Case Digest

Decisions of Kenyan Courts on Terrorism

Brian Kimari and Melissa Mungai

May 2020

Acknowledgment

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Introduction

Over the last two decades or so, Kenya has been confronted with the threat of terrorism that has evolved from a largely international phenomenon linked to Al Qaeda to a homegrown problem associated with Al Shabaab. In 1998, Al Qaeda attacked the United States embassy in Nairobi killing over 200 people. That attack, just like the 2002 attacks on an Israeli-owned hotel in the Kenya coast was targeted at foreign interests within the country. The emergence of Al Shabaab in neighbouring Somalia in 2006 however, changed the nature of the terrorist threat with Kenya now a target of the Somalia-based group. Over time, the group has also recruited Kenyans to its ranks mutating the threat into a homegrown challenge.

In response, Kenya has undertaken a broad range of counterterrorism measures. These have ranged from the country's military intervention in Somalia in 2011, to a host of domestic law enforcement measures. In 2012, Kenya enacted the Prevention of Terrorism Act and has in the last several years arrested and prosecuted a large number of individuals under this law as well as other laws.

A number of studies and commentaries have evaluated and critiqued these interventions from both legal and non-legal perspectives. Most of the cases have been tried in magistrates' courts as per the jurisdiction conferred by the Prevention of Terrorism Act and only a limited number of these have found their way to the superior courts on appeal. Consequently, the jurisprudence on terrorism matter is still evolving. Nevertheless, the few cases that have been determined by the High Court, Court of Appeal, and the Supreme Court do provide us with an opportunity to better understand how the judiciary has interpreted the counterterrorism legislation.

This case digest draws from the decisions of these courts to provide summaries of various judgments from the year 2015 to 2019, clarifying the emerging precedents, and the interpretation of the courts on a number of issues. While each case deals with a multitude of issues, each case lays precedent on a particular question, that is, the central point of the matter before the court. This digest categorises these as follows: standard of proof in terror offences; admissibility of evidence; appropriate charges under the prevention of terrorism Act, and fair trial and sentencing. Ultimately, this digest is intended to whet the appetite of researchers and policy experts and to provoke and promote the critique and inquiry into the legal and judicial mechanisms for addressing terrorism in Kenya.

A Standard of Proof in Terror Offences

1 Abdalla Said Katumu v Republic [2018] eKLR

(Being an appeal arising from conviction and sentence in Chief Magistrate's Court (Kwale) in Criminal Case No. 897 of 2016 dated 16th March 2016 by Hon. B. Koech SRM.)

Court: High Court at Kwale **Reference:** Criminal Appeal No. 23 of 2018

Date Delivered: 26 October 2018 **Judge:** Hedwig I Ong'udi

Read Judgement **here**

Implications

The court establishes that prosecutors trying terror offences should satisfy the evidentiary burden required in all criminal matters. The judge warns against arrests made on trumped up terrorism charges and castigates failure to investigate thoroughly.

However, the case might also affect fair trial guarantees of persons accused with terror offences. The judgment permits police to conduct a search without a warrant for protection of 'national security' but does not require them to tender proof that it was impracticable to comply with the provisions of section 118 and 119 of the Criminal Procedure Code on obtaining search warrants.

Background

The Appellant was arrested on 17 December 2016 in his Kwale home after police allegedly found a firearm in his home after conducting a search. He was charged with two counts:

- Being in possession of a weapon within premises contrary to section 12B of the Prevention of Terrorism Act 2012.
- Being in possession of a firearm contrary to section 4(2)(a) as read with section 3(a) of the Firearms Act, Cap 114.

The Chief Magistrate's Court in Kwale acquitted him of the first count. He was convicted of the second count and sentenced to seven years' imprisonment. His appeal was based on the argument that the prosecution had failed to prove the offence without a reasonable doubt and had relied on circumstantial and extraneous evidence.

Questions for determination

a) Whether it was mandatory for the police to have a search warrant before searching the Appellant's home.

b) Whether the Appellant was found in actual possession of the firearm. If not, whether he had knowledge of the possession by any other person.

c) Whether the Appellant's sentence was lawful.

Decision & Rationale

On the first question, the judge ruled that the police did not require a search warrant. The judge argued that the police had a clear and urgent duty to conduct the search in the interest of national security since they had received information that the Appellant was involved in terror activities.

On the second question, the court found that the evidence tendered was insufficient to prove that the Appellant was in actual possession of the weapons. It also rejected arguments that the prosecution need only prove constructive possession. The judge stated:

"My conclusion is that the police officers who went to the Appellant's house had been sent by their boss to arrest him. It did not really matter what he did, had or did not have. They had a mission to accomplish hence the failure to undertake very detailed investigations e.g. taking photos of the scene, dusting the firearm for fingerprints etc."

The court also upheld the trial court's finding that the prosecution must tender evidence linking the Appellant and the offence to terrorism activities. In this matter, possession of weapons was not proven to have constituted a terrorism offence under the Prevention of Terrorism Act. The conviction was quashed and the sentence was set aside.

2 Abdirizak Muktar Edow v Republic [2019] eKLR

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court Milimani Criminal Case No. 884 of 2014 delivered by Hon. Gandani on 30th September 2016)

Court: High Court at Nairobi **Reference:** Criminal Appeal No. 149 of 2016

Date Delivered: 13 March 2019 **Judge:** G.W. Ngenye-Macharia

Read Judgement **here**

Implications

This case sets out the evidence threshold required to convict an accused for various terror offences. Most importantly, the judge outlines the evidence needed to satisfy the intention/mens rea requirement in section 9(1) of Prevention of Terrorism Act, which makes it an offence to **knowingly** support the commission of a terrorist act.

Background

The Appellant was arrested in Talek Area, Mandera County on 2 June 2014 after police allegedly learnt of an impending terrorist mission within Mandera Town by some terrorists under the command of Sheikh alias Blacky who had crossed over to Somalia to secure grenades. On laying the ambush, they managed to gun down the said Sheikh and another terrorist while one managed to escape. Police submitted evidence that the Sheikh had earlier communicated with the Appellant, who was the owner of the motor vehicle that was used to launch an aborted terrorist mission and had purportedly hired the said motor vehicle as a taxi from him at a fee of Kshs 2,000. Police also submitted evidence that the Appellant was found with a mobile phone containing four audio files which were for use in instigating the commission of a terrorist act in contravention of the said Act.

He was consequently convicted by the Chief Magistrate's Court at Milimani, Nairobi and sentenced to concurrently serve 20 years imprisonment for count I, and 10 years each for counts II, III, V, VI, VII and VIII outlined below.

- **Count I:** Giving support for the commission of a terrorist act contrary to section 9(1) of the Prevention of Terrorism Act of 2012.
- **Count II:** Being a member of a terrorist group contrary to section 24 of the Prevention of Terrorism Act.
- **Count III:** Collection of information contrary to section 29 of the Prevention of Terrorism Act.
- **Counts V - VIII:** Being in possession of an article(s) contrary to section 30 of the Prevention of Terrorism Act.

Questions for determination

a) Whether the charge sheet was defective

b) Whether the Appellant supported acts of terrorism

c) Whether the Appellant was in possession of articles/information for the use in the commission of a terrorist act

d) Whether the Appellant was/is a member of the Al Shabaab

Decision & Rationale

The Appellant submitted that the charge sheet was generic and lacked specificity, thus, failed to disclose the terrorist offence that he allegedly supported. The judge found that the ground of appeal had failed stating: "It suffices to state that not all information or facts of the case can be squeezed into the particulars of the charge. What is paramount is that the particulars disclose all the essential elements necessary for the proof of the offence."

