassan Mohamed Dhuhullow and others in committing a terrorist act at the Westgate Shopping Mall within Nairobi County in contravention of the said Act.
11. Similarly, the 1st appellant was charged in count (4) with the offence of being a member of a terrorist group held information for the use in commission of a terrorism act contrary to Section 29 of the Act.
12. The particulars are that on 30th September, 2013 in Kitale Town in Trans-Nzoia County was found in possession of a Compact Laptop S/No. 5CB1333XM3 containing video namely AL-KATAIB Foundation for Media Productions "Training Series in Swahili AK-47" which can be used in the instigation, preparation and facilitation of terrorist acts.
13. The 1st appellant was charged in count (5) with the offence of; being in possession of an article connected with a terrorism offence contrary to section 30 of the *Prevention of Terrorism Act* 2012.
14. That on 30th September, 2013 at Kitale in Trans-Nzoia County was found in possession of a Compact laptop s/no. 5CB1333XM3 containing video namely; Ambush at Bardale Al-shabaab which can be used in the instigation, preparation and facilitation of terrorist acts.
15. In count (6) the 1st appellant was charged with the offence of; being in possession of an article connected with a terrorism offence contrary to section 30 of the *Prevention of Terrorism Act* 2012.
16. That on 30th September, 2013 at Kitale in Trans-Nzoia County was found in possession of a Compact Laptop S/No. 5CB1333XM3 containing video namely; Abu Musad Al-Zarqawi Eid Khutiba which can be used in the instigations, preparations and facilitations of the terrorist act.
17. The 2nd accused was charged in count (7) with the offence of; giving support to a terrorist group contrary to section 9(1) of the *prevention of Terrorism Act* 2012.
18. That on or before the 21st September, 2013 within the Republic of Kenya jointly with others not before court knowingly supported Mohamed Abdinur, Hassan Mohamed Dhohulow and others in committing a terrorist act at the Westgate Mall within the Nairobi County in contravention of the said Act.



19. The 2nd accused was further charged in count (8) with the offence of; making a false statement contrary to section 20 of the [Prevention of Terrorism Act](#) 2012.
20. That on or before the 15th October, 2013 at the Anti-Terrorism Police Unit headquarters in Nairobi within Nairobi County with intent to mislead No. 232737 C.I. Charles Ogeto made a statement that a Nokia 305 telephone set with IMEI No. 355223057422387 was given to him by his brother Ahmed Hassan Abukar on the 24th September, 2013, knowing the same to be false.
21. In count (9) the 3rd accused was charged with the offence of harbouring of persons committing terrorist acts contrary to Section 10(a) of the [Prevention of Terrorism Act](#) 2012.
22. That on or before 7th October 2013 at Salman Al-Faris Madrassa along Mayuyu Avenue, Eastleigh in Nairobi County knowingly harbored one Abdikadir Hared Mohame alias Mohamed Hussein whom he knew to have committed a terrorist act.
23. Similarly, the 3rd accused was charged in count (10) with the offence of obtaining registration by false pretenses contrary to Section 320 of the Penal Code.
24. That on or before the 13th July, 2010 at the National Registration Bureau office in Mandera Town within Mandera County being a Somali national willfully and by false pretences procured registration as a Kenyan citizen and was issued with a Kenyan identity card No. 27168535.
25. The 3rd accused was also charged in count (11) with the offence of being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the [Kenya Citizenship and Immigration Act](#) No. 2 of 2011.
26. That on 14th October, 2014 at Saxon Plaza along Mayuyu avenue, Eastleigh Nairobi County being a Somali national was found being unlawfully present in Kenya in that he did not have a valid permit or pass to allow him to remain in Kenya in contravention of the said Act.
27. Finally, the 4th accused (herein “the 2nd appellant”) was with the offence of giving support to a terrorist group contrary to Section 9(1) of the [prevention of Terrorism Act](#) 2012.
28. That on or before the 21st September, 2013 within the Republic of Kenya jointly with others not before court knowingly supported Mohamed Abdinur, Hassan Mohamed Dhuhullow and others in committing a terrorist act at the Westgate Shopping Mall within the Nairobi County in contravention of the said Act.
29. The charges were read out to the accused and each accused pleaded not guilty. The case proceeded to full hearing with the prosecution calling a total of forty-six (46) witnesses. At the conclusion of the prosecution’s case the trial court ruled that the prosecution had not proved its case beyond reasonable doubt against all accused on count (1), the 3rd accused on counts (2), (9), 10 and 11 and 1st appellant on count (4), accused 2 on count (8). Consequently, the 3rd accused was acquitted at the close of the prosecution case.
30. The 1st, 2nd and 4th accused were put on their defence and each gave his own defence, with the 1st accused calling one defence witness.
31. At the conclusion of the trial, the learned trial Magistrate delivered a judgment dated; 7th October, 2020 and acquitted all the three (3) accused persons on count (1), and the 2nd accused on count (12) but found the 1st appellant guilty on counts, (2) (3), (5) and (6), and the 2nd appellant on counts (2) and (12) and convicted them accordingly.



32. The 1st appellant was sentenced to serve eighteen (18) years on counts (2) and fifteen (15) years imprisonment on counts (5) and (6), to run concurrently but consecutively to the eighteen (18) years. While the and appellant was sentenced to serve eighteen (18) years imprisonment on each count (2) and (12). The sentence on conspiracy under count (2) and that of giving support on counts (3) and (12) were ordered to run concurrently.
33. However, both appellants being aggrieved by the trial court's decision filed appeals. The 1st appellant appealed against on both conviction and sentence vide High Court Criminal Appeal No. E035 of 2020 on the following grounds as verbatim reproduced:
- a. That the learned magistrate erred in fact and in law in convicting the appellant on an incurably defective charge of conspiracy to commit a terrorist act that did not accord with the particulars of the charge and/or with the evidence adduced.
 - b. That the learned magistrate erred in fact and in law in fact in convicting the appellant on the offence of conspiracy to commit a terrorist act without any or cogent evidential nexus between the appellant and his co-accused persons and/or with the unnamed other persons not before the court.
 - c. That the learned magistrate erred in fact and in law in convicting the appellant on an incurably defective charge of giving support to terrorist group that did not disclose an offence nor accord with the particulars of the charge and/or with the evidence adduced.
 - d. That the learned magistrate erred in fact and in law in convicting the appellant on an incurably defective charges of being in possession of articles connected with terrorism offence that did not disclose any offence or accord with the particulars of the charge and/or with the evidence adduced.
 - e. That the learned magistrate erred in fact and in law in convicting the appellant when the ingredients of the offences charged and convicted for were glaringly missing, inadequate and/or unproved.
 - f. That the learned magistrate erred in fact and in law in convicting the appellants on non-existent and/or tenuous evidence of common intention.
 - g. That the learned magistrate erred in fact and in law in convicting the appellant on non-existent and/or tenuous circumstantial evidence.
 - h. That the learned magistrate erred in fact and in law in convicting the appellant when material witnesses were not called by the prosecution.
 - i. That the learned magistrate erred in fact and in law in convicting the appellant on the said offences on non-existent and/or flimsy evidence, incredulous, surreal, discredited, unreliable, contradictory and inconsistent evidence of the prosecution.
 - j. That the learned magistrate erred in fact and in law in convicting the appellant on insinuations, assumptions, presumptuous analysis and speculative conclusions that were not supported by evidence.
 - k. That the learned magistrate erred in fact and in law in convicting the appellant when the prosecution did not prove any of the offences convicted to the standard required by law.



