IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, PCA, M'INOTI & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 135 OF 2016

BETWEEN

AHAMAD ABOLFATHI MOHAMMED.....1ST APPELLANT

SAYED MANSOUR MOUSAVI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(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)

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JUDGMENT OF THE COURT

The ***1st appellant, Ahamad Abolfathi Mohammed***, and the ***2nd appellant, Sayed Mansour Mousavi***, are both citizens of the ***Islamic Republic of Iran.*** The 1st appellant holds Iranian passport ***No. V201292677***, whilst the 2nd appellant holds a similar national passport ***No. V23950958***. They entered Kenya through Jomo Kenyatta International Airport on 12th June 2012 on tourist/holiday visas valid for two weeks. On the day they entered Kenya, they took a domestic flight to Mombasa and checked in, at about midnight, at the ***Royal Castle Hotel***, Moi Avenue, where the Golfers Travel Agency (GTA), Teheran, had booked them for a period of 10 days. Before the expiry of the 10 days however, they checked out on 16th June 2012 and proceeded to Nairobi where they checked in at the ***Laico Regency,*** Uhuru Highway. On 19th June 2012, they checked out of Laico Regency and boarded motor Vehicle Registration No. KBJ 011 J enroute to Jomo Kenyatta International Airport, ready to leave the country. Before getting to the airport, officers from the Anti-Terrorism Police Unit, who claimed to be acting on intelligence that the appellants were in Kenya on a terrorist mission, intercepted and arrested them.

Subsequently, the respondent obtained permission from the High Court to hold the appellants beyond the prescribed period, and on 25th June 2012 the two were charged before the ***Chief Magistrate's Court, Nairobi***, with two offences under the ***Penal Code*** and one under the ***Explosives Act***. In the first count they were charged with committing an act intended to cause grievous harm contrary to ***section 231*** of the Penal Code in that on or before 20th June 2012 at ***Mombasa Golf Course*** along ***Mama Ngina Drive*** in Mombasa County, jointly with others not before the court, they put an explosive substance, namely ***Cyclotrimethylene trinitramine (RDX)*** at the said golf course with intent to cause grievous harm to golf players. The second count charged them with preparing to commit a felony contrary to ***section 308(1)*** of the Penal Code, the particulars being that on or before 20th June 2012, at the same golf course, jointly with others not before the court, they were found armed with 15 kilograms of RDX in circumstances indicating that they were so armed with intent to commit a felony, namely grievous harm. Lastly in the third count, the appellants were charged with being in possession of explosives contrary to ***section 29*** of the Explosives Act. The particulars of that offence were that on or before 20th June 2012, at the same golf course, jointly with others not before the court, they were found in possession of 15 kilograms of an explosive, namely RDX for unlawful purpose.

After pleading not guilty to all the charges, the appellants were tried before the Senior Principal Magistrate who took the evidence of 15 prosecution witnesses before the trial was taken over under ***section 200*** of the ***Criminal Procedure Code***, with the consent of the appellants, by the ***Chief Magistrate Hon. K. W. Kiarie*** (as he then was), who visited the *locus in quo* in Mombasa, recalled 3 witnesses for further cross-examination, heard 2 fresh prosecution witnesses, heard the appellant's defences, and wrote the judgment. The substance of the prosecution case against the appellants was that while in Mombasa, they visited the golf course twice and unlawfully hid therein the RDX, an explosive

within the meaning of the Explosives Act, with the intention of causing grievous harm to golfers or committing the felony of grievous harm. When they were arrested in Nairobi on 19th June 2012 and interrogated, the 1st appellant led the police to a thicket within the golf course where the RDX was recovered in a bag that was buried in the ground.

In their unsworn defence, the appellants denied committing the offences. They stated that they visited Kenya on holiday and to explore business opportunities. They confirmed being in Mombasa on the dates given by the prosecution and having stayed at the Royal Castle Hotel, but insisted that they only went out for site seeing. They also confirmed their stay at Laico Regency and their arrest as testified by the prosecution witnesses, but denied ever having been in possession of the RDX or leading the police to the golf course where it was recovered. The 1st appellant stated that upon being arrested he became dizzy and that he was interrogated and threatened by among others, a person who spoke Persian or Farsi. Wires were attached to his body which he was informed were to determine whether he was lying. He next found himself at the airport and did not know what happened thereafter, until he met the 2nd appellant who informed him that he was in court. He believed that he had been drugged.