On whether the Appellant supported acts of terrorism, the court held that the prosecution did not avail any cogent evidence that clearly demonstrated that the Appellant gave out his vehicle with full knowledge and that the said motor vehicle was to be used for terrorist acts. The judge reasoned that the prosecution failed to produce sufficient evidence:

- that the Appellant had knowledge that his car was to be used for committing a terror offence considering that the car was used to operate as a taxi within Mandera town. Thus, he could not be faulted for merely hiring out his vehicle.
- that the Appellant gave out the said motor vehicle solely for the commission of a terrorist attack.
- that the terror attack would be facilitated by the Appellant's vehicle.
- linking the Appellant to the eight grenades that were recovered in his motor vehicle, which were intended for the commission of a terrorist act.

On the third question, the court found that the ingredients of the offence as defined under section 30 of Prevention of Terrorism Act were sufficiently established and supported the Appellant's conviction for counts V, VI, VII and VIII. The judge found that it was clear that the content of the said pictures, videos and audio files found in the Appellant's phone related to terrorist activities because they encouraged the followers or sympathisers of the group. Moreover, the Appellant did not dislodge the prosecution's evidence as he chose to remain silent on the issue.

Considering whether the Appellant was a member of Al Shabaab, the judge relied on evidence recovered from the Appellant's mobile phone showing that he supported terror activities. For instance, an invitation to attend an Al Shabaab meeting was recovered and the Appellant had circulated this message. Following up on this evidence, the police testified that they intercepted the meeting and seized an Al Shabaab flag and firearms. Besides, the Appellant did not give rebuttal evidence or offer his version of events.

Having quashed the conviction for count I, the court set aside the sentence of twenty years imprisonment. The conviction and sentence in respect of Counts II, III, V, VI, VII and VIII were, however, upheld.

3 Mohammed Haro Kare v Republic [2016] eKLR

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Criminal Case No. 787 of 2014 delivered by Hon. Daniel Ogembo, CM on 14th March 2016)

Court: High Court at Nairobi

Reference: Criminal Appeal No. 49 of 2016

Date Delivered: 29 November 2016

Judge: G.W. Ngenye-Macharia

Read Judgement **here**

Implications

This case establishes the threshold required for the prosecution to discharge the burden of proof of beyond reasonable doubt for the offence of being a member of a terrorist group as per section 24 of the Prevention of Terrorism Act.

Background

On 15th March 2014, the Appellant was arrested in Huruma Estate, Nairobi on suspicion of involvement in twin blasts on commuter vehicles along Thika Superhighway.[1] On arrest, he was in possession of a mobile phone, which after forensic analysis revealed various photographs of the Appellant in military uniform holding an AK47 rifle and downloaded photos of known Al Shabaab and Al Qaeda operatives. He was charged with three counts:

- **Count I:** Being a member of a terrorist group contrary to section 24 of the Prevention of Terrorism Act, 2012
- **Count II:** Collection of information contrary to section 29 of the Prevention of Terrorism Act
- **Count III:** Being in possession of an article contrary to section 30 of the Prevention of Terrorism Act

He was convicted on the first count and acquitted of Counts II and III due to insufficient evidence. He was sentenced to 20 years imprisonment.

Questions for determination

a) Whether the prosecution proved its case beyond reasonable doubt

b) Whether the sentence prescribed was appropriate in the circumstances

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Decision & Rationale

The court held that to prove the offence of being a member of a terror group under section 24 of the Prevention of Terrorism Act, the prosecution ought to demonstrate that:

- the accused person belongs to or professes to be a member of the terror group.

[1] This was later proven to be false information.

- the terror group either falls under the category of a specified entity (usually gazetted) or involved in the commission of a terrorist act as prescribed by statute.

The court examined whether the trial court erred for basing their finding that Al Shabaab was a proscribed group on Kenya Gazette Notice No. 12585 of 2010, noting that Al Shabaab was therein proscribed, along with other entities, under section 22 of the Prevention of Organised Crimes Act. It also took notice of Gazette Notice No. 1618 published on 14 March 2016, which does proscribe Al Shabaab under the Prevention of Terrorism Act. The court held that despite the proscription under the Prevention of Terrorism Act being published after the alleged offence had been committed, the court could take judicial notice of the group's existence and involvement in terror attacks as a matter of general notoriety. It, thus, found Al Shabaab to be a terror group.

On whether the prosecution proved the Appellant's membership in Al Shabaab, the court concluded that under section 2 of Prevention of Terrorism Act there are two elements of a person's actions that should be demonstrated clearly: i) being a member or ii) professing to be a member. The judge considered that none of the witnesses testified to the fact that the Appellant professed being a member of Al Shabaab and that the Appellant had in fact denied the allegation. The court also considered that the investigating officer relied on the photos extracted from the phone to prefer the charges and found that this did not meet the element of professing. The judge asserted that "to profess involves a positive acclamation, a confession to something."

Relatedly, on whether the evidence showed that the Appellant was a member of a terror group, the court held that such determination requires consideration of whether there is circumstantial evidence that points to a person's association with the group. Necessarily, the prosecution must prove that the "actions alleged against the accused show a nexus with operations associated with the outlawed group as to enable the court reach a conclusion to his membership." The court offered the subsequent non-exhaustive list of such actions:

- a person being trained by the group on the use of weapons
- possession of weapons and articles associated with the group
- travelling to the known operations of the group
- being associated with members of the group, or being together with members of the group or taking part in activities of the group.

The judge considered that the Appellant was convicted under section 24 based on evidence that he was in possession of a mobile phone with photos of the Appellant holding an AK 47 and wearing military uniform and photos of known Al Shabaab and Al Qaeda members. He faulted the trial court for solely relying on the photos and not showing a linkage between the actions of the Appellant and the operations of the terror group noting that:

- There is no proof of ownership of the phone to the Appellant nor was any association created between the Appellant and the registered owner of the phone.
- While some of the photographs bore the image of the Appellant in military attire, and bearing a weapon, it was not alone sufficient to implicate the Appellant as a member of the Al Shabaab.
- No attempt was made to demonstrate operatives, elements and other articles of the Al Shabaab and to link the same to the Appellant. While the investigating officer made general reference to photos showing Al Shabaab members on the training ground and articles or symbols used by Al Shabaab, he did not provide a description of those references.
- There was no further evidence produced to prove the allegation that the Appellant travelled to Somalia and trained and associated with the Al Shabaab before returning back to Kenya.

The conviction and sentence were set aside.

4 Nur Deka Maalim v Republic [2016] eKLR

(From original conviction and sentence in Criminal Case No. 157 of 2014 of the Principal Magistrate's Court at Wajir L. Kassan -PM).

Court: High Court at Garissa **Reference:** Criminal Appeal No. 88 of 2015

Date Delivered: 29 November 2016 **Judge:** George Dulu

Read Judgement **here**

Implications

This case establishes the evidence threshold required to convict an accused for the Prevention of Terrorism Act offences of possession of ammunition and preparation to commit a felony. The case further puts investigators to task, requiring them to prove a connection between their actions and the intelligence they relied/or acted on.

Background

On 3 May 2014, the Appellant and three others (who were acquitted) were arrested in Wajir after the Anti-Terror Police Unit (ATPU) received intelligence that some people had just come from Al Shabaab training in Somalia. While none of the arrested were found with any weapons at the point of arrest, the police conducted a search on the Appellant's residence the next night and found seven AK47s, hand grenades, and ammunition.