- l. That the learned magistrate erred in fact and in law in convicting the appellant by failing to critically evaluate the record of evidence that in all the circumstances does not support commission of any offence by the appellant.
 - m. That the learned magistrate erred in fact and in law in convicting the appellant by shifting the burden of proof generally and particularly of common intention, circumstantial evidence and of being possession and by watering down the requisite legal standard of proof on common intention, circumstantial evidence and being possession.
 - n. That the learned magistrate erred in fact and in law in convicting the appellant by failing to accord the appellant the benefit of doubt that was too apparent and glaring on the record of the case.
 - o. That the learned magistrate erred in fact and in law in convicting the appellant by dismissing the appellant's defence in a rush, offhanded and casual manner and failing to accord the appellant's defence an objective, fair and impartial assessment thus deprived the appellant of the fundamental right to a fair trial before an impartial competent court.
 - p. That the learned magistrate erred in fact and in law in meting out unlawful, harsh and excessive sentences in the circumstances of the case.
34. The 2nd appellant appealed against both conviction and sentence vide High Court Appeal No. E033 of 2020, on the grounds as here below verbatim reproduced: -
- a. That, the learned trial magistrate erred in law and facts in his failing to consider that the prosecution adduced insufficient and uncorroborated evidence which could not have sustained a conviction.
 - b. That, the learned trial magistrate erred in law and facts in making assumptions and taking into account extraneous matter which had no basis on the evidence tendered before him leading him to a wrong decision.
 - c. That the learned trial magistrate erred in law and facts in his failure to comply with section 124 of the Evidence Act.
 - d. That the learned trial magistrate erred in law and facts by shifting the burden of proof to the appellant.
 - e. That the learned trial magistrate erred in law and facts by rejecting the appellants defence without assigning any good reason for doing so which is contrary to section 169 of the C.P.C.
 - f. That since we cannot recall all what transpired during the trial due to time lapse we do hereby request to be supplied with the certified copy of trial records to enable me retrieve more grounds of appeal. I wish to be present during the hearing of my appeal.
35. The matter came up for directions on 8th December, 2021 and the appeals were consolidated vide High Court Criminal Appeal No. E033 and High Court Criminal Appeal No. E035 of 2020 file closed.
36. The background facts of the case as led through the prosecution case are that, on 24th May, 2011, PW21, Elvis Raymond Awuor Wenllow purchased motor vehicle registration number KAS 575X Mitsubishi Lancer, saloon car metallic silver in colour from one JaneMary Adhiambo at Kshs. 340,000. That he was given a copy of the log book and the transfer forms. However, he did not transfer ownership of the vehicle immediately.



37. That he decided to dispose of the motor vehicle due to frequent mechanical issues and took the vehicle to Jomakini Auto garage at Buru Buru where PW22 Samuel Sila Ngui and PW 23: John Ngui Muti, were working as mechanics for them to procure a buyer. That on 6th September, 2014, PW 24: Martin M. Mbithi, a car washer at the garage was approached by three (3) people described as, two Somalis and one Kikuyu who had an interest in the purchase of the motor vehicle.
38. That, PW 24 Martin M. Mbothi, informed the mechanics PW22 Samuel Sila Ngui and PW 23: John Ngui Muti, about the potential purchaser and subsequently the mechanics met two people of Somali origin and who introduced themselves as Mohamed and Abdi Mohamed and communicated in Somali language.
39. A meeting was arranged between the potential purchasers and the owner of the vehicle and they negotiated the purchase price at Kshs 340, 000. It is in evidence that Mr. Mohamed wanted to pay for the vehicle in cash but the owner told him to transact through the bank and since it was late he proposed that they transact the following day but Mohamed Hussein insisted that they wanted the vehicle on that very day.
40. As such the parties went to Barclays Bank (K) Limited, Queensway Branch at 8.00pm and were searched by PW15 Silvester Mutunga, the security guard and proceeded to the counter where PW16 Grace Wamuru was serving and made a payment of \$3, 900 into the seller's account. The vehicle was released to the buyer after the parties executed a sale agreement thereof.
41. Subsequently the purchaser obtained an Insurance cover from PW18, Mohammed Swaleh Warfa for the period of; 9th September 2013, to 8th October, 2013, issued to Abdullahi Subow telephone number 0718090577.
42. However, it is this vehicle that was later used to ferry terrorists to Westgate Shopping Mall when the attack took place. According to PW14 Mwimi Kitemi he arrived at Westgate parking in a motor vehicle registration KBS 629 Q to deliver green groceries, when a Mitsubishi motor vehicle pulled up and suddenly four people alighted and started shooting randomly at everyone. That he was shot at but the bullet missed his head narrowly and hit his motor vehicle. He managed to escape to safety.
43. The other witness security guard on duty at the Mall including; PW1, Juma Injusi, PW2 Patrick Otwahe, Pw4 Paul Mulandi described the terrorist as people of Somali origin, who had covered their faces and heads with scuffs, were carrying big guns with bullets and/or magazines stock on their chest, and shot at everyone in sight.
44. The evidence of these witnesses was corroborated by PW3 Thomas Kamau Ndung'u a business man running a business by the name of Ashley at Westgate Shopping Mall, PW 5 No. 22809 PC Ali Miraj who had escorted Safaricom cash to the Mall in the company of Sgt Samson Biwott and PW6, APC Wilfred and even engaged the terrorist under the belief that they were robbers, but surrendered after exchanging fire for two hours and ran out of ammunition.
45. Pw7 Corporal Nicholas K. Kaberia also testified that he was on patrol duties along Ngong road when he was instructed to run to the Mall and on arrival, he was confronted by three men holding AK 47 rifles covered with black head scarf and was shot on the left foot and shoulder and was admitted at MP Shah hospital. PW8 No. 68786 Phenias Kiremi Rithi corroborated the evidence of Pw7 Corporal Nicholas K. Kaberia.
46. PW 9 No. 216845 Moses Ombati, testified that when he got to the Mall he saw many people dead and scores injured. He narrated how the police officers engaged the terrorist of Somali origin. That



the Army took over the operations from the Police. The evidence of this witness was corroborated by PW10. No. 230938 C.I. Pascal Kiamba, and PW11, No. 82351 PC Benjamin Chemjor.