It is common ground that the evidence against the appellants as regards the recovery of the RDX is purely circumstantial because there was no direct evidence of their being in possession or armed with the RDX or placing it in the golf course. On 2nd May 2013, the trial magistrate convicted the appellants on all three counts and sentenced them to life imprisonment for the first count, ten years imprisonment for the second count and fifteen years imprisonment for the third count, all the sentences to run concurrently.

The appellants were aggrieved by the conviction and sentences and preferred a first appeal in the High Court. By a judgment dated 24th February 2016, ***Kimaru J***. dismissed their appeal against conviction, but allowed the appeal against sentence and set aside the sentence imposed by the trial court. In lieu thereof, he sentenced each appellant to a consolidated sentence of 15 years imprisonment. The appellants were still aggrieved by the judgment of the High Court and preferred this second appeal now before us.

Whilst their memorandum of appeal listed 19 general, circuitous, overly broad, and repetitive grounds of appeal, their learned counsel, ***Mr. Ahmednassir, SC***, compressed all of them into six broad grounds, contending that the first appellate court erred by sustaining the conviction of the appellants on insufficient and contradictory evidence; by relying on circumstantial evidence that did not point to the appellants exclusively as the only person who could have placed the RDX at the golf course; by holding that the RDX was an explosive within the meaning of the Explosives Act; by finding that the appellants were in possession of the RDX; by failing to hold that the appellants were denied a fair trial as guaranteed by Article 50 of the ***Constitution*** and the ***Criminal Procedure Code***; and by imposing an illegal and manifestly harsh and excessive sentence.

On the first and second grounds of appeal, the appellants submitted that no witness testified to having seen them put the RDX or anything else for that matter, at the golf course, adding that it was upon the prosecution to prove beyond reasonable doubt that they were the ones who placed the RDX where it was recovered. They added that the golf course was easily accessible to members of the public as it was neither fenced nor guarded and therefore any other person could have had the opportunity to place the RDX at the golf course. In their view, this created reasonable doubt that other persons were responsible for placement of the RDX at the golf course. On the authority of ***Okeno v. Republic [1973] EA 31***, they submitted that their conviction should have been based on the weight of the actual evidence adduced by the prosecution and not merely on theories or attractive reasoning by the judge.

Further invoking the judgments of this Court in ***Abanga alias Onyango v. Republic, Cr. App. No 32 of 1990*** and ***Sawe v. Republic [2003] eKLR***, the appellants submitted that all the tests set out in the said judgments, which must be satisfied before circumstantial evidence can be relied upon to found a conviction, were not so satisfied. And further on the authority of ***Mary Wanjiku Chichira v. Republic, Cr. App. No 17 of 1998***, they added that suspicion alone, however strong cannot form the basis of a conviction. Specifically as regards the 2nd appellant, it was submitted that no evidence was adduced against him as regards the RDX; that he did not accompany the police to Mombasa when the RDX was recovered; and that he was merely guilty by association, condemned only for associating with the 1st appellant.

Turning to the third ground of appeal, the appellants argued that the first appellate court erred in holding, as had the trial court, that the RDX was an explosive within the meaning of the Explosives Act, whilst the evidence of the Government Chemist, ***Catherine Serah Murambi (PW 16)*** merely showed that RDX was a hazardous substance rather than an explosive. In the appellant's view, the RDX was not an explosive because PW16 testified that it could not explode by itself in the absence of a detonator or stimulus in the form of mechanical heat or friction. It was also the evidence of the Coast in Charge, Bomb Unit, ***S.Sgt. Machobi Salim Malongya (PW8)*** that there was no detonator or wires to the RDX when it was recovered. On that basis, the appellants submitted that their conviction for offences requiring intent to cause grievous harm was untenable because in the absence of a detonator or stimulus, the RDX could not explode on its own and cause grievous harm.