The Appellant was charged with the following offences:

- **Count I:** possession of explosive materials contrary to section 29 of the Explosives Act (Cap 115)
- **Count II:** possession of ammunition contrary to section 4(2) (a) & 4 (3) (b) of the Firearms Act (Cap 114)
- **Count III:** preparation to commit a felony contrary to Section 308 (1) of the Penal Code
- **Count IV:** being a member of a terrorist group contrary to section 24 of the Prevention of Terrorism Act, 2012

The Appellant was acquitted of count I and count IV but was found guilty of count II and count III for which he was convicted and sentenced to serve concurrent sentences of 5 years and 7 years imprisonment respectively.

Questions for determination

a) Whether the trial court erred in finding that Count II had been proven beyond reasonable doubt.

b) Whether the trial court erred in finding that Count III had been proven beyond reasonable doubt.

Decision & Rationale

The court held that the prosecution did not prove count II (possession of ammunition) beyond a reasonable doubt. The judge considered that since the people who gave intelligence did not testify and the Appellant was not found in possession of ammunition, the evidence on record was insufficient to show that the police

arrested the Appellant because of intelligence directing them to search for certain ammunition. While the evidence pointed to an allegation of undergoing training with Al Shabaab, there was none to show that the appellant had willingly offered the police details on the location of the alleged ammunition. Therefore, it would seem that the police were acting on their own private and confidential information. Further, possession was not proved beyond reasonable doubt because the Appellant lived in an unlockable grass-thatched house and thus did not have exclusive access and control to the house such that the items may have been planted by the police or put there by somebody else.

Concerning Count III, the court held that since it had found that the Appellant was not in possession of ammunitions, the Appellant could not have committed the offence of preparation to commit a felony. Further, the judge held that even if the offence of possession was proved, the prosecution was duty-bound to prove that the ammunition was specifically possessed in preparation to commit a felony.

The conviction and sentence were set aside.

5 Osman Mohamed Balagha v Republic [2018] eKLR

(From the conviction and sentence in Garissa Chief Magistrate's Court Criminal Case No. 393 of 2015 by Hon. T. L. Ole Tanchu, SRM)

Court: High Court at Garissa **Reference:** Criminal Appeal No. 30 of 2017

Date Delivered: 4 May 2018 **Judge:** George Dulu

Read Judgement **here**

Implications

To prove the offence of possession of an article for use in instigating the commission of a terrorist act, it should be clearly demonstrated that the person was in possession of the article and the person intended to use the article for terror-related purposes.

Background

On 9 April 2014 in Trans Nzoia County, the Appellant was arrested when the police had gone to the home of the Appellant looking for a Tanzanian who was indicted in the terror attack at Garissa University. The Appellant was found in possession of a Samsung tablet, which had two videos: one was a video that allegedly called others (in Kiswahili) to join Al-Shabaab; and the other portrayed a man being beheaded in an unknown place by a group who were professing in Arabic that it was an act of terrorism. He was charged with the count of:

- Possession of an article for use in instigating the commission of a terrorist attack contrary to section 30 of the Prevention of Terrorism Act, 2012.

He was convicted and sentenced to ten years imprisonment.

He lodged his appeal, claiming that he downloaded the videos for his research on interfaith conflict, which he used in a presentation at a conference on young generation interfaith. Further, the first video was not about instigating terrorism while the second video was in Arabic which could neither be comprehended by the witnesses nor the court. Furthermore, the information found on the Appellant's Facebook page proved that he was a teacher in Garissa or Mombasa and hence, an adequate connection between any terrorist acts or Al Shabaab and him was not made.

Questions for determination

a) Whether the prosecution proved that the information contained in the video was for use in instigating commission of or preparation to commit a terrorist act.

Decision & Rationale

The appellate judge considered that since the Appellant did not deny possession of the tablet and knowledge of the contents of the videos, the prosecution need only prove that the articles were held for use in instigating commission of a terror attack. The court examined the contents of the videos and found that the first video that

called or encouraged others to join Al Shabaab was clearly meant to facilitate the commission of terrorist acts. Besides, the Appellant had admitted that he used the video to teach unidentified people in Mombasa. Further, the court held that the second video was meant to demonstrate how terrorist acts can be executed. Thus, the judge found that the possession and content of the videos, and admitted use in teaching the material to others proved commission of section 30 of the Prevention of Terrorism Act.

The Appellant's conviction and sentence were upheld and the appeal was dismissed.

B Admissibility of Evidence

6 Ahmad Abolfathi Mohammed & another v Republic [2016] eKLR

(An appeal arising out of the conviction and sentence of Kiarie W-Chief Magistrate- delivered on 6th May 2013 in Chief Magistrate's Court in Nairobi. Criminal Case No.881 of 2012)

Court: High Court at Nairobi

Reference: Criminal Appeals Nos.106 & 107 of 2013

Date Delivered: 24 February 2016

Judge: Luka Kimaru

Read Judgement **here**

Implications

This judgment clarifies the rule on sufficiency of circumstantial evidence, that is, the evidence must be inconsistent with the innocence of the accused and points to no one else other than the accused as the persons who committed the offence.

Background

The Appellants, Ahmad Abolfathi Mohammad and Sayed Mansour Mousavi, were arrested on 19 June 2012 for allegedly having planted an explosive substance namely RDX (Cyclotrimethlyne trinitramine) at Mombasa Golf Course along Mama Ngina Drive, Mombasa County. After interrogations, the Appellants accompanied the police to the golf course where the RDX was found. They were charged with the offences below.

- **Count I:** committing an act intended to cause grievous harm contrary to Section 231 (f) of the Penal Code.
- **Count II:** preparation to commit a felony contrary to Section 308 (1) of the Penal Code.
- **Count III:** being in possession of explosives contrary to Section 29 of the Explosives Act.

They were sentenced to serve concurrent sentences of life imprisonment, 10 years imprisonment and 15 years imprisonment for the respective counts.

Questions for determination

a) Whether the provisions of Section 200 of the Criminal Procedure Code were breached when the convicting magistrate took over the proceedings from the magistrate who first heard the case.

b) Whether the prosecution adduced evidence, which connected the Appellants with the crime.

c) Whether RDX was an explosive within the meaning ascribed to it by the Explosives Act.

d) Whether the sentence was harsh and excessive.

Decision & Rationale

The court considered that since the Appellants were represented by counsel, they should have been aware of their rights under Section 200(3) of the Criminal Procedure Code to recall witnesses or request a new trial. Moreover, when the succeeding magistrate took over the proceedings, counsel for the Appellants indicated that they did not have objection to the case proceeding from where it had reached. This ground of appeal was therefore dismissed.

The court held that both direct and circumstantial evidence placed the Appellants within the proximity of the area where the RDX was buried and later recovered. To rely on circumstantial evidence, a court must consider whether the exculpatory evidence adduced by the prosecution is inconsistent with the innocence of the accused and points to no one else other than the accused as the persons who committed the offence. On this, the court found that the Appellants had special knowledge of where the explosive substance was buried, having escorted the police to the specific spot where it was recovered. Further, the prosecution adduced evidence in form of intelligence reports, which established that the Appellants were in the vicinity of the place where the RDX was recovered a few days earlier.

The judge dismissed the Appellants' argument that since RDX required a stimulus or other substances to make it an explosive, it did not meet the definition of an explosive. The court found that RDX is an explosive as per section 2 of the Explosives Act, that is, "manufactured with a view to produce a practical effect by explosion." The court held that the Appellants were found in possession of RDX, a material with no other purpose than to be used as an explosive, in circumstances that clearly suggested that they were preparing to commit a felony by causing an explosion that would have caused grievous harm to the people of Kenya.