47. According to the evidence of PW13 Inspector Newton Mwiti the operation went on until the 25th September, 2013, when the investigation team learnt that the vehicle which the terrorist used was registration No. KAS 575X Mitsubishi, grey in colour. That the bomb experts cleared the vehicle for inspection.
48. That upon searching the vehicle No. KAS 575X Mitsubishi, two suitcases were recovered with tyres used to conceal ammunition, yellow fever certificate, Safaricom subscription forms, receipt for payment of the gym, 2 black wallets, five (5) Sim cards holders, 2 grenades pins, and 2 bottles of mineral water.
49. That the back of the vehicle a search yielded; 1 bullet calibre of 7,65mm, fire jericin with fuel, and toothpaste in between the seat. That the scene of crime personnel visited the scene and took photographs thereof. The photo of the vehicle and items recovered were taken and processed by PW 40 Corporal Ernest Muriga from CID headquarters.
50. That four phones had used the recovered Sim cards and the phone numbers were; 0704-784254, 0725-408139, 0712-743260 and 0726-658736.
51. Pursuant to the aforesaid, the investigators noted one number 0726-658736 had been used JKIA in Nairobi on 17th June, 2013 and Entebbe on the same day and was also used in Turkana at Kakuma Camp. The investigation revealed that the person who used the number was; Mohamed Abdinur Said who arrived in Kenya, in the year 2010 and registered as a refugee at Daadab, issued with Ratio Card No. 115530 and transferred to Kakuma Camp. That Mohamed Abdinur Said had left for Somalia and returned to Kenya, on 17th June, 2013 and perished in the attack.
52. Be that as it were, the investigation zeroed down on numbers which the suspect Mohamed Abdinur Said had communicated with and arrested PW25 Abdi Fata who stated and testified that he had gone to the same school with Mohamed Abdinur Said at Kakuma and in the year 2010 they parted way and meet again in the year 2013, and exchanged telephone numbers.
53. That PW28 Farah Mohamed had let out his premises of a single room to Mohamed Abdinur Said in the month of August/September, 2013 and of August, 2013 and spoke Somali language.
54. In the meantime, investigations revealed that another suspect Aden A. Aden had obtained a Kenyan national identity card fraudulently as confirmed by the evidence of; Abdullahi Mohammed Omar, Chief Bulljabwa location, who confirmed the vetting minutes were not signed. PW27, Said Salim Dado Godana, Registrar of Persons Mandera County, who noted there was mixture of locations, names of NSIS and CID officer in the vetting meeting were missing.
55. PW29 Ibrahim Hussein who disowned his signature in the vetting minutes and PW30 Ali Mohammed Hassan, Chief Shashafey Location who did not attend the vetting meeting and noted the minutes had not been signed by the Committee Members. Therefore, the minutes used to issue the suspect with the Kenyan national card were forged.
56. As investigation advanced, Corporal Gabriel Lentuangoi attached to Anti- Terrorist Police Unit, acting on intelligence information went to Kakuma to track a suspect known as; Mohammed Abdi, the 1st appellant and arrested him along Eldoret- Kitale road. Upon arrest a laptop bag containing a laptop, a Nokia phone, Identity number No. 26236022 were recovered. An inventory of the items recovered were prepared but the suspect refuse to sign.



57. Similarly, on 7th October, 2013, led by an informer, PW32 No.74630 Corporal Ali Bakari (ATPU) attached arrested the 2nd appellant at Eastleigh and recovered a phone serial number;355223057422384.
58. The investigations into the phone numbers recovered in the suspect's vehicle led the investigators to PW34 Catherine Y. Munya who was connected to a cell phone number 0712-743260 which had been used by one of the suspect attackers by the name of Abdi Dahir Abdi Said and who used to make calls from Eastleigh.
59. PW34 Catherine Y. Munya explained that she owned the subject cell phone line but lost it when the hand set she was using was stolen. She denied a question put to her in cross examination, that her 1st boyfriend called Abdi Dahir Abdi Said and maintained she was never at the Westgate Shopping Mall or Eastleigh.
60. PW 36 AP Joseph Njoroge testified that on 21st September 2013, he was at Elburgon and not Westgate Shopping Mall. That he held an Identity number 23607697 and a mobile number; 0718-090577 and o711-636000. According to Safari (K) Limited cell phone number 0718-090577, was registered in the name of Hassan Subow, one of the terrorists who held identity number 25099466. The witness explained that he has never lost his identity card.
61. PW37 Rose Wakonya Mutele testified that she owns an identity card number 2040198 issued in the year 1996 and has never lost it. That she doesn't know Rose Muinde who holds the same identity card number. That she lost a photocopy of her identity card which was stolen in Nairobi. She denied having gone to Westgate or knowledge of one; Abdi who held a cell phone number 0712-743260 used at the Westgate Shopping Mall.
62. Further investigations revealed that the terrorists were armed with mainly AK 47 rifles and after the shooting incident came to a halt several firearms and rounds of ammunitions used by both the police and terrorists were recovered and subjected to ballistic examination by PW38 No. 230245 SP Lawrence Nthiwa, the firearm examiner who produced a report of his findings as (Pexh 53 and 55).
63. To revert to the case facing the appellants, it is the prosecution case that the laptop Serial No. 5CP1333XM3 recovered from the 1st appellant was subject to forensic examination by PW39 No. 75736 Sgt Joseph Olum attached to ATPU, Computer Cyber Crime Unit. That he found the laptop contained materials associated with terrorism as stated in his report and which led to the charges in count 5 and 6 levelled against the 1st appellant.
64. Further investigation was centred on the people who perished in the terrorist attack. PW41 Corporal Frank Anunda testified that he took photos of several dead bodies at the City Mortuary and bones of human beings. PW 43 Dr Johanssen Odour and other pathologist performed post mortem on the bodies of the 62 people who died in the attack.
65. The police concluded investigation and charged four suspects including the appellants. After considering the evidence adduce at the close of the prosecution case the appellants were placed on their defence. The 1st appellant denied committing the offence levelled against him.
66. He testified that, he resides at Eastleigh along 9th street and he is a madrassa teacher in Eastleigh. That he reported for madrassa in the morning and left in the evening on the material date. Further he heard of the Westgate attack after his arrest.



67. That he met the 2nd appellant at the Police station although he knew him since 2011, as he owned a shop at Hong Kong Shopping Mall in Eastleigh and that he would order for clothes and call to establish if they were available hence their relationship was that of seller and customer.
68. That he knew Mohammed Abdinur alleged to be one of the terrorists, in August, 2013 as he lived in Eastleigh 6th street with his siblings and was his brother in law, as he was going to marry his sister Rahma. That he used to communicate with Abdinur via his phone number 0726 658736. However, after he introduced him to his sister and his family, communication ended between them as confirmed by PW 44 who said that, there was no other communication from then.
69. The 1st appellant denied the evidence of PW 45 that he looked for accommodation for the terrorists and denied the same. That he was arrested at a junction before Kitale town together with two Sudanese nationality while travelling to Kakuma Refugee Camp to see his brother Ali Ahmed Abdi who lived and operated a retail shop there.
70. That upon arrest the police took his phone number 0717-905599 and a bag containing his clothes which he did not see again until when he was being interrogated in Nairobi and which was never brought to court. That he refused to sign the inventory because it included a laptop and a black HP bag that he did not have. Further, C.P Gabriel Lentrangoi who arrested him and brought him to Nairobi did not testify.
71. The 2nd appellant on his part testified that he came from Somalia to Kenya as a refugee after the civil war and that his identity card was taken by a police officer No 551670. That he was arrested, while was selling clothes at the refugee camp in Hagadera.
72. He denied committing the offences levelled against him in both counts 2 and 12. He also denied knowledge of; Yahya, Dhuhullow, Hassan Abukar or Hared. That he knew Mohamed Abdinur Said identified as the first attacker as they used to play football together at Gambela Primary School and would communicate via cell phones. That they met again in 2013, at Eastleigh in Nairobi after losing contact and Abdinur reminded him that they were together at the refugee camp and played at the youth football games.
73. That on 14th October, 2013, he was at Hajadera Block J10 while selling in his shop when he was arrested and searched and Kshs. 80,200, a sim card and a phone, Nokia 2700 taken from him. That the phone was produced before the court as Exhibit 140 but the sim card and money were not produced.
74. He stated that he was not at Westgate on material date and did not conspire to commit a terrorist attack. Further his last communication with the 1st appellant was on 13th October 2013. That he had ordered for clothes and had not paid and so he called him severally but he did not pick his calls and then sent him a message requesting the said payment. He denied knowledge of the 2nd or 3rd accused persons.
75. At the conclusion of the case the appellants were convicted of the various offences and sentenced as stated herein.
76. The appeal was disposed of vide filing of submissions which are considered herein. In a nutshell the appellants argue vide submissions dated; 23rd June, 2022 that count 2 and count 3 were fatally and incurably defective as section 23 of the Act creates distinct categories of the offence of conspiracy. However, count (2) in the charge sheet did not specify the genre of conspiracy.
77. That, it was imperative for the prosecution to particularize which of the subsection (1) to (3A) was violated. That the trial court dismissed the argument of a defective charge and held that section 23 (1),