On the fourth ground, it was the appellants' submission that the prosecution did not prove that they were in possession of the RDX. It was submitted that they were arrested in Nairobi whilst the RDX was recovered in Mombasa and that none of the witnesses testified to having found the substance in the appellants' luggage, hotel rooms or vehicles. The appellants added that the burden of proving that they were in possession of the RDX was on the prosecution, which it failed to discharge. They relied on ***Idris Muktar & 20 Others v. County Government of Garissa & 7 Others [2016] eKLR*** in support of that submission.

Next, the judgment of the first appellate court was impugned on the basis that the appellants were denied a fair trial. It was submitted that the security intelligence report, which the police relied upon to arrest the appellants, was not produced so as to test its veracity. In the appellants' view, that was in violation of ***Article 50 (2) (j)*** of the Constitution, which guarantees them access to all material information that the prosecution intends to rely on and is one of the key tenets of a fair trial. Relying on the judgment of the English Court of Appeal in ***R v. Ward [1993] 2 All ER 557***, it was submitted that the prosecution was under a duty throughout the trial to disclose to the defence all relevant evidence whether it strengthened or weakened its case. The appellants also contended that the 1st appellant was interrogated by a white man, was tortured by attachment of wires to his body, and was drugged, thus making the evidence against him illegally obtained evidence and inadmissible by dint of ***Article 50(4)*** of the Constitution.

Lastly it was submitted that the sentence of 15 years was harsh and manifestly excessive and that we should interfere with the same. The appellants urged that the 15 years they were sentenced to by the first appellate court was more than the maximum sentence prescribed for the

offence under the third count, that of unlawful possession of explosives. They added that although the maximum sentence prescribed for that offence by section 29 of the Explosives Act is seven years imprisonment, the trial court had sentenced them to an illegal sentence of 15 years imprisonment. On the authority of the judgment of the Supreme Court of India in ***Alister Anthony Pareira v. State of Maharashtra [2012] 2 SCC, 748*** and of the High Court in ***Arthur Muya Muriuki v. Republic [2015 eKLR***, we were urged to find that the first appellate court did not take into account all relevant factors while sentencing the appellants, such as proportionality, rehabilitation, mitigating factors, and the period that the appellants had spent in remand after denial of bail. It was the appellants' contention that the two courts below erred in directing that their sentence should take effect from the date of conviction by the trial court.

The sentence was also challenged on the ground that the two courts below allowed themselves to be unduly influenced by extraneous and irrelevant considerations such as previous terrorist attacks in Kenya, to which the appellants were not proved to have been party. In their view the illegal sentence and the remarks made by the two courts below before sentencing them showed bias against them and lack of impartiality on the part of the two courts, which tainted and vitiated the judgment. On account of all the foregoing reasons, we were urged to allow the appeal, set aside the appellants' conviction, and quash the sentence imposed upon them.

Mr. Wanyonyi, learned Senior Assistant Director of Public Prosecutions opposed the appeal on behalf of the respondent. He contended that the evidence adduced by the prosecution was cogent and consistent and proved the appellants' guilt beyond reasonable doubt. Although the evidence was circumstantial, it was contended, it showed that it was the appellants, to the exclusion of any other person who placed the RDX at the golf course. Emphasis was laid on the evidence of a taxi driver, ***Dennis Kamanga Kamau (PW7),*** who testified that while in Mombasa, the appellants hired him twice and specifically requested to be driven to Mama Ngina Avenue near the golf course, as well as the evidence of a golfer at Mombasa Golf Club, ***Simon Mwangi Wambugu (PW14)*** who testified to seeing the appellants at the golf course on 15th June 2012 at about 6.30 pm near the place where the RDX was recovered. Lastly, the respondent relied on the fact that it was the 1st appellant who led the police to the RDX and urged us to find that the appellants' conviction on the circumstantial evidence was proper and safe. In the respondent's view, the evidence adduced by the prosecution proved beyond reasonable doubt that the 2nd appellant was acting in concert with the 1st appellant in the commission of the offences and was not convicted merely for associating with the 1st respondent.