On whether the sentence was justified, the court held that since the intended terror attack was thwarted and the Appellants did not succeed in their criminal intention, the offence disclosed was inchoate, that is, denoting attempt or preparation to commit an act. Therefore, the sentence of life imprisonment imposed on the Appellants was not justified for the offence. The judge set aside the sentence and substituted it with a consolidated sentence of 15 years imprisonment for each Appellant.

7 Ahmad Abolfathi Mohammed & another v Republic [2018] eKLR

(Appeal from the judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 9th January 2013 in H.C.CR.A. Nos. 106 and 107 of 2013)

Court: Court of Appeal at Nairobi

Reference: Criminal Appeal No. 135 of 2016

Date Delivered: 26 January 2018

Judge: P.K. Kariuki, PCA; K. M'inoti; & A. K. Murgor, JJ.A.

Read Judgement **here**

Implications

The Court of Appeal pronounced itself on the admissibility of information given by the accused outside of court. The court found that while confessions may be legal, information leading to the discovery of evidence is inadmissible. This protects the rights of the accused not to be tortured by law enforcement officers as prohibited under Article 29 of the Constitution.

Background

See Case [6] above

Questions for determination

a) Whether the High Court erred by holding that RDX is an explosive within the meaning of the Explosives Act.

b) Whether the Appellants were in possession of RDX.

c) Whether the Appellants were denied the right to fair trial as guaranteed by Article 50 (2) (j) and Article 50(4) of the Constitution.

d) Whether the evidence tendered by the prosecution was sufficient to support the conviction of the Appellants.

e) Whether contradictions in the prosecution's case voided the case against the Appellants.

f) Whether the High Court properly exercised their/its discretion in sentencing the Appellants.

Decision & Rationale

On the first question, the court upheld the High Court's ruling that RDX did meet the definition of an explosive under the Explosives Act despite the fact that it requires stimulus to detonate. The court likened RDX to gunpowder and dynamite, both of which are defined as explosives under the Act despite their inability to self-detonate.

The court similarly dismissed the second ground of appeal stating that possession under section 4 of the Penal Code encompasses both actual and constructive possession. Despite the parties not being in actual possession, there was evidence that the Appellants knowingly had the RDX at the golf course for their own use or that of any other person.

The court also found no merit in the claim that the Appellants' right to fair trial had been infringed. They found that the prosecution shared all the evidence they intended to rely on with the Appellants. Therefore, there was no violation of Article 50 (2) (j). The judges also held that the Appellants had failed to substantiate the claim that the evidence was obtained through torture which would have been inadmissible as per Article 50(4). This decision was also informed by the fact that the Appellants did not raise the issue in their first appearance and even praised the police in earlier testimony given in court.

However, the judges found that the High Court erred in holding that the evidence tendered was sufficient to convict the Appellants. This was guided by two reasons. First, the circumstantial evidence was too weak to justify a conviction since there were co-existing circumstances capable of destroying the inference of guilt. The court agreed with the Appellants that the golf course was not fenced or guarded and that it was possible for any member of the public to have entered it and place the RDX where it was found. Secondly, that the evidence that allegedly led to the discovery of the RDX was inadmissible in court. They held that, outside a confession, information from an accused person leading to discovery of evidence is not admissible.

The court further agreed with the High Court's finding that there were no discrepancies of the nature that would have created doubt and vitiated the prosecution's case. While the Court of Appeal also agreed that the sentence issued by the High Court was neither malicious nor manifestly harsh and excessive, they faulted the lower court for two reasons. First, it issued an omnibus sentence of 15 years for all three counts rather than issuing a sentence for each count. Secondly, that in sentencing the Appellants, it did not properly consider the time served in custody. They held that the first appellate court acted contrary to section 332 of the Criminal Procedure Code in holding that the sentence should take effect from the date of their conviction by the trial court. Instead, the sentence should have taken effect from the date of arrest since they were in custody from that date.

Following their finding that the evidence tendered did not support conviction of the Appellants, the Court of Appeal quashed the Appellants' conviction and sentence and ordered that the Appellants be repatriated to their country of origin upon release.

8 Republic v Ahamad Abolfathi Mohammed & another [2019] eKLR

(Being an appeal from the judgment of the Court of Appeal delivered at Nairobi on 26th January 2018 in Criminal Appeal No. 135 of 2016 and pursuant to the leave granted on 28th September 2018)

Court: Supreme Court of Kenya **Reference:** Petition No. 39 of 2018

Date Delivered: 15 March 2019 **Judge:** Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ

Read Judgement **here**

Implications

This judgment clarified that there is no legal conflict between sections 25A and 111 of the Evidence Act since they apply to different scenarios. It also clarified that, despite the lack of a legal provision to the effect, admissions made to police are admissible in court, though it must be supported by clear and credible corroboration to support a conviction.

Background

See Cases [6] and [7] above.

Questions for determination

a) Whether, despite the repeal of section 31 of the Evidence Act, information given to the police by a suspect leading to discovery of material evidence and such discovered evidence is admissible under the provisions of section 111(1) of the Evidence Act

b) Whether information given to the police by a suspect leading to discovery of material evidence in a case is admissible only under section 25A of the Evidence Act

c) Whether the Court of Appeal erred in equating evidence proceeding from a suspect leading to discovery with a confession under section 25A of the Evidence Act

d) Whether there is an apparent conflict between sections 25A and 111(1) of the Evidence Act

e) Whether the Court of Appeal's decision in this case will hamper police investigations and render detection of crime impossible

f) Whether the Respondents' conviction was based purely on circumstantial evidence and if so, whether the circumstantial evidence on record in this case unerringly pointed to the guilt of the Respondents

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Decision & Rationale

In answer to questions (a) and (d) the superior court argued that admissions made to police in the course of investigations cannot be held to be admissible under section 111(1) of the Evidence Act, which only deals with the burden of proof in the course of a trial. Further sections 111(1) and 25A are not in conflict since the latter pertains to the admissibility of confessions, the two sections thus relate to different scenarios.

In answer to questions (b), (c) and (e), the Supreme Court first faulted the Court of Appeal for holding that "information from an accused person leading to discovery of evidence is not admissible outside a confession....", as this would equate 'evidence leading to discovery' to a confession. It then held that while the information did not meet the definition of a confession under section 25A of the Evidence Act, it is still admissible since police have a right to interview suspects and obtain explanations. Thus, the Court of Appeal's contrary finding would unreasonably hamper the work of police officers and render crime detection impossible.

While the majority opinion found that admissions made to police to be admissible, they also held that unlike a confession, it cannot on its own found a conviction but requires clear and credible corroboration. In this case, the court considered that:

- one of the Respondent's act of leading the police to Hole No. 9 on the Mombasa Golf Club course where the RDX explosive was dug out, was an admission of a material fact
- there was strong circumstantial evidence that there was no proof of anyone else having previously planted anything in the Mombasa Golf Course—more specifically in the vicinity of Hole No. 9—where the RDX explosive was discovered and which the respondents visited at least thrice, the last visit having been a day before the recovery of the RDX explosive from that spot

These supported the finding that the Court of Appeal erred in holding that the respondents' conviction was based solely on circumstantial evidence. They held that the admission coupled with the circumstantial evidence on record sealed the Respondents' guilt.

Thus, the appeal was allowed and the Court of Appeal's decision set aside. The judges affirmed the conviction by the trial court and the High Court's decision and ordered that the Respondents serve the remainder of their imprisonment term after which they should be repatriated to their country of origin.