- (2) and (3) are merely explanatory of the place of commission of offence as a transnational organized crime and conferred universal jurisdiction to prosecute perpetrators in Kenya.
78. However, appellants argued that in the circumstances the accused ought to have been warned of where the conspiracy is alleged to have been committed as per the subsections. Further that, the evidence produced did not agree with the particulars of the count (2) as no evidence was led as to when the conspiracy took place taking into consideration that PW44 Sargent Paul Maingi and PW45 ASP Charles Ogeto testified that the terrorist were all foreigners living abroad prior to the attack.
79. That the offence under section 23(4) of the Act should have been drawn to read with one or more of subsections (1) to (3A), otherwise the charge did not contain a fair warning to appellants to enable them prepare the defence.
80. That as regard count 3, there was critical variance between the statement of offence and the particulars as the particulars alleged the support was given to two individuals and undisclosed others who did not qualify as a terrorist group as defined in section 2 of the Act and that the terrorist group ought to have been disclosed and failure to rendered the charge sheet as defective in terms of section 214 of the Criminal Procedure Code. The case of; Yongo vs Republic [1983] eKLR was relied on.
81. That despite the trial Magistrate acknowledging the variance in the charge and particulars, he nevertheless validated the charge and in so doing ignored the precedent in the case(s) of; Jason Akumu Yongo V Republic (1983) eKLR and Christopher Omufira Akwabi V Republic (1990) eKLR without justification.
82. It was further submitted that the particulars of count (3) did not state in general terms the nature of support and the case of; Kipkirui Arap Sigilai & another vs Republic [2004] eKLR where the court stated that the offence and should be disclosed and stated in a clear and unambiguous manner to enable an accused to understand and plead specifically to the charge, and to prepare his defence.
83. The appellants faulted the reasoning by the learned trial Magistrate that the support given would be determined by the evidence adduced as erroneous and rejected by the Court of Appeal in Christopher Omufira Akwabi vs Republic (1990) eKLR.
84. Further to prove the offence of conspiracy, the prosecution must prove that; there was an agreement and consent between the accused persons to commit an unlawful act, there was an intention to achieve the agreement's objectives, there was action or conduct that furthered the agreement, and there was joint planning of the specific crime contemplated in the conspiracy.
85. The appellant relied on the case of; Evans Waweru Maina vs Republic [2020] eKLR where the Court of Appeal quoted from Archibold: Writing on Criminal Pleadings, Evidence and Practice pages 2589 and 2590 and stated that:
- “The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons... so long as a design rests in intention only, it is not indictable; there must be agreement... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”
86. That none of the prosecution witnesses led any evidence to imply an agreement, consent, common intention towards the commission of the terrorist attack at Westgate. That, all the evidence on the telephone communication adduced by PW43 C.I. Mumo Shamalla, PW44 Sargent Paul Maingi, and PW45 ASP Charles Ogeto the Investigating Officers did not lead contents of the communication including text messages that were available in the mobile phones seized by the police. That failure to



- produce the contents of the communication in the mobile phones ought to be construed adversely against the prosecution.
87. Further, PW44 Sargent Maingi and PW45 ASP Ogeto conceded that the appellants and alleged attackers were not the only ones linked to their phones, and that they were only picked out due to the frequency of their communication.
 88. The appellant relied on the case of; Feisal Mohamed Ali vs Republic [2018] eKLR where the court held that the officer ought to have availed transcripts to confirm the nature of communication between the appellant and his contacts instead of leaving the court guessing what they were discussing and how it related to the case.
 89. The trial Magistrate was faulted for holding that the evidence of communication between the appellants and the alleged attackers was sufficient circumstantial evidence to infer guilt and argued that communication per se is not proof of guilt without the content of the conversation.
 90. That in the case of; PON vs Republic [2019] eKLR the Court of Appeal reiterated the principles to be applied in testing circumstantial evidence as a basis for inferring guilt. That the Court of Appeal quoted the case of; Omar Mzungu Chimera vs R Criminal appeal No. 56 of 1998 where the court stated that circumstantial evidence must satisfy three tests being; that the circumstance from which the inference is to be drawn must be cogently and firmly established, those circumstances should be a definite tendency unerringly pointing towards the guilt of the accused, and the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused alone and no one else.
 91. Further the trial Magistrate failed to consider facts that weakened and/or destroyed any inference of guilty being that; he properly registered his mobile phone number in his name unlike the stolen identities analysed, he never changed or deactivated his number any time before, during or after the attack, he never tampered with his phone data, his last communication with the alleged attackers was more than a month before the attack, his number was not among the phone numbers geolocated in Westgate as surveillance, the alleged attackers never communicated with him using their new phone numbers, the mobile number of the mastermind never communicated with his mobile number, and the contents of the message from the 2nd appellant to himself was innocuous.
 92. That the learned trial Magistrate having at held the offence of giving support should have ideally been an alternative charge to the charge of conspiracy then the converse was true and without the evidence of giving support, the charge of conspiracy should have collapsed.
 93. Furthermore, it was never proved that he was in possession of the laptop as there is no cogent evidence of its recovery from him and relied on the case of; Josephat Kisilu Mulinge vs Republic [2014] eKLR where the Court of Appeal held that to prove possession there must be some evidence as to the search and recovery of the allegedly stolen property.
 94. As regard, the inventory of the laptop, the 1st appellant argued that, it had straight ruled margins and straight writing which PW31 Corporal Gabriel Lentirangoi claimed to have written using the back of his colleague PC Irungu but who was never called as a witness. Similarly, Sargent Gilbert Chepkwony who signed the inventory as a witness was never called to testify.
 95. Similarly, it was written in past tense and in the second person which does not support the allegation that it was prepared upon the arrest of the 1st appellant especially compared to the handing over note (exhibit 37) prepared by PW31 and is in the first person and present tense.