On whether the RDX was an explosive, the respondent urged us to find that under ***section 2*** of the Explosives Act, RDX qualified as an explosive even though it required a detonator or stimulant to explode. The respondent also relied on a number of decisions from the courts of India, among them

Manohar v. The State of Madhya Pradesh, Cr. App. No. 1275 of 1998 and ***Lopchand Naruji Jat & Another v. State of Gujarat, Cr. App. No. 580 of 1999***, which we find unhelpful because they involved interpretation of Indian enactments which are not in *pari materia* with our Explosives Act.

Turning to whether in law the appellants were in possession of the RDX, the respondent relied on section 4 of the Penal Code and submitted that the appellants were in possession of the RDX even though they did not have it in their physical possession. Further relying on ***Ahmed Mohammed Ali v. Republic [1988] eKLR,*** the respondent added that possession could also be constructive.

On whether the appellants were denied fair trail, the respondent submitted that they were availed in advance all the necessary evidence that the prosecution sought to rely upon, including witness statements, and therefore Article 50(2) (j) of the Constitution was not violated. However it was submitted that the appellants were not entitled to be given security intelligence reports received by the police and disclosure of the sources of those reports because such disclosure was likely to prejudice police sources and security. In support of that view the respondent relied on the judgment of this Court in ***Bakari Rashid alias Beka v. Republic, Cr App No. 48 of 2015.*** Regarding whether the evidence against the appellants was illegally obtained contrary to Article 50(4) of the Constitution, the respondents maintained that it was not. It was contended that the alleged torture of the 1st appellant was not proved and that he had not raised the issue in the two courts below, including during his first court appearance when he would have been expected to raise the matter, if indeed he had been subjected to torture. The respondent also submitted that the 1st appellant had voluntarily led the police to the RDX, which evidence was admissible.

Lastly, as regards sentence, the respondent submitted that the error committed by the trial court when it imposed an illegal sentence was duly corrected by the first appellate court and was no longer an issue before us. It was further submitted that the two courts below were justified in taking into account previous terrorist attacks in Kenya when sentencing the appellants. In the respondent's view, taking into account such events, which the courts could even take judicial notice of because they were matters of public notoriety, was not evidence of bias as alleged by the appellants. It was also contended that the remarks complained of, having been made after the conclusion of the trail and conviction of the appellants, could not vitiate their conviction. Accordingly the respondent urged us to find the appeal bereft of merit and dismiss it.

We have anxiously considered this appeal and the authorities cited by the appellants and the respondent. As it is a second appeal, we are obliged, by dint of ***section 361 (1) (a)*** of the Criminal Procedure Code to consider only issues of law. Where the two courts below have made concurrent findings of fact, we are further obliged to respect those findings unless we are satisfied that the conclusions are not supported by the evidence or are based on a perversion of the evidence. This is a well-established principle and is aptly articulated in the authorities cited by the appellants such as ***Karingo v. Republic [1982] KLR 213***. In ***M'Riungu v. Republic [1983] KLR 455***, this Court was empathic that:

> ***"[W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law".***

Turning now to the grounds of appeal, we shall first consider whether the learned judge erred by holding that RDX is an explosive within the meaning of the Explosives Act. The appellants contend that because RDX is incapable of exploding without a detonator or a stimulus, which did not exist in this case, it was not an explosive. The Government Chemist, PW 16, gave a detailed account of the procedure she used to examine and test the samples that she received from the Anti-Terrorism Police Unit before she determined that the samples were RDX. This is what she said of RDX:

> ***"RDX is a secondary explosive. This means it cannot explode on its own but (requires) a stimulus consisting of some energy in form of mechanical heat or flame or friction for it to set off. It has a very high degree of stability in storage and is considered as one of the most powerful military explosives. It can bring down a tall building like Times Towers."***

Section 2 of the Explosives Act defines an explosive thus:

> ***"Explosives" means—***
>
> ***(a) gunpowder, nitro-glycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury or of other metals, coloured fires and every other substance, whether similar to those herein mentioned or not, which is used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect;***
>
> ***(b) any fuse, rocket, detonator or cartridge, and every adaptation or preparation of an explosive as herein defined; or***
>
> ***(c) any other substance which the Minister may, by notice in the Gazette, declare to be an explosive, but does not include ammunition as defined in the Firearms Act (Cap.114)". (Emphasis added).***