Dissenting opinions

In their dissenting opinions, Justices Ibrahim and Wanjala agreed with the majority that there is no conflict between sections 25A and 111. Accordingly, Justice Ibrahim argued that parliament would have addressed such conflict because section 25A was introduced to address a legitimate concern (prevention of torture). Besides, section 25A had been amended twice through which parliament would have identified the conflict. Justice Wanjala argued that there could be no conflict since they deal with different evidentiary issues. While section 25A looks at the process of searching for, collecting and admissibility of evidence, section 111 looks at the burden of proof.

The dissenting duo disagreed with the majority with regards to whether the evidence on record was adequate to secure the conviction of the accused. The judges affirmed that the majority erred in examining evidence that was not before the Court of Appeal. According to Justice Ibrahim, both the High Court and the Court of Appeal rendered their decisions based solely on circumstantial evidence, since the prosecution's case was never based on a confession from either of the accused. Both judges then agreed with the Court of Appeal that the circumstantial evidence was insufficient to support a conviction.

C Appropriate charges under the Prevention of Terrorism Act

9 Hamidu Said Ligoli v Republic [2017] eKLR

(From the conviction and sentence in Garissa Chief Magistrates Court Criminal Case No. 316 of 2016 – M. Wachira)

Court: High Court at Garissa

Reference: Criminal Appeal No.19 of 2016

Date Delivered: 11 July 2017

Judge: George Dulu

Read Judgement **here**

Implications

This case extends the criminal procedure doctrine and fair trial guarantee that a charge must disclose an offence in order to put the accused to his defence.

Background

The accused is a Tanzanian national who was arrested on 16 March 2016 at Hare, Garissa County attempting to cross to Somalia. He was charged with two counts:

- **Count I:** Travelling to a terrorist designated county without passing through designated immigration exit points contrary to section 30B(2)(a) as read with section 30C (1) of the Prevention of Terrorism Act 2012.
- **Count II:** Attempting to depart from Kenya through a place that has not been specified as a point of entry or exit contrary to section 59 of the Kenya Citizenship and Immigration Act 2011, Regulation 15(2)(b) as read with Regulation 57 of the Kenya Citizenship and Immigration Regulation 2012.

He pleaded guilty to both counts. He was convicted and sentenced to serve a concurrent sentence of 10 years imprisonment on count I and 1 year imprisonment on count II.

Questions for determination

a) Whether the accused was convicted based on equivocal evidence

b) Whether the sentence was manifestly harsh and excessive

Decision & Rationale

On the first question, the accused did not challenge his conviction thus, the judge upheld the conviction on count II. Regarding count I, the judge pointed out that for a plea to be unequivocal, the charge must disclose an offence and must not be defective. In this case, the judge found that no known offence in count I was disclosed by the charge. Section 30B and 30C of the Prevention of Terrorism Act did not create an offence and the prosecution had not referred to the legal notice declaring Somalia a terrorist country. Thus, the plea was not unequivocal because the accused did not plead guilty of a known offence.

The court set aside the sentence on Count I. Conviction on count II was upheld since it was not challenged. However, the Appellant had served more than his one-year sentence for count II. The court ordered his release and repatriation to Tanzania.

10 Ibrahim Adan Abdirahman v Republic [2018] eKLR

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 846 of 2011 by Hon. T. L. Ole Tanchu-SRM)

Court: High Court at Garissa

Reference: Criminal Appeal No. 34 of 2017

Date Delivered: 29 June 2018

Judge: George Dulu

Read Judgement **here**

Implications

This case shows that the court cannot cure a charge that is based on the wrong section of the law because this would affect the right of the accused to adequately prepare for his defence. The court also considered that to prove an offence under section 30 of the Prevention of Terrorism Act, the prosecution must show that the article or information was specifically held on behalf of another person.

Background

The Appellant, a Somali national, was arrested on 10th August 2015 where he was allegedly found in possession of a drawing of an improvised explosive device (IED). He was charged in the Magistrate's Court at Garissa with two counts:

- **Count I:** Possession of an article for the use in instigating the commission of a terrorist act contrary to section 30 of the Prevention of Terrorism Act, 2012.
- **Count II:** Being unlawfully present in Kenya, contrary to section 53 (1) (j) as read with section 53 (2) of the Kenya Citizenship and Immigration Act, 2011.

He pleaded guilty to count II, for which he was ordered to pay a fine of Kshs 50,000 or serve 1 year imprisonment in default. He pleaded not guilty to count I and was convicted by the Magistrate's Court and ordered to serve 10 years imprisonment.

Questions for determination

a) Whether the provisions of section 200 of the Criminal Procedure Code were breached when the convicting magistrate took over the proceedings from the magistrate who first heard the case.

b) Whether the magistrate erred by relying on evidence of a single witness.

c) Whether there was a contradiction between the charge sheet and the evidence on record.

Decision & Rationale

The judge dismissed the first ground of appeal, arguing that since the first magistrate had not taken any evidence the second magistrate was not required to comply with section 200 of the CPC requiring them to recall witnesses or request a new trial.

The court dismissed the second ground arguing that the magistrate was entitled to rely on the evidence of the single witness-a military officer- as it was clear evidence of possession of the notebook containing information on how to assemble an IED.

The judge further found no contradiction between the evidence on record and the charge sheet since testimony of the military officer placed the notebook inside the Appellant's bag at the time of his arrest, and testimony of the Appellant did not in any way disprove that evidence.

Nonetheless, the court found that the charge was defective. Section 30 reads:

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

The judge noted that to convict on section 30, the evidence must prove that the Appellant held the article or information on behalf of another person. Accordingly, the judge found the charge to have been fatally defective and allowed the appeal since no such evidence was tendered. Thus, the sentence for count I was set aside. Further, the judge ordered the Appellant's release and repatriation to Somalia because he had already served his sentence for count II.

11 Pius Wambua & 5 others v Republic [2017] eKLR

(From the conviction and sentence in Mandera SPM Criminal Case No. 648 of 2015 – P. N. Areri SRM)

Court: High Court at Garissa **Reference:** Criminal Appeals No. 18, 19, 20, 21 and 22 of 2016 (Consolidated)

Date Delivered: 13 January 2017 **Judge:** George Dulu

Read Judgement **here**

Implications

This case also extends the criminal procedure doctrine and fair trial guarantee that a charge must disclose an offence in order to put the accused to his defence.

Background

The Appellants were charged with the offence of travelling to a terrorist designated country without passing the designated exit point contrary to section 30B (1) (a), 30B (2) (a) and 30C (1) of the Prevention of Terrorism Act. They pleaded not guilty. The magistrate convicted them and they were sentenced to serve a 10-year imprisonment term.

Questions for determination

a) Whether the conviction and sentence were lawfully imposed

Decision & Rationale

The appeal was uncontested based on previous similar appeals that cited the above-mentioned sections of Prevention of Terrorism Act.

Relying on ***Richard Baraza Wakachara v Republic (2015),*** the judge maintained that for an offence to be lawfully established under the sections, the Cabinet Secretary has to designate Somalia as a terrorist country. In this case, the prosecution had neither referred the court to nor produced a copy of the legal notice in the Kenya Gazette designating Somalia to be a terrorist country. The charge sheet was, therefore, defective because it did not disclose an offence based on the law.

It was held that the Appellants were wrongfully convicted and sentenced by the trial court. The appeal was allowed, the convictions were quashed and the sentences were set aside.

12 Richard Baraza Wakachala v Republic [2016] eKLR

(From the conviction and sentence in Mandera SPM Criminal Case No. 601 of 2015 – D. K. Mutai RM)

Court: High Court at Garissa **Reference:** Criminal Appeal No. 109 of 2015

Date Delivered: 17 August 2016 **Judge:** George Dulu

Read Judgement **here**

Implications

This case also extends the criminal procedure doctrine and fair trial guarantee that a charge must disclose an offence in order to put the accused to his defence.