96. Further still, the chain of custody of the laptop was broken severally raising question on the reliability of the evidence. Firstly, the 1st appellant was arrested on 30th September 2013 at Kitale and escorted to Nairobi on the same day. However, PW31 Cpl Lentirangoi instead of giving the exhibits to the escorting officers, he travelled with the exhibits from Kitale to Kakuma and only handed them over to PC George Mburu on 1st October, 2013.
97. That the serial number of the laptop mutated from 5CB/33XM3 as per PW31 Cpl Lentirangoi to 5CB/333XM3 in the handover note (exhibit 37). Furthermore, the learned trial Magistrate in his judgment noted that PW39 Inspector Joseph Kolum the forensic examiner indicated in court that the serial number of the laptop was 5CB1333XM3 however, the serial number as indicated in the exhibit memo form was 55CB133XM3.
98. That the officer who prepared the memo was not called as a witness. Reference was made to the case of, Mohamed Abdulrahman vs Republic High Court Garissa Criminal Appeal No. 9 of 2016 where the court stated that the failure to call the maker of the exhibit memo form or give reasons for his absence created a big gap in the value of the prosecution evidence and created real doubt as to whether the items relied from were from him or another source.
99. That in cross-examination, PW39 IP Kolum conceded that the name of the user of the laptop who visited the subject website was Adan and was using a modem, however no evidence was led to link Adan nor the mobile number of the modem to the 1st appellant.
100. Further, PW39 IP Kolum testified that the videos were owned by Google and publicly accessible on their website and had been viewed on YouTube. That, the videos were located in the web history and had not been downloaded and thus it is tenuous to say that the 1st appellant was in possession of the videos.
101. The appellant quoted the case of; R vs G and R v J (2009) UKHL 13 where the House of Lords considering the ingredients of the offence of possession under section 57(1) – (3) of the English Terrorism Act 2000 and stated that the Crown has to establish that the defendant possessed the article in question that he knew he had the article and was in control of it.
102. That, PW39 IP Kolum did not produce the certificate required under section 65 of the Evidence neither was it marked for identification and therefore the forensic report (exhibit 110) was of no evidential value.
103. The 1st appellant faulted the learned trial Magistrate for casually dismissing his sworn defence by holding that he failed to pinpoint from the call data a single call to his girlfriend, despite the fact that he testified to such dates in his examination in chief and which were not challenged.
104. The 2nd appellant argued that the learned trial Magistrate erred in upholding the prosecution's claim that he shared a handset with any of the attackers despite PW44 Sgt Maingi being unable to demonstrate the alleged handset sharing more so in relation to the CDR of the 2nd appellant.
105. That the 2nd and 3rd accused were acquitted despite evidence of communication with Abdikadir Hared, who purchased the motor vehicle registration No. KAS 575X used to ferry the attackers to Westgate Mall up to 102 times between 1st August, 2013, and 21st September, 2013, the date of the attack and 3rd accused who communicated with Mohamed Abdinur Said, and Ahmed Hassan Abukar the main attackers.
106. Furthermore, the 3rd accused had saved the numbers of three attackers in his phonebook all with under different names. That, he communicated with Ahmed Hassan Abukar 76 times and with Mohamed



- Abdinur Said on 18th September, 2013. Additionally, his phonebook contained the number used to procure insurance for the car used on the day of the attack.
107. The appellants further faulted the learned trial magistrate in the interpretation of section 23 (1), (2) & (3) and argued that section 23 (4) does not create any offence but relates to the punishment of the offence and relied on the case of *Kipkurui Arap Sigilai & another v Republic* (supra) that had similar circumstances.
 108. It was submitted that the sentence was unlawful, harsh and excessive. That, the offence having been committed at the same time in a series of one transaction, it should have attracted a concurrent sentence in line with the decision of the Court of Appeal in the case of; *Peter Mbugua Kabui vs Republic* [2016] eKLR.
 109. Further that the learned trial Magistrate failed to properly and meaningfully interpret the provision section 333(2) of the Criminal Procedure Code as stipulated by the Court of Appeal in the case of; *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR
 110. That despite the trial Magistrate's stand that he considered the period the 2nd appellant had spent in custody, he sentenced him to serve 18 years' imprisonment yet the two counts attracted a maximum penalty of 20 years. The 2nd appellant having been in custody for 7 years, it would have made sense if he had been sentenced to 13 years taking into account the maximum, despite the fact that he is a first offender.
 111. That should the appeal on conviction fail, the court should consider the period of 8 years spent in custody to be sufficient punishment for reformation and rehabilitation considering the objectives of sentencing.
 112. However, the respondent vide submissions dated 22nd July, 2022 argued that the charges were not defective as the particulars therein gave sufficient information to enable the appellants respond to them as required under section 134 and 137 of the Criminal Procedure Code and were not prejudiced. That, for conspiracy to commit a terrorist attack under section 23(4) of the Act, there was no need to particularize the acts based on the various sub-sections therein.
 113. The respondent submitted that to succeed on a charge of conspiracy to commit a terrorist attack, the prosecution must prove;
 - a. The existence of an agreement to commit of a terrorist act;
 - b. The date and location of the commission of the terrorist act;
 - c. That the terrorist act was carried out with an intention and/or motive as provided in section 2 of the Act; and
 - d. That the accused took part in the commission of the offence
 114. Further, the elements of the offence of giving support to a terrorist group that the prosecution must prove are:
 - a. Proof of an act of support or proof of an act of seeking support;
 - b. Evidence that the support was for the commission of a terrorist act;
 - c. The recipient of the support, either a person or a terrorist group; and
 - d. That the suspect intended that his actions would support or encourage support for a terrorist act.



115. Further the House of Lords held that, the possession is proved in certain circumstances which give rise to reasonable suspicion that his possession is for purposes connected with the commission, preparation or instigation of an act of terrorism. That it is not the possession of the article that is criminal but possession in those particular circumstances.
116. The respondent quoted the Black's Law Dictionary 9th Edition Vol. 1 page 351 on the definition of conspiracy; and the case of Uganda v Esther Onzia & Anor Mukono High Court (Uganda) Criminal Session Case No. 68 of 2000, where the court defined conspiracy as an agreement between two or more parties to commit a crime.
117. That, the agreement need not be written and is usually inferred from the facts or circumstances as stated in the case of; R v Gokaldas Kanyi Karia & anor (1949) 16 EACA 116. Further, in Rebecca Mwikali Nabutola & 2 others v Republic (2016) eKLR, the court stated that in considering whether there was an agreement to execute an unlawful act, such agreement may be either express or implied from the circumstances of the case, and requires proof of a common purpose between or among the subject parties
118. The respondent relied on the case of Mohd Khalid v State of West Bengal September, 2002 Case No.: Appeal (cri.) 1114 of 2001 where the Supreme Court of India held that in cases of conspiracy there cannot be any direct evidence as privacy and secrecy are characteristics of conspiracy and therefore direct evidence is seldom available.
119. The respondent further relied on the case(s) of; Simoni Musoke v R (1958) EA 715, at p.718, Teper — vs- R (1952) A.C. 480, and Musili Tuko v Republic Criminal Appeal No. 30 of 2013 (2014) eKLR, that laid down principles for proof of circumstantial evidence, already alluded to by the appellants.
120. That the evidence of PW44 Sgt Maingi showed that at some point, the appellants had used the same handset as Mohamed Abdinur Said the 1st attacker and mastermind of the attack. Further, the evidence shows that the 1st attacker Abdinur communicate with the 1st appellant 188 times between June and September 2013 while he communicated with the 2nd appellant 26 times.
121. Further a flurry of the communications with the 1st attacker Abdinur and the intense communication exchanges made up of short calls lasting a few seconds but repeatedly over a span of about 20 minutes and the manner in which the calls were made indicate people who are planning something.
122. Further, the fact that Abdinur the 1st attacker would speak to other attackers and a few minutes later he would call the appellants brought out clear the conspiracy and the co-conspirators, and it was an attempt by the 1st attacker Abdinur to keep the identities of the attackers from each other and the appellants. That in addition, 1st appellant called the same number based in Somalia, which number was also in communication with the attackers.
123. The respondent argued that the defence by the appellants were an afterthought and weak. That the 1st appellant could not identify the telephone number of Rakham, the 1st attacker's Abdinur's sister and his purported wife when accorded an opportunity. Further, he could not verify whether the telephone numbers he gave investigators belonged to Rakham, whether she registered it in her name and he did not know her national identification card number.
124. Furthermore, the 1st appellant lied about where the 1st attacker lived and his evidence was rebutted by the evidence of PW28 who testified that he rented one of his rooms to the 1st attacker and who would pay him Kshs. 7,000.