From the above definition, an explosive will include any blasting powder or substance, which is used or manufactured with a view to producing a practical effect by explosion. We have no doubt in our minds that from the evidence of PW 16, RDX is a "blasting powder" within the meaning of the above section. In our view, the mere fact that RDX requires a detonator or stimulus to produce a practical effect by explosion does not take it outside the definition of an explosive. There is no dispute that it is used or manufactured to produce a practical effect by explosion, whether or not a detonator or a stimulus is required for that eventuality. If RDX qualifies as an explosive only when it is coupled with a detonator or a stimulus as the appellants contend, there would be no reason for the Act to independently include, in section (2) (b), a fuse or a detonator, in the definition of explosives since they are mere igniters. If a fuse or a detonator, whose purpose is to ignite a substance to produce a practical effect by explosion can qualify on their own as explosives, why not the substance which is ignited? The fallacy in the appellant's submission becomes readily apparent when we consider gunpowder and dynamite, which are defined by the Act as explosives. Neither gunpowder nor dynamite, the invention of Alfred Nobel, explodes or detonates all by itself. Gunpowder requires an igniting or compressing agent while dynamite requires a blasting cap to cause an explosion. Yet the Act defines the two as explosives. We are satisfied that there is absolutely no merit in this ground of appeal and we reject the same.

The next ground of appeal that we shall consider is whether the appellants were in possession of the RDX. From the appellants' submissions, they could only have been guilty of possession of the RDX if they were found in physical possession of the substance. Section 4 of the Penal Code defines "possession" in the following terms:

> ***"(a) "be 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 or of any other person;***
>
> ***(c) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them." (Emphasis added).***

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 ***Chrispine 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.

The third issue in this appeal is whether the appellants were denied the right to fair trial as guaranteed by Article 50 (2) (j) and Article 50(4) of the Constitution. Article 50(2) (j) guarantees every accused person a fair trial which includes the right:

> ***"to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."***

We agree with the appellants' submissions regarding the duty of disclosure by the prosecution as set out in ***R. v. Ward (supra)***, which continues throughout the trial. ***R. v. Ward*** was cited with approval by this Court in ***Thomas Patrick Gilbert Cholmondeley v. Republic [2008] eKLR*** which involved interpretation of section 77 of the former Constitution. This Court concluded thus:

> ***"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."***

The record indicates that the appellants were availed all the statements of the prosecution witnesses before those witnesses testified. They also had access to the exhibits that were produced. What we understand the appellants to complain about is that they were not availed the intelligence report that led to their arrest for suspicion of involvement in terrorism acts. Our reading of Article 50(2) (j) of the Constitution does not grant the appellants the blanket right to access all the information in possession of the police including intelligence reports. What the appellants were entitled to was the evidence that the police intended to rely on at the trial, and of course any other evidence in possession of the police that could have exonerated them from the charges they were facing, even though the police did not wish to use that evidence.

Indeed, even the right to access the evidence that the police intend to rely on is not totally unfettered; it is qualified by the constitutional requirement that the access should be reasonable, the determination of which must depend on the circumstances of each case. In ***Bakari Rashid v. Republic*** ***[2016] eKLR***, this Court refused to fault the prosecution for failure to produce police informers as witnesses. It stated thus:

> ***"Police officers and crime-busters, most of the time use informers to gather information regarding crime. The informers are normally secretive as they go about their business and to open them up by calling them as witnesses in open court would certainly blow up their cover, compromise them and expose them to danger. That will defeat the very purpose for which they exist. That is why they are never called or are rarely called as witnesses."***

We are therefore satisfied that the appellants' right to fair trail under Article 50(2)(j) was not violated because all the evidence that the prosecution produced in support of its case was availed in advance to the appellants.