Additionally, it establishes that section 30C does not create an offence but only creates a presumption that a person who travels to a country designated by the Cabinet Secretary without passing through a designated immigration entry or exit point should be deemed to have travelled to that country to receive training in terrorism.

Background

On 27 October 2015 at Mandera Township, Mandera County, the Appellant was found to have travelled to Somalia, a terrorist designated country, contrary to the Prevention of Terrorism Act. On the same day, he was found to have crossed the Kenya-Somalia border through the entry and exit point without reporting his departure to the immigration officer as required by the Kenya Citizenship and Immigration Act. He was charged with two counts namely:

- **Count I:** travelling to a terrorist designated country without passing through the designated exit point contrary to section 30B (1) (a), 30B (2) (a) and 30C (1) of the Prevention of Terrorism Act (2012)
- **Count II:** failure to report departure as per section 172 of the Kenya Citizenship and Immigration Act (2011)

At the Magistrate's Court at Mandera, he pleaded guilty to both counts. When the facts of the case were read out to him, he disclosed that his intention was to "join Al Shabaab and be killed by them." The magistrate found the Appellant guilty of Count I and imposed a 10-year imprisonment sentence. Count II was rejected because the offence was wrongly-founded; it was based on a provision of the repealed Immigration Act.

Questions for Determination

a) Whether the plea and conviction on Count I were properly established

b) Whether the sentence imposed was excessive

Decision & Rationale

The judge held that there was no offence provided for under the mentioned sections 30B and 30C of Prevention of Terrorism Act. Therefore, the magistrate wrongly convicted the Appellant on Count I for the subsequent

reasons. First, the charge sheet did not specify on the legal notice, which would prove that Somalia had been declared a designated terrorist country formally. Second, the mentioned sections of the Prevention of Terrorism Act pertain to training or instructions for the purposes of terrorism whether in Kenya or outside the country. Travelling, thus, only creates that presumption that it was for the purpose of training.

Lastly, Count I was therefore defective because it was not backed by the law. It follows that the Appellant could not plead guilty to a non-existent offence. For that reason, the judge quashed the conviction and set aside the sentence of a 10-year imprisonment.

13 Unknown alias Julius Yohana Mbunguni v Republic [2018] eKLR

(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 174 of 2016 by Hon. T. L. Ole Tanchu, SRM)

Court: High Court at Garissa

Reference: Criminal Appeal No. 5 of 2018

Date Delivered: 18 September 2018

Judge: George Dulu

Read Judgement **here**

Implications

This case also extends the criminal procedure doctrine and fair trial guarantee that a charge must disclose an offence in order to put the accused to his defence.

Moreover, it clarifies that pending a formal declaration that Somalia is a terrorist training country, the section cannot be operational as the presumption of training in terrorism in Somalia will not arise.

Background

On 12 February 2016 in Masalani Ijaara Division, Garissa County, the Appellant was found on his way travelling to Somalia, an alleged terrorist designated country at the time. On the same day, the Appellant, a Tanzanian national, did not have a valid permit. He was charged with two counts namely:

- **Count I:** travelling to a terrorist designated country contrary to section 30C (1) of the Prevention of Terrorism Act (2012)
- **Count II:** being unlawfully present in Kenya contrary to section 53 (1) and (2) of the Kenya Citizenship and Immigration Act (2011)

The Appellant pleaded guilty to both counts and was sentenced to a 10-year imprisonment term for the first count and 6 months for the second. The Chief Magistrate ordered that the sentences should run concurrently and on completion of the sentence the appellant should be repatriated to Tanzania.

Questions for Determination

a) Whether the conviction on Count II was proper

b) Whether the conviction on Count I was proper

Decision & Rationale

On the first question, the appellate judge upheld the conviction and sentence of being unlawfully present in Kenya as ordered by the trial judge. The plea on Count II was proper and the sentence imposed within the law. On completion of this 6-month sentence, the Appellant would be repatriated to Tanzania.

In determining the second question, the judge laid focus on the interpretation of Section 30C (1) of Prevention of Terrorism Act which provides:

"A person who travels to a country designated by the Cabinet Secretary to be a terrorist training country without passing through designated immigration entry or exit point shall be presumed to have travelled to that country to receive training in terrorism."

In the judge's reasoning, for the offence to be committed it was instructive that the Cabinet Secretary had designated the country as a terrorist training country. The section, therefore, does not create an offence of travelling to a terrorist designated country without passing through a designated country. In this case, the charge sheet did not disclose that Somalia was declared by the Cabinet Secretary to be a terrorist training country. Further, the charge sheet did not indicate when and how the Cabinet Secretary made the declaration. The court held that the designation must be formal in order for section 30C to apply and so that there can possibly arise the presumption that the Appellant travelled to Somalia to "receive training in terrorism."

Accordingly, the court found that the Appellant pleaded guilty and was convicted for a non-existent offence. The conviction on Count I was not proper. The appellate judge allowed the appeal on Count I, quashed the conviction and set aside the 10-year imprisonment imposed by the trial court.

D Fair trial and Sentencing

14 Ibrahim Katana Mzungu v Republic [2015] eKLR

(Appeal from the conviction of Hon. M. N. Nzibe in Malindi Misc. Appl. No.91 of 2014)

Court: High Court at Malindi

Reference: Criminal Appeal No. 53 of 2014

Date Delivered: 14 July 2015

Judge: Said J. Chitembwe

Read Judgement **here**

Implications

This case restated the unconstitutionality of part III of the Criminal Procedure Code (Cap 75) titled "Prevention of Offences," which permitted magistrates to order that an accused be held in custody upon information that they are likely to breach peace or disturb public tranquillity.

Background

The Appellant was arrested on 23 September 2014 after he had disappeared from his village for quite some time. When he returned, members of the community reported him to the police. He was suspected to be supporting commission of terrorism acts contrary to section 9 (1) of the Prevention of Terrorism Act, 2012. After interrogation by the ATPU, the investigating officer was unable to prefer charges against the Appellant.

He was arraigned before the Malindi Resident Magistrate on 25 September 2014. He was not charged with any offence but was bonded to keep peace for a period of one year and was further ordered not to leave Kenya during the bond period. The Appellant was to execute a bond of Kshs 200,000 with a surety of a similar amount.

Questions for determination

a) Whether the lower court followed the correct procedure

b) Whether the information was sufficient to call upon the Appellant to execute the bond

c) Whether the Appellant's constitutional rights were violated

d) Whether the 'Prevention of Offences' section of the Criminal Procedure Code (Cap 75) is constitutional

Decision & Rationale

On the first question, the court examined the procedure in part III of the Criminal Procedure Code titled "Prevention of Offences." According to part III, when a magistrate receives information that a person is likely to commit a breach of the peace or disturb the public tranquillity, the magistrate may require the accused to "show cause why he/she should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding one year." The magistrate would then hold an inquiry into the truth of the information upon which the action has been taken and if satisfied, make the order to execute such bond. In this case, the judge found that the trial magistrate did not follow the required procedure because the bond was executed without first requiring the accused to show cause why he should not be ordered to execute the bond.

The appellate judge also found that the magistrate did not set out the substance of the information to establish whether it was sufficient to call upon the Appellant to execute the bond. The judge found the information to be insufficient since the investigating officer had informed the court that he was unable to charge the suspect.

The court considered that in accordance with Article 50 (2) (e) of the Constitution, every arrested person has the right to be presumed innocent until the contrary is proved. It held that bonding the Appellant to keep the peace keeps him in custody without proof that he committed an offence and without charging him with an offence. This violated his right to the presumption of innocence under the Constitution.

Accordingly, the court agreed with Justice Mumbi Ngugi in ***Nairobi High Court Constitutional Petition No. 45 of 2014,*** that part III of the Criminal Procedure Code is unconstitutional.

15 Isaac Lekushon Taruru v Republic [2017] eKLR

(From original conviction and sentence in Criminal Case No. 1962 of 2014 of the Chief Magistrate's Court at Narok)

Court: High Court at Narok **Reference:** Criminal Appeal No. 51 of 2017

Date Delivered: 29 June 2017 **Judge:** J. M. Bwonwonga

Read Judgement **here**

Implications

This case establishes that courts should, in pronouncing sentences for terror-related offences, take into account the accused's mitigation factors and the maximum sentence in order to avoid manifestly harsh sentences.

Background

The Appellant was arrested on 27 October 2014 in Narok County following information given to the police by the National Intelligence Service that Al Shabaab members had been seen in the area. The Appellant then allegedly told the police that they had been recruited by some Somali men and taken to a mosque in Mombasa and trained. He allegedly also said that he would identify the other recruits, who he claimed were planning an attack in the area. He was sent to the Anti-Terrorism Police Unit (ATPU) in Nairobi, where he denied any knowledge of Al Shabaab membership. Upon medical assessment at Mathare Mental Hospital, he was found fit to stand trial. The Appellant was charged with the offence of giving false information contrary to section 20 of the Prevention of Terrorism Act. He then entered a plea of guilty and was convicted and sentenced to serve 10 years in prison. He appealed against the sentence.

Questions for determination

a) Whether the trial court erred in not ensuring that he was supplied with witness statements

b) Whether the trial court erred in not taking into account the medical report concerning his mental status

c) Whether the trial court erred in allowing the investigating officer to testify in court

d) Whether the trial court erred in failing to find that the investigating officer fabricated the case against him

e) Whether the trial court violated his right to fair trial

f) Whether the sentence was manifestly excessive

Decision & Rationale

The court found that the first ground is without merit in view of his plea of guilty and conviction and was thus dismissed. The third and fourth question were similarly dismissed because he had entered a plea of guilty.

The court also dismissed the second ground after finding that the medical report concerning his mental status was considered. The court observed that the report of the doctor from Mathare Mental Hospital concluded that the Appellant had no history of mental illness and was fit to stand trial. On the fifth question, the court found

that the Appellant's right to a fair trial was not violated because the plea of guilty was entered unequivocally after the consequences of entering such plea had been explained to the Appellant.

Finally, the court found that the sentence imposed was manifestly excessive after taking into account his mitigation (that he had pleaded guilty and was a first-offender), the circumstances of the offence and in the light of the fact that the maximum penalty provided is 20 years. Thus, the sentence imposed was manifestly excessive. The sentence was reduced to 5 years' imprisonment.

16 Joseph Mutuku Muinde v Republic [2018] eKLR

(An appeal from the decision of Hon. Senior Principal Magistrate E. Nderitu, Senior Principal Magistrate's Court Voi on 27th January 2017)

Court: High Court of Kenya at Voi

Reference: Criminal Appeal no. 68 of 2017

Date Delivered: 16 October 2018

Judge: Farah S.M. Amin

Read Judgement **here**

Implications

This case establishes that even when one is convicted for terror offences, rehabilitation remains the paramount objective of sentencing so that proof of reformation may be pleaded as a mitigation factor to reduce the sentence.

Background

On 17 January 2017, the Appellant was convicted for making a false statement with intent contrary to Section 20 of the Prevention of Terrorism Act, 2012. At Voi Police Station, he had claimed to be a member of Al Shabaab and had been hired to undertake terrorist attacks in December 2017. Having pleaded guilty, the Chief Magistrate found him guilty and sentenced him to 5 years' imprisonment.

At the appellate court, he contested the sentence claiming that he was a drunkard, a first offender, responsible for children and the sentence was too harsh.

Questions for determination

a) Whether the sentence imposed was excessive

Decision & Rationale

The judge found that while the offence that the Appellant was charged with is serious and goes to the heart of social cohesion, a five-year imprisonment term was manifestly excessive. The court considered that while the Appellant's false allegations did waste police time, the Appellant is reformed since he accepts that his actions were foolish and regrets them.

He ordered that the sentence be reduced to 12 months, which he had already served. Further, it was ordered that he would commit every Tuesday and Thursday for 6 months at Voi Police Station assisting with maintenance, repairs and cleaning duties considered necessary by the officer commanding police station (OCS).

17 Musa Shaban Kabughu v Republic [2017] eKLR

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 844 of 2015 – M. Wachira CM)

Court: High Court at Garissa
Reference: Criminal Appeal No. 38 of 2017
Date Delivered: 23 November 2017
Judge: George Dulu

Read Judgement **here**

Implications

This case clarifies several aspects of the constitutional right to a fair trial, as applies to persons charged with terror-related offences and criminal offences in general. The court clarified that:

- Arraigning a person in court after 24 hours does not vitiate a conviction. The person can file a civil suit to claim for damages against the State. The State has an opportunity to give their position in that civil suit.
- A confession merely confirms a guilty plea. It should be read out in court as part of the facts of the case in the event of disputable statements.
- The right to representation does not impose a duty on the State to provide such legal services for free. In cases where the law obligates the State to do so, like capital offences (e.g. murder), the accused person still has to indicate their incapacity to hire a lawyer.
- The attendance of a court clerk throughout the proceedings and the contents of the records could establish whether an accused person understood the language used in court.

Background

The Appellant had been charged with being a member of a terrorist group contrary to section 24 of the Prevention of Terrorism Act, 2012. At Garissa Police Station, Garissa County, on 12 August 2015, he had openly confessed to have been recruited as a member of the Al-Shabaab. He pleaded guilty before the magistrate. He was convicted and sentenced to serve 15 years imprisonment.

His advocate filed his appeal to contest that the Appellant was not afforded a fair hearing and that the sentence was excessive. Also, as an arrested person, the Appellant was not brought to court within 24 hours and that his confession was misused by the police and magistrate, leading to his conviction.

Questions for determination

a) Whether the magistrate erred by convicting the Appellant on an equivocal plea

b) Whether the magistrate erred by convicting the Appellant against his constitutional rights

c) Whether the magistrate erred by imposing an excessive sentence of 15 years for an offence that carries a 30-year maximum sentence on a first offender

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Decision & Rationale

On the first question, the judge held that the Appellant had been convicted on his own guilty plea. The complaint that the police wrongly used his confession in court could not hold much sway because 'the statement (confession) merely confirmed the plea of guilty of the Appellant.' Besides, the prosecutor read out his confession in court as part of the facts of the case. These were not disputed.

On the second question, the Appellant had complained that he had not been arraigned in court within 24 hours of his arrest (Article 49), he was not informed about his rights to be represented by an advocate (Article 50(2) g) and he could not understand the language used during the trial; it was unclear whether English, Kiswahili or Somali was used consistently (Article 50(3)). While it was proved that the Appellant was arraigned in court after 24 hours, the violation did not vitiate the conviction. Even so, the Appellant could file a civil case for damages and the State could similarly have the right to give their position. The judge held that the right of representation does not impose a duty on the State to provide such legal services for free. In cases where the law obligates the State to do so, like capital offences, the accused person still has to indicate their incapacity to hire a lawyer.

The judge was convinced that the Appellant understood the court proceedings based on their conduct in the court records which showed that the Appellant 'said a lot in his mitigation.' The judge referred to the case of ***George Mbugua Thiong'o v Republic (2013),*** where the Court of Appeal stated that the attendance of a court clerk throughout the proceedings and the contents of the records could establish whether an accused person understood the language used in court.

Lastly, at the trial court (magistrate), the Appellant had admitted that it was only when he was unable to withdraw money from M-Pesa (because he used Tanzanian currency) that he went to the police station to make his confession. This, in the judge's view, did not show any remorse for the offence and therefore, the sentence was justified. The appeal was dismissed and the conviction and sentence of the trial court were upheld.

18 Republic v Nuseiba Mohammed Haji Osman [2018] eKLR

(Appeal from a Ruling of the High Court of Kenya at Nairobi (GW Ngenye J) dated 11th July 2016 in H.C.CR.R 232 of 2016)

Court: Court of Appeal at Nairobi **Reference:** Criminal Appeal No. 103 of 2016

Date Delivered: 27 April 2018 **Judge:** PN Waki, RN Nambuye & W Ouko

Read Judgement **here**

Implications

This case emphasises the right of terror suspects to be released on bail unless there are compelling reasons not to do so. The judges maintained that despite the serious nature of offence, their discretion to deny bail should only be triggered when there are real and cogent reasons that meet constitutional standards. In their own words: "Discretion to grant or not to grant bail cannot be exercised arbitrarily, capriciously and injudiciously, even though the heinous nature of the crime may warrant more caution on the part of the court in considering a bail application."

Background

The Respondent, a Kenyan female and a fourth year medical student at the Kampala International University (Uganda), was arrested on 5 June 2016 by Anti-Terrorism Police Unit (ATPU) officers at Entebbe International Airport. She was allegedly heading to Nairobi upon learning of her husband's arrest.

Following the arrest, police officers allegedly found in her possession a Kenya Airways plane ticket in her name destined for Kigali. The Respondent was escorted to Kenya and charged with 3 counts under the Prevention of Terrorism Act, 2012 as follows:

- **Count I:** being a member of a terrorist group, contrary to Section 24
- **Count II:** possession of articles connected with the commission of a terrorist act, contrary to Section 30
- **Count III:** soliciting for the commission of a terrorist act contrary to Section 9 (1)

At the trial court, she denied all the charges and she was released on bond with the following terms: 2 Kenyan sureties of Kshs. 5 million each; depositing of her passport in court; reporting to the ATPU offices fortnightly.

The prosecution appealed the bail decision at the High Court, requesting it to exercise its powers of revision. The High Court judge was unconvinced that the prosecution had made out a case for revision, and rejected the appeal.

The prosecution then filed this second appeal at the Court of Appeal, arguing that the High Court had ignored the principles for granting bail.

Questions for determination

a) Whether the learned Judge properly exercised their discretion in granting the Respondent bail

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Decisions & Rationale

The appellate court judges pronounced that while judges have discretion to grant bail, they should have regard to Article 49 of the Constitution and Section 123 and 123A of the Criminal Procedure Code as well as the Bail and Bond Policy Guidelines. Further, judges' discretion is in line with article 49 (h), which allows for release of every arrested person on bail **unless there are compelling reasons,** meaning that they are forceful and cogent enough to make the court feel strongly that the person should not be released on bail.

In this case, the prosecution had based their objection to the Respondent's release on bail arguing that she was a flight risk since at the time of arrest, she had an air ticket to Kigali proving her intention to leave Kenya. Secondly, the prosecution claims there was evidence pointing to the likelihood of the Respondent resorting to online platforms to interfere with the witnesses. Thirdly, she allegedly had associates who were being sought out by the police. Lastly, there was need to factor in the nature or seriousness of the offence and the strength of the prosecution evidence, which had previously been overlooked.

The court found that the question of the strength of the prosecution evidence was problematic because it could not make the determination without hearing the evidence. Besides, the prosecution had conceded that, since she was released on bail, the Respondent had faithfully complied with the terms of the bond and had been consistently reporting to the ATPU. Further, Kenya Airways had dispelled the ground that she was a flight risk when it confirmed that the Respondent only had a one-way ticket from Entebbe to Nairobi hence, she was not en route to Kigali as alleged. Lastly, the prosecution did not disclose information on her associates with whom she was said to have communicated before her arrest.

Additionally, the judges expressed concern about the delay in commencing the trial. The judges noted that at the time they heard arguments in the appeal, the respondent had been arrested 2 years earlier yet the trial had not begun. The judges argued that the case would have been long concluded had the prosecution spent less time pursuing the issue of bond instead of prosecuting and bringing witnesses to testify.

The court held that the appeal lacked merit and it was accordingly dismissed.

OTHER PUBLICATIONS ON VIOLENT EXTREMISM

Confronting Violent Extremism in Kenya: Debates, Ideas and Challenges (CHRIPS, 2018)

This pioneering collection brings together critical analyses on a range of issues touching on violent extremism by a multidisciplinary team of scholars and scholar-practitioners with an intimate and long-standing interest on the subject in Kenya, the region and globally. They cover the breadth as well as depth of the complex problem of violent extremism in a manner and language that speaks to both scholars and policy makers.

Trends of Violent Extremist Attacks and Arrests in Kenya, January 2019 – December 2019

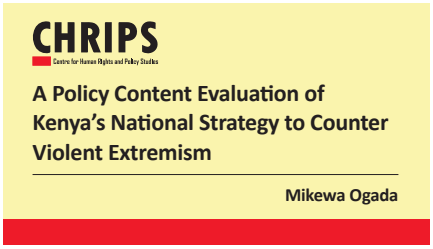
This report draws from the Terror Attacks and Arrests Observatory of the Centre for Human Rights and Policy Studies (CHRIPS Terrorism Observatory). It presents the latest data collected and analysed from 1 January – 31 December 2019. CHRIPS uses verified traditional and new media reports as well as information from local partners to generate the most comprehensive database on terror-related occurrences in Kenya.

Trends of Violent Extremist Attacks and Arrests in Kenya, December 2017 – December 2018

The data and analysis in this report draws from the Terror Attacks and Arrests Observatory of the Centre for Human Rights and Policy Studies (CHRIPS). It presents the latest data collected and analysed from media reports on terror attacks between 1 December 2017 and 31 December 2018.

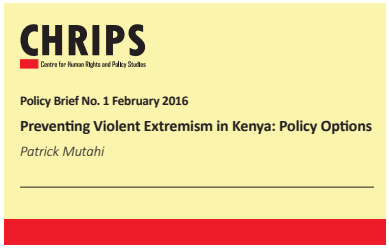
Trends of Violent Extremist Attacks and Arrests in Kenya, January-November 2017

The data and analysis in this report draws from the terror attacks and Arrests Observatory of the Centre for Human Rights and Policy Studies (CHRIPS). It presents and analyses the latest data, collected from media reports, on terror attacks and arrests between January 1, 2017 and November 30, 2017. Data on terror-related attacks will be regularly updated on the observatory and reports published periodically.



A policy Content Evaluation of Kenya's National Strategy to Counter Violent Extremism

This policy brief evaluates the content of Kenya's National Strategy to Counter Violent Extremism (NSCVE), which was launched in September 2016. It assesses the NSCVE's goals and objectives; its relationship to existing counterterrorism legislation; its evidence base and performance measurement framework; the given institutional and implementation arrangements; the policy implementation context; the role of counties; and security challenges and implementation. It offers a set of recommendations which could inform future policy review and updating.



Preventing Violent Extremism in Kenya: Policy Options

This policy brief discusses some of the drivers of violent extremism in Kenya, and the available policy opportunities that Kenyan and regional policymakers should consider to effectively address the problem of violent extremism.

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