125. That the defence by the 2nd appellant that he used to sell clothes to the 1st appellant and that the 1st appellant owed him money was not borne by the evidence and is hearsay and of no evidentiary value.
126. On the charge of being in possession of an article connected with terrorism, the respondent relied on the case of; *Abdirizak Muktar Edow v Republic* (2019) eKLR where the court cited with approval the case of; *Osman Mohamed Batagha v Republic* (2018) eKLR where it was stated that the prosecution had a duty to prove that the information contained in the videos was used in instigating the commission of, or preparation to commit a terrorist act.
127. The respondent quoted the definition of possession as set out in *Black's Law Dictionary 10th Edition* inter alia as the fact of having or holding property in one's power, the exercise of domain over property.
128. That, in the case *Tima Kopi v Republic* (2015) eKLR the Court referred to the case of *Salim v R* where the Court of Appeal adopted the definition of the word possession from *Stephen's Digest of Criminal Law, 9th Ed* at page 304 and interpreted it in a manner not to mean legal title or having access to the exclusion of other but rather that the possessor must have such access to and physical control over the thing that he can deal with it as the owner could.
129. The respondent submitted that PW31 Cpl Lentirangoi was never cross examined on the issue of the inventory. Further, it was never put to PW31 that the reason for failing to sign the inventory was that the laptop did not belong to 1st appellant and that he did not know how to read.
130. The respondent submitted that the videos recovered from the laptop were played in court and it was clear that there were meant to instigating commission of or preparation to commit a terrorist act. That the trial Magistrate held that all the videos had content encouraging others to take up arms against people referred to as infidels, and that evidence from the attack at Westgate indicated that the attackers referred to the victims as infidels.
131. On the issue of contradictions, the respondent argued that there were no contradictions nor inconsistencies and even if they were there, they were minor and do not go to the root of the prosecution case and were satisfactorily explained.
132. At the conclusion of the hearing of the appeal, I note that, as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32, the role of the first appellate court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
133. In that matter, the court stated as follows: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses”
134. To revert back to the matter herein, the first issue the appellants have raised is that the charge of conspiracy is defective as it does not specify the applicable sub-section of section 23 where the offence is created but refer to the sub-section of the penalty.



135. I have looked at the charge and it is true it refers to section 23(4) which stipulates the penalty for the offence. However, the particulars of the charge are clear as to the date, country, where the offence was committed

136. The provision of section 134 of the Criminal Procedure Code deal with framing of charges and states that: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

137. In addition, section 137 (a) of the Code states that:

“The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this code, not be open to objection in respect of its form or contents if it is framed in accordance with this code –

Mode in which offences are to be charged

- (a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;
- (ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;
- (iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:

Provided that where any rule of law or any act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;

138. In the case of; Benard Ombuna v Republic [2019] eKLR the Court of Appeal stated that: -

“15. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”

139. The appellants pleaded to the charge and participated in the trial and in my considered opinion they were not prejudiced. The appellants also argued the evidence did not support the charge. However, I find that that argument goes to whether the case was proved beyond reasonable doubt. I therefore dismiss the argument on the defective charge.

140. I shall move to the charges the appellants were convicted of summarised as; conspiracy, possession of terrorist material and giving support to terrorists. The parties have in their respective arguments and/



or submissions dealt with the statutory and cases on the same extensively. In that regard, I will not prolong this judgement by repeating the same.

141. Be that as it may, the elements of the offence of conspiracy to commit an offence are articulated in Archibold: Writing on Criminal Pleadings, Evidence and Practice, pages 2589 and 2590, where the authors state as follows: -

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons... so long as a design rests in intention only, it is not indictable; there must be agreement... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”(Emphasis added)

142. The appellants argued that there was no evidence to show the content of communication between the appellants and terrorists and that communication per se is not a crime and cannot prove the charge of conspiracy. Further the 2nd and 3rd accused were acquitted while the appellants were convicted and yet those accused also communicated with the terrorists. Furthermore, the attackers were foreigners who only came to Kenya to commit the terror attack and could not have conspired with the appellants.

143. I shall now move straight to the analysis of evidence adduced on the charge of conspiracy. I note the prosecution relied mainly on call data which showed communication between the appellants and 1st terrorist cum attacker one Mohammed Abdinur and between the appellants themselves.

144. The evidence starts with recovery of five (5) sim cards from the vehicle suspected to have been used by the four terrorists Mohamed Abdinur Said, Ali Hassan Afrah aka Dhuhullow, Ahmed Hassan Abukar and Yahye Ahmed Osman.

145. The subject vehicle was found outside Shopping Mall. The details of the five (5) Sim cards holders are indicated at page 11 of the Westgate Terrorist Attack Investigation and Analysis Report produced as (Pexh 130).

146. Similarly, page 12 of the report shows the telephone numbers used in first four (4) Sim cards while page 13 of the report reveals the name of the persons who were registered by Safaricom as holders of the Sim cards and cell phone numbers. These were held to be the prime terrorist who attacked the Mall.

147. The details of the recovered Sim cards, telephone numbers and persons associated are as indicated below: -

Simcard Holder S/no Mobile No. Owner

- a. 89254027841011558221 —0726658736—Mohamed Abdi Saciid
- b. 89254029451004040563—0704784254—Abdullahi Dogon Subow
- c. 89254028281001135335—0712743260—Abdiqadir Abdi Saciid
- d. 89254027681000263627—0725408139—Abdiqadir Abdi Saciid
- e. 89254027751013087907—Inactive—N/A

148. Pursuant to the above there is no evidence that the appellants were at Westgate Mall on the day of attack. That informed their acquittal on the charge of committing a terrorist act.



149. Be that as it were, further evidence reveals that of the above phone numbers, numbers 0712-743260 and 0725 408139 which used the Sim cards recovered from vehicle were active at the Mall during the attack while the other two were not active or used.
150. However, to revert to call data evidence page 25 of the investigation report (Pexh 130) reveals that on the day of the attack the owner of phone call number 0712-743260, left Al-habib Eastleigh at 12.30 hours and arrived at Westgate Shopping Mall at 13.47 hours. Similarly, the holder of the number 0725 408139 departed from same destination to the Mall while communicating with other numbers number 0712-743260. These clearly shows the terrorist were communicating with each other on the way to the mall.
151. The question is: how are the appellants linked to these terrorists' numbers. The 1st appellant is linked to is cell phone number 0726-658736, whose Sim card was recovered in the terrorist vehicle and used by one of the attackers, Mohamed Abdinur on 17th June 2013.
152. That on the material date the number 0726-658736, had contact with the 1st appellant number 0717-905599. Further that phone number shared same hand set IMEI No353784046008780 with the 1st appellant's phone Nokia 180 using number 0717-905599. Thus, the 1st appellant's shared hand set with Mohammed Abdinur and so did the 2nd appellant's Nokia black in colour.
153. The evidence of Sgt Paul Maingi who prepared the report exhibit 44 details how the 1st terrorist communicated with the appellants. That the 1st appellant's phone number 0717-905599 was in communication with the 1st terrorist Mohammed Abdinur's number 0726-658736 a total of 215 times between 19th June and 20th August, 2013.
154. The 1st appellant's number 0717-905599 was also in contact with number 0704-784254 used by Abdullahi Dugow Subow who purchased the motor vehicle KAS 575X a total of 16 times between 20th August to 26th August 2013. The 1st appellant's said number was in contact with number 0715-499160 a number associated with transfer of money from Eastleigh to Mogadishu between 26th August to 19th September, 2013, a total of 71 times.
155. Further, 1st appellant's number 0717-905599 was in contact with number 0725-692951 a total of 27 times between 1st August and 29th September, 2013. That was the number in the hand set that was used to get the insurance cover for the terrorist vehicle. Further the 1st appellant would call Mohammed Abdinur, and Abdinur would call the other terrorists.
156. The afore evidence reveals that the 1st appellant was in contact with more than one terrorist between 17th June to 19th September, 2013, before the attack up to 29th September, 2013 after the attack.
157. As such his defence that he had no contact with the terrorists before August 2013 is not tenable and that he only knew the terrorist Mohammed Abdinur through a relationship with his sister is also not true and he cannot justify how his phone communicated with the other attackers. Further if the relationship over the attacker's sister started in August 2013, then doesn't his earlier contact with the attacker Mohamed Abdinur in June, 2013.
158. As regard the 2nd appellant, he used phone number 0725-692951 to contact phone numbers 0726658736, 0715499160 and 0704784254 all of Mohamed Abdinur Said, a total of 26, 42 and 5 times respectively and with the 1st appellant 37 times. That communication took place between 30th August and 4th September, 2013.
159. The above analysis clearly indicates that the 2nd appellant was in contact with the same terrorist the 1st appellant communicated with. It follows that even if the appellants had business of clothes the



communication between them place them, there is evidence of communication the terrorists who communicated with both of them. Consequently, his defence is not tenable and neither is the argument that the 2nd and 3rd accused were released as the same does not vindicate him.

160. Further the respondent did not appeal against the acquittal of the 2nd and 3rd accused to accord this court an opportunity to test the finding of the trial court and thus not available to this court to deal with.
161. I note from the judgement of the trial court at page 155, it is observed that the 1st appellant was in contact with all the terrorists and the 2nd appellant. That the 1st appellant had both call and physical contact with Abdinur, the 1st attacker during the period of June and September 2013. Further, the 1st appellant conceded to sharing a handset with Abdinur. Similarly, the 2nd appellant communicated with all attackers and had physical contact with the 1st attacker Abdinur.
162. In arriving at its decision after evaluating evidence and submissions, the trial court found that communication between the appellants and attackers was not disputed.
163. The trial court distinguished the case of Aboud Rogo cited by the appellants to argue that call communication per se was not adequate to sustain a conviction and held that the afore case was on common intention with respect to the charge of murder.
164. The trial court also distinguished the case of; Hania Said Sagar where calls made were only four (4). That, in this case it was over a long period and very frequent. However, the trial court admitted the content of communication was not available but held that the frequency and pattern was adequate.
165. The trial court then analysed the law, ingredients and arguments of the parties on count (2) of conspiracy and held that the 1st and 2nd appellants were in active communication with the terrorist and would not be doing so without any link to them.
166. The court stated as follows:

“Conspiracy is complete when the agreement to enter into is formed, even if nothing is done to implement it. Implementation gives effect to the conspiracy, but it does not alter its essential elements....

Thus, the first element of the crime of conspiracy is the existence of agreement amongst the co-conspirators. But the prosecution does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The prosecution also does not have to prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objective(s), or agreed to all the details, or agreed to what the means were by which the objective(s) would be accomplished. The prosecution is not even required to prove that all the people named in the charge were, in fact, parties to the agreement, or that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known.

What the prosecution must prove beyond a reasonable doubt is that two or more persons in some way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective

If it is established that a criminal agreement or conspiracy existed, then in order to find the accused person guilty of conspiracy the prosecution must also prove beyond a reasonable doubt that the accused person knowingly and intentionally joined that agreement or conspiracy during its existence. The prosecution need not prove that the accused person



knew everything about the conspiracy or that he or she knew everyone involved in it, or that he or she was a member from the beginning. The prosecution also does not have to prove that the accused person played a major or substantial role in the conspiracy.”

167. Having evaluated the evidence adduced, I find that the trial was well guided in its finding on conspiracy. The intention of the conspirators cannot be supported by direct evidence “for not even the devil knoweth the mind of man”. Conspiracy by its nature is an opaque offence heavily guarded and clouded.
168. It is not easy to find direct evidence and indeed part of commission the offence is to conceal the evidence. Thus if the court were to insist on direct evidence per se, no one will be convicted of the offence. The knowledge and involvement in the offence can be inferred from the conduct of the parties with a common desire to commit a criminal offence.
169. The involvement of the appellants with terrorists within the period before and after the terror attack negates their innocence is supported by circumstantial evidence herein.
170. The law on circumstantial evidence is settled. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows: -

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“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 of 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.” (emphasis mine)

171. Furthermore, the court in *Republic v Jumaa Kaviha Kalama Ndolo* [2020] eKLR citing the case of *DPP Kiborne 1973 AC 729*, stated as follows on circumstantial evidence: -

“Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion. It works by cumulatively, in geometrical progression, against other possibilities and has been likened to a rope composed of several cords:

One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. There may be a combination of circumstances no one of which would raise a reasonable suspicion but the three taken together may create a strong conclusion of guilty with as much certainty as human affairs can require or admits of.”(emphasis added). See also *Ndurya versus Republic* [2008] KLR 135 24

172. In conclusion I find that the circumstances of the case herein, both appellants knew Mohammed Abdinur physically, in fact he operated from Eastleigh where the appellants lived, communicated with him severally before and after the attack and indeed the attack took place during the communication period. Therefore, it leaves no doubt in the mind of a reasonable person of sound mind on what the communication was all about. As such the appellants defence hold no water in the light of these evidence. I uphold the conviction on count 2.



173. As regards the 5th and 6th count, the prosecution evidence is that the laptop was recovered from the 1st appellant. I have seen the inventory made after the recovery and which the 1st appellant did not sign and find that failure to sign does not mean he did not have the laptop.
174. The officers who arrested him did not know him. There are no reasons advanced why they would have planted it on him and/or videos therein. I have looked at the report on the same and the trial court observation thereon as indicated in the trial court record and they are *res ipsa loquitur*.
175. The 1st appellant submits that, he was not in possession of laptop and/or the videos as he did not have control over them as they belonged to Google.
176. The term possession is not defined in the *Prevention of terrorism Act*, but under section 4 of the Penal Code as:-
- (a) “Being in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself of any other person;”
177. The Court of Appeal in the case of; Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR, stated:
- “In our view, under that provision, being in possession of the RDX does not require the appellants to be in actual, personal physical possession of it. So long as there is evidence on record that they knowingly had the RDX at the golf course for their own use or that of any other person, that will constitute possession within the meaning of the Penal Code. Indeed in *Martin Oduor Lengo & 2 Others v. Republic* [2014] eKLR and *Chispine Kent Otieno v. Republic* [2017] eKLR, this Court affirmed that possession under section 4 of the Penal Code encompasses both actual and constructive possession. We are satisfied that this ground of appeal too has no merit.”
178. Finally, Black Law’s Dictionary, 9th Edition defines possession as:
- “The fact of having or holding property in one’s power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object”.
179. In the instant matter I note the inventory dated 30th September 2013 by Corporal Lentirangoi (PW31) shows that the 1st appellant was arrested at Moi’s Bridge near Kitale at about 1600Hrs and the following items recovered:
- a. Black HP laptop bag
 - b. Black Compaq laptop
 - c. Nokia 103 mobile IMEI 357261/05/073483/6 with Safaricom simcard serial No. 89254029141009530052
 - d. Kenyan identity card 36234022 (not seen)
180. An exhibit memo form forwarded a laptop make Compaq serial No. 55CB1333XM3 marked “A” and required to established whether it contained information on the Westgate attack or any other supporting evidence under section 4(2) of the *Prevention of Terrorism Act*.



181. The memo form further gives the details of the suspect, the date of the recovery of the laptop being 30th September, 2013 along the Eldoret – Kitale Highway. It was submitted by Corporal Ndungu. Exhibit 110 is a report on the forensic examination of the laptop which confirmed the videos were capable of instigating terrorist attacks.
182. The 1st appellant admitted in his defence, that he was arrested by (PW31) Lentirangoi. Therefore, his argument that there was nothing to show that the laptop belonged to him is not tenable. Furthermore, his argument that the videos recovered from the said laptop were from a public site (YouTube) and that the prosecution could not tell who was using the laptop is not tenable.
183. In convicting him the trial court that had the benefit of watching the videos stated as follows: -
- “I am satisfied that from the detailed evidence tendered by the expert on digital forensic examination herein that the information contained in the videos obtained from sites visited by the 1st accused person on his laptop were for use in instigating commission of or preparation to commit a terrorist act. It was not just one video but several of them with content clearly calling or encouraging others to take up arms against people referred to as infidels. Indeed, there is evidence that at the scene of the attack, the attackers referred to the victims as infidels. Other videos showed a demonstration of how a terrorist attack can be executed.
- I am satisfied that both the laptop and the videos contained therein taken together are articles for use in instigating commission of or preparation to commit a terrorist act.
- I reject the denial by the accused person of his possession of the articles and find that the prosecution evidence has sufficiently countered it.
- I am satisfied that the prosecution has proved the charges of possession of articles for use in commission of a terrorism offence against the 1st accused person beyond a reasonable doubt and I find the accused person guilty thereof as charged.”
184. In conclusion I find that, having been connected to the attackers, it falls in place to arrive at the conclusion that the materials in the videos are materials that can be used to facilitate or instigate terrorism acts. I find no reason to interfere with the convictions on count 5 and 6 and confirm it.
185. On the last charge of giving support to terrorists, the 1st appellant submitted that no evidence was led to show and/or disclose the support allegedly given. Further, that the court found it should have been an alternative charge to the charge of conspiracy and should have collapsed.
186. I have carefully considered the charge and particulars therein and the kind of support allegedly given is not indicated in the charge sheet. It suffices to note that Article 50(2) (b) of *the Constitution* of Kenya requires the accused person to be informed of the charge with sufficient detail so as to answer it.
187. Similarly, Section 134 of the Criminal Procedure Code (*supra*) requires that an accused person be confronted with a specific and particularized allegation of commission or omission. Indeed, failure to do creates ambiguity that defeats the article and section 134.
188. Further although the acts that can constitute assistance are not specifically defined under POTA, section 2 of POTA deals with different acts of commission that constitute terrorist act are would have been useful in framing the particulars of the charge.
189. A proper charge sheet would be similar to the charge and particulars as indicated in the charge sheet in the case of; *Abdirizak Muktar Edow v Republic* [2019] eKLR where the particulars of charge in count



1 in which the appellant was charged with giving support for the commission of a terrorist act contrary to Section 9(1) of the *Prevention of terrorism act* of 2012 read: -.

“The particulars are that the Appellant between the 31st day of June. 2014, at Mandera town within Mandera County knowing gave support to Sheikh Hassan alias Blacky authorizing the use of motor vehicle registration number KBP 274U Toyota Succeed for the use in commission of a terrorist act”.(emphasis added)

190. In the absence of clarity in the particulars of the charge the conviction thereon cannot stand. I quash the conviction on counts 3 and 12 and set aside the sentence.
191. Finally, as regard the sentence meted out against the appellants it is lawful and proper under the law and I also note that the offence committed at Westgate Shopping Mall was horrendous, treacherous, and ghastly, horrific and unbearable and no sentence can remedy the pain victims of that crime went through.
192. I further note that the trial court ordered some sentences run concurrently and period in custody be considered thus significantly reducing the period to serve. Furthermore, even if sentences were lenient it cannot be enhanced without a notice by the respondent for the enhancement to accord the appellants an opportunity to be heard. I will therefore leave the sentences on the counts 2, 5 and 6 as imposed.
193. However, before I pen off, I wish to make general comments that the attack on Westage Shopping Mall should teach us lessons as a Country to be more vigilant in discharge of our duty or security issues. The terrorist in this matter managed to infiltrate the systems and inter alia; obtained a vehicle for use and insurance cover without vigilance in ascertaining their true identities, conducted the purchase of the vehicle hurriedly and deposited dollars in the bank without raising suspicion.
194. The terrorists obtained accommodation within Eastleigh moving in with minimal personal effects and for a short stay without raising any suspicion, while others obtained national identity card and sim cards fraudulently.
195. Furthermore, the investigators could not manage to establish whether the terrorist were eliminated during the attack or managed to escape and if they escaped where they were harboured and by who.
196. Finally, it does appear the planning of the attack took quite some time and as early as June, 2013 if not earlier and it is unfortunate that it was not within the knowledge of the intelligence. I hope as a country we have learnt our lessons.
197. Be that as it may, the afore are the orders of the court. Right of appeal 14 days explained.

DATED, DELIVERED AND SIGNED THIS 28TH DAY OF JUNE 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Prof. Nandwa for the 1st appellant

Mr. Chacha Mwita for the 2nd appellant

Mr. Ondimu for the respondent

Quinter: Court Assistant