As regards Article 50(4), the provision is in the following terms:

> ***"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."***

There is absolutely no evidence to back the 1st appellant's belated claim that he was subjected to torture. Other than the fleeting claim, without any particulars, that he was dizzy, drugged, interrogated by a person who spoke Persian or Farsi and wires attached to his body to test whether he was lying, there is nothing on record to substantiate the torture claims. Article 29 of the Constitution prohibits torture in absolute terms and under Article 25, the right guaranteed by the Constitution against torture cannot be derogated from under any circumstances. Such unconstitutional conduct as subjecting a person to torture would require cogent effort to establish, which we cannot find in this appeal. As the two courts below properly noted, when the 1st appellant made his first court appearance, he did not raise any complaint about being subjected to torture as he would reasonably have been expected to do. It is not lost to us that he was represented in the two courts below by some of the most experienced practitioners of the Kenyan criminal Bar. It also appears very unusual to us that the 2nd appellant actually praised the same officers that the 1st appellant claims subjected him to torture, when he told the court:

> ***"I told them I know nothing about the photos. Kenya Police treated me very well."***

Like the other grounds of appeal that we have disposed of, we do not find any merit in this ground of appeal either.

Turning to what we consider to be the crux of this appeal, we have already noted that the evidence of the appellants' possession of the RDX was purely circumstantial because no witness saw them in possession of the substance or placing the same in the golf court. The evidence of PW 7, the taxi driver and PW 14, the golfer at Mombasa Golf Club, was emphatic that other than being at the golf course, the appellants were not in physical possession of any luggage or parcel.

However, it is altruism 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 as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 ***Lord Heward, CJ***, stated as follows on circumstantial evidence in ***R v. Taylor, Weaver & Donovan*** ***[1928] CR. App. R. 21***:

> ***"It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial."***

(See also ***Musili Tulo v. Republic*** ***Cr. App. No. 30 of 2013).***

Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In ***Abanga alias Onyango v Republic, Cr. App No. 32 of 1990*** this Court set out the conditions as follows:

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

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

In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.

(See Teper v. R. [1952] All ER 480 and ***Musoke v. R. [1958] EA 715)***. In ***Dhalay Singh v Republic, Cr App. No. 10 of 1997,*** this Court reiterated this principle as follows:

> ***"For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."***

The following was the relevant circumstantial evidence that the two courts below relied upon to convict the appellants: while staying at the Royal Castle Hotel in Mombasa, they hired PW7, ostensibly to take them to tourist sites in the city. On the first occasion he picked them up from that hotel and drove them to a Hindu temple, Jomo Kenyatta Beach, Moorings Restaurant and Heller Park, Bamburi, which they did not enter. They requested to be driven back to the hotel but on the way asked PW7 to drive them to Mama Ngina drive, which from the evidence on record traverses the golf course. The appellants then asked PW7 to stop near a kiosk, alighted from the car and walked to the golf course about 300 meters away, where they stayed for about 10 minutes. Thereafter he drove them back to the Royal Castle Hotel.

The next day he was called from the hotel to take the appellants to Simba Hills. However, the appellants instead asked him to take them to Mama Ngina Drive, the place they had visited the previous day. He drove and parked near the same kiosk, but this time the appellants did not alight from the car. Thereafter, he dropped them at Darfus for lunch at about 1.00 pm, before picking them from Royal Castle Hotel for the airport at 3.00 pm.

The evidence of PW14, the golf player was that on 15th June 2012 at about 6.30 pm, he was playing golf with three others at the club. Just before the tee box on the 9th hole, they encountered the appellants standing near the tee box. Upon enquiring what they were doing, the 1st appellant replied that they were "looking". The golfers proceeded with their game and left the appellants at the same place.

Charles Ogeto (PW13) and ***Erick Opagal Okisai (PW17)*** both testified that upon interrogating the appellants, the 1st appellant led them to the golf course in Mombasa where he showed the police a thicket in which the RDX was buried. From the evidence on record, including that of a golfer at the club, ***Mark Gicha Mbua (PW15***), the RDX was recovered near the 9th hole and in the presence of the 1st appellant.

We agree with the appellants that from the evidence on record, 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. In the absence of any other circumstantial evidence tying or linking the appellants to the RDX, the easy accessibility, without let or hindrance, of the golf course was strong co-existing circumstances that were capable of destroying the inference of guilt on the part of the appellants.

Both the trial and the first appellate courts however took the view that there were no other co-existing circumstances capable of destroying the inference of guilt on the appellants' part because it was the appellants who lead the police to the golf course where the RDX was found near the 9th hole, the same place that PW 14 had seen them on 15th June 2012 at about 6.30 pm. That showed that the appellants had special knowledge of the existence and concealment of the RDX in the golf course. The trial court relied heavily on the judgment of this Court in ***Karukenya & 4 Others v. Republic [1987] KLR 458*** where the Court considered the admissibility of such evidence as led to the recovery of the RDX. In that case two of the appellants, upon being interrogated by the police led them to a stationary car in which a G3 rifle was recovered together with the rifle's magazine, which was buried in a compound in the vicinity. The court held that the conduct of the appellants of taking the police to places where the rifle and the magazine were recovered was admissible evidence. The first appellate court equally relied on the alleged special knowledge of the appellants as regards the RDX to void the possibility of other co-existing circumstances capable of destroying the inference of guilt on the appellants' part.

When ***Karukenya & 4 Others v. Republic (supra)*** was decided in July 1984, ***section 31*** of the ***Evidence Act*** expressly allowed admissibility of evidence discovered in consequence of information given an accused person whether the giving of the information amounted to a confession or not. The provision, whose side note read ***"information from accused leading to discovery of facts"*** provided thus:

> ***"Notwithstanding the provisions of sections 26, 28 and 29 of this Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."***

However, in 2003, the ***Criminal Law (Amendment) Act, No 5 of 2003*** effected fundamental changes to the law on confessions and admissibility of information from an accused person leading to discovery of evidence. Among the changes, a new ***section 25A*** was introduced into the Evidence Act, which made confessions inadmissible unless made in court. In addition, ***section 102*** of the 2003 Act repealed section 31 of the Evidence Act, meaning that henceforth information from an accused person leading to discovery of evidence was not admissible. As this Court noted in ***Thoya Kitsao alias Katiba v. Republic [2015] eKLR***, those changes were intended to address the then egregious abuses and irregularities arising from confessions taken by the police. Practical challenges in the implementation of the new law however led to further amendments in 2007 through the ***Statute Law (Miscellaneous Amendments) Act No. 7 of 2007***, which allowed confessions to be made before a judge, a magistrate or a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the suspect's choice. It also allowed the Attorney General, in consultation with the Law Society of Kenya, the Kenya National Commission on Human Rights, and other suitable bodies to make rules governing the taking of extra-judicial confessions, leading the promulgation of the **Evidence (Out of Court) Confession Rules, 2009.** What is very clear in all this is that section 31 of the Evidence Act or a variation thereof was not re-enacted, meaning that information from an accused person leading to discovery of evidence is not admissible outside a confession. This was the position that this Court took, for example, in ***Kennedy Otieno Odeny v. Republic [2008] eKLR***. In this appeal, it was never the prosecution's case that the appellants had confessed to committing the offences that they were charged with. Accordingly we are satisfied that the two courts below erred in admitting the evidence that allegedly led to the discovery of the RDX.

As regards contradictions in the prosecution's case, other than the fact that the appellants did not point out any specific contradictions, this Court has consistently stated that because discrepancies are bound to occur in evidence; the critical question is always whether the discrepancies are minor and inconsequential or whether they are material so as to vitiate the prosecution case. (See for example ***Joseph Maina Mwangi v. Republic, CR, APP No. 73 of 1993, Kimeu v. Republic (2002) 1 KAR 757*** and ***Willis Ochieng Odero v. Republic [2006] eKLR).*** In ***John Nyaga Njuki & 4 Others v. Republic, Cr. App. No. 160 of 2000,*** this Court expressed itself as follows on the issue:

> ***"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."***

In this appeal, we are satisfied that there were no discrepancies of the nature that would have created doubt and vitiated the prosecution case.

The last issue relates to the sentence imposed on the appellants. Whereas the trial court erred in sentencing the appellants to 15 years imprisonment for the third count when the maximum prescribed sentence is 7 years imprisonment, that in itself is not evidence of judicial bias as understood in law. It was an error, which was eventually corrected by the first appellate court and is now moot.

As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In ***Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000*** this Court stated thus:

> ***It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.***
>
> *(See also* ***Wanjema v. Republic*** ***[1971] E.A 493).***

The appellants' complaints are that the sentence was manifestly harsh and excessive; that the first appellate court failed to take into account relevant considerations and was influenced by irrelevant considerations and that the court erred by failing to take into account the period that they had served in custody before they were sentenced.

We remind ourselves that under section 361 (1) (a) of the Criminal Procedure Code severity of sentence alone is a question of fact, not one of law. Absent a demonstration that the learned judge erred on principle, we have no basis for interfering with the sentence. The sentence prescribed for the first count is life imprisonment, for the second count not less than seven years and not more than 15 years imprisonment and for the third count, imprisonment for seven years. The first appellate court sentenced the appellants to a consolidated or omnibus sentence of 15 years imprisonment, which in our view is not manifestly excessive.

The appellants have complained about some comments made by the two courts below which they submit unduly influenced the courts in meting out the sentence. The pertinent comments by the trial court were as follows:

> ***"I have considered the mitigation of each accused as I have considered their individual health status. However, I am alive to the evidence of Catherine Serah Murambi (PW 16) who said that the 15 kg RDX was capable of bringing down a tall building such as Times Towers. I shudder to imagine the amount of life and property that would have forever been destroyed. Even as I hear the accused person's mitigating and crying for mercy, there is yet a louder cry by the blood of previous victims of terror attacks, all are crying for justice.***

The first appellate court on its part stated:

> ***"...the appellants were found in possession of the said RDX specifically to do harm to the people of Kenya. The trial court correctly observed that Kenya and its people has (sic) been a victim of terror attacks perpetrated by extremists and foreigners. This court holds that the RDX found in possession of the appellants had no other purpose other than to harm the people of Kenya."***

While it is apposite for the court to take into account such considerations as prevalence of an offence before sentencing an accused person, it should not suggest or imply that the accused person has committed offences for which he has not been convicted or permit the making of prejudicial statements that are only meant to influence the severity of the sentence ***(See Karanja v. Republic [1985] KLR 348*** and ***Ruhi v. Republic [1985] KLR 373).*** Whilst some of the comments by the trial court may have been unnecessarily exuberant, we are not convinced that they form a basis for impeaching or invalidating the appellants' conviction, particularly when those statements were made at the tail end of the trial rather than at the beginning like in ***Ruhi v. Republic (supra).*** The statements are only relevant as regards the sentence, which we have held we cannot interfere with in the circumstances of this appeal.

There are however two grounds upon which we must fault the first appellate court, as regards sentence. The first is the imposition of an omnibus sentence for all the three counts. The appellants were entitled to be sentenced separately for each count. ***(See Majole v. R [1956] EACA 576).*** However as the appellants did not raise this issue, we shall not say more about it. The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by ***section 333(2)*** of the Criminal Procedure Code. That provision provides as follows:

> ***"333(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from,***

and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

The appellants have been in custody from the date of their arrest on 19th June 2012. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012.

Ultimately we have come to the conclusion that in view of the error by the two courts below of admitting the evidence from the 1st appellant that allegedly led to the discovery of the RDX at the golf course, the remaining circumstantial evidence against the appellants was so weak that it did not unerringly point to their guilt or to them as the only persons who could have placed the RDX in the golf course. In other words, if the evidence leading to the discovery of the RDX is excluded, there were strong co-existing circumstances that completely destroyed the inference of the appellants' guilt.

In the circumstances, we allow this appeal, quash the appellants' sentence and direct that they be set to liberty forthwith unless they are otherwise lawfully held. Upon being set to liberty, the appellants shall forthwith be repatriated back to their country. It is so held.

Dated and delivered at Nairobi this 26th day of January, 2018

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

K. M'INOTI

…….....…….

JUDGE OF APPEAL

A. K. MURGOR

…….....…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR