



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 59 OF 2013

From Original Conviction And Sentence By Chief Magistrate (H. Ndung'u, Cm) In Garissa Chief Magistrate's Court Criminal Case No. 573 Of 2012

JUMA NJUGUNA.....1ST APPELLANT

MOHAMED ABDALLA KILUME.....2ND RESPONDENT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Juma Njuguna, 1st Appellant, and Mohamed Abdalla Kalume, the 2nd Appellant, were charged in the lower court in Criminal Case Number 573 of 2012 where they appeared as 1st and 2nd Accused persons respectively. They were accused of engaging in organized criminal activities contrary to section 3(a) as read with section 4 (1) of the Prevention of Organized Crimes Act, No. 6 of 2010. It was alleged that on 11th April 2012 at Lagdera District within Garissa County the two of them knowingly engaged in criminal activities by being members of the Al-Shabaab, a prohibited group as per Kenya Gazette Notice 12585 of 18th October 2010.

The case was subjected to full trial after which the trial court found the charges proved against each of the appellants. The 1st Appellant was sentenced to seven years imprisonment while the 2nd accused was committed to Shimo La Tewa Borstal Institution for three years. The record of the lower court as regards sentencing is confusing in the manner the appellants are named. On page 14 of the typed judgement, the record shows as follows:

“FURTHER ORDER/SENTENCE FOR ACCUSE NO.1

MOHAMED ABDALLA KILUME

I note the accused is 1st offender. I also note that he has been in custody for the last one year. I do take into account the period of stay in custody. There is nothing offered for him in mitigation..... I note that this offence is grave, accused therefore sentenced to serve seven (7) years imprisonment. Right of appeal 14 days.”

The error here is that the 1st Accused (1st Appellant) is not Mohamed Abdalla Kilume but Juma Njuguna.

Mohamed Abdalla Kilume was 2nd Accused and is now 2nd Appellant. He was aged 16 years and therefore a minor. The lower court record shows he was committed to Shimo La Tewa Borstal Institute after a report from the Probation Office. The accused who was sentenced to seven (7) years imprisonment is Juma Njuguna and therefore this record is corrected accordingly.

Petition of Appeal

Each appellant filed an appeal separately. The 1st Appellant filed Criminal Appeal No. 59 of 2013 while the 2nd Appellant filed Criminal Appeal No. 72 of 2013. The two appeals were consolidated on 10th February 2014 into Criminal Appeal No. 59 of 2013. Mr. Chacha Mwita, Advocate, represents both appellants while the Respondent is represented by Mr. Mulama.

Both appellants have advanced similar grounds of appeal save for ground 2(c) and ground number 6 which are specific to each appellant. My understanding is that the appellants are raising issue with the trial magistrate in the following areas:

- i. Failing to inform the appellants of their rights to engage an advocate at the time of taking the plea.
- ii. Violating Article 50(2)(a) of the Constitution in presuming the appellants guilty until they proved their innocence.
- iii. Failing to take into account the age of the 2nd Appellant and violating his rights as a child offender.
- iv. Relying on hearsay evidence which is inadmissible.
- v. Failing to consider contradictory evidence.
- vi. Finding that the prosecution case had been proved beyond reasonable doubt.
- vii. Relying on the Probation Officer's report without allowing the 2nd Appellant a chance to challenge it.
- viii. Imposing a harsh and excessive sentence against the 1st Appellant.

Appellant's Submissions

Counsel for the appellants submitted that the appellants were denied a fair trial by the trial magistrate's failure to inform them of their rights under Article 50 of the Constitution which include to choose, and be represented by an advocate, and to be informed of this right promptly; that they were jeopardized when the trial court commenced hearing on a date not set for the hearing; that the trial court failed to take into account that the 2nd Appellant was a minor; that the appellants were denied bond until 17th May 2012; that the appellants were not presumed innocent until the contrary was proved thereby contravening Article 50 (2) (a) of the Constitution and that the trial magistrate was biased against the appellants and this bias was captured in the trial magistrate's careless comment that she did not like the appellants and by pressurizing PW1 by treating him as a hostile witness in order to incriminate the appellants.

It was further submitted that the trial magistrate shifted the burden of proof to the appellants; that the defence of the appellants weakened and destroyed the inference of guilt on their part and that the circumstantial evidence was fabricated by PW3; that suspicion alone cannot be the basis for conviction; that there are contradictions as to the date the alleged offence was committed and the name of the lodging the appellants are alleged to have been found; that the sentence of seven years is excessive and that the trial court followed the recommendations of the Probation Officer without allowing the 2nd Appellant to challenge the same.

Counsel further submitted that the prosecution did not prove that the appellants were members of the Al-Shabaab group; that prosecution did not prove the activities the appellants were engaged in before the arrest as to justify the assertion that they were members of this group; that it was not proved that the appellants professed being members of Al-Shabaab. It was submitted that the appellants testified that they are not members of the Al-Shabaab and that they had a legitimate reason to be at Hargadera.

The learned state counsel opted not to submit. He told the court that he was not opposed to the appeal.

Learned state counsel did not want to go on record as conceding the appeal but these are just semantics. If one does not oppose something it follows that one is conceding to it.

Facts

It is stated in evidence that following a tip off police arrested the appellants from a lodging at Hargadera on 10th April 2012. The reason behind the arrest is that it was alleged that the two appellants had been travelling to Kismayu Somalia for undisclosed reasons. It was said that the two had been passengers in a lorry whose registration number was not given and which was travelling to Bura Marel which is said to be in Kenya past Hargadera. This lorry is said to have been attacked by bandits, forcing the driver to drive back to Hargadera to take the injured to hospital. At Hargadera, it is said that the driver left the other passengers in the lorry as he took the injured to hospital. It is alleged that the two appellants were among those passengers and they left the lorry and sought accommodation at the lodging where the police found them. After investigations, the police preferred this charge against the appellants.

Determination

This court is alive to the duty placed on it while sitting on first appeal to examine and evaluate all the evidence tendered in the lower court afresh to guide its decision. This notwithstanding the fact that it did not have the benefit of observing witnesses as they testified in order to form an opinion as to their demeanour.

I have read all the evidence. I have also looked at Section 3(a) and 4(1) of the Prevention of Organized Crimes Act under which the appellants are charged. The Act is misquoted in the charge as the 'Organized Crimes Act'. Under section 3(a) of the Prevention of Organized Crimes Act, a person engages in organized criminal activity where the person is a member or professes to be a member of an organized criminal group.

In my view, the central issue to be determined by this court is whether the appellants or any of them are members of the Al-shabbaab group. The prosecution bears the burden of proving this was the case. The prosecution has to prove that the appellants or any of them engaged in organized criminal activity either by:

- a. Being a member of Al-shabaab, or
- b. Professes to be a member of Al-shabaab

This burden never shifts in criminal cases except where the law so specifies. The standard of proof is one beyond reasonable doubt. Even where the law specifically shifts the burden of proof to an accused person, the standard of proof is lower and it never reaches 'beyond reasonable doubt.'

Did the prosecution in the lower court discharge this burden? It is not disputed that al-shabaab group is a proscribed group by virtue of Gazette Notice No 12585 dated 18th October 2010. It is also not disputed that the appellants were arrested at Hargadera as both shared a room for the night. The two appellants have stated in their defence that they had travelled from Nairobi to Hargadera looking for customers for the Kiswahili version Qurans they carried along.

I wish to address the issues raised in this appeal under the following headings:

- a. Contravention of the Constitution.
- b. Bias by the trial court.
- c. Shifting of the burden of proof by the trial court.
- d. Proof of the case beyond reasonable doubt.
- e. Harsh and excessive sentence and reliance of the Probation Report.

Contravention of the Constitution

It is true that the appellants were not informed promptly of their rights under Article 50 (2) (h) of the Constitution 2010 to choose and be represented by an advocate. I note that during the taking of the plea and during the testimony of Ali Muse Noor, PW1, the Appellants did not have legal representation. However the appellants engaged an advocate to represent them thereafter. While I find that it is important for courts to remind an accused person of this right especially in serious and complex matters, in this case the appellants did not suffer prejudice. Other than PW1 whose testimony is not adverse to them as will be shown, the other witnesses testified in the presence of the appellant's legal counsel.

It is contented that the police did not produce the appellants in the lower court to face charges within the time allowed under Article 49 (1) (f) of the Constitution thereby violating the law. To this I wish to state that the appellants are at liberty, if they have evidence to proof the same, to institute civil proceedings against the State for compensation.

It was also submitted that the trial magistrate contravened the law in not treating the 2nd Appellant as a minor. I find this argument without merit. After the court ordered for age assessment and after it was confirmed that the 2nd Appellant was aged 16 years, the court ordered that he be remanded at the Police Station and not at the G.K Prison. It is not stated under which conditions the 2nd Appellant lived at the Police Station. If there were not separate cells for minor children is not stated but if this were the case, the reasons may be beyond the control of the trial court. This court has taken judicial notice of the fact that there are no institutions within Garissa Municipality where minor children can be held in custody separate from adults due to lack of such facilities.

Bias

The appellants have contented through their counsel that the trial magistrate was biased against them. Instances of the alleged bias are given that the trial court took evidence of the PW1 on 13th April 2012 on a date fixed for mention of the case for purposes of confirming whether the police had completed their investigations. I have noted that the appellants were remanded in police custody to enable police finalize investigations. When the case came for mention on 13th April 2012 the prosecutor confirmed that police had completed investigations and also applied to be allowed to lead evidence of PW1 who was said to come from Somalia and who may not be traced if release allowed to leave. It is true the trial court allowed this and took evidence of PW1 who was however remanded in police custody after failing to give evidence as per the statement he had given the police. 13th April 2012 was therefore not the hearing date. The prosecutor applied and the court asked the appellants if they had any objection. They did not have any. The court proceeded to take evidence. PW1 was put in custody until 23rd April 2012 when he testified. After this the case reverted to the earlier date given for hearing, 10th July 2012.

The committal to jail by the court of PW1 is lawful under section 152 (b) of the Criminal Procedure Code. The appellants did not raise issues with it and in my view they were not prejudiced by it as the court had power to exercise discretion in the matter. The circumstances under which the application to have PW1 testify on 13th April 2012 are understandable and I find nothing illegal or prejudicial in it.

Another incident cited to show bias existed is the application to review bond by counsel for the appellants. The court had initially granted bond of Kshs 500,000 with surety on application of Mr. Onono who was initially on record for the appellants. The bond terms were revised to Kshs 300,000 with surety on application of Mr. Chacha when he came on record for the appellants. It seems Mr. Chacha made a further application to reduce bond terms and sought free bond to which the court stated:

“I am reluctant to review bond terms in view of the prevailing anxiety in the country due to the Al-shabaab threat.”

This statement seems to have been taken by counsel to mean that the court was presuming the appellants guilty before they were tried and to have been biased against them.

I am not able to understand why counsel was seeking further review of bond terms when already he had done so and the order had been granted. It is not clear what the magistrate meant by her ruling but it is true that this case was being tried at the time when anxiety due to terror threat was at its fever pitch. It is unfortunate because it would have been very easy for the magistrate to state that she had already reviewed the bond terms and circumstances had not changed. I however do not think this was a show of bias on her part.

It was also submitted that the trial magistrate uttered, on 26th November 2012, words to the effect that she did not like the appellants. I have read the record carefully and did not come across such words. On 26th November 2012 when the trial magistrate is alleged to have uttered those words, there is nothing on record to show this was the case. On that date, the case was mentioned before another magistrate and the record indicates that the trial magistrate was on leave. It is therefore misleading to allege she uttered those words on that date without demonstrating this was the case. She has addressed the issue in her judgment where she denied ever uttering those words. I have no reason, in the absence of any evidence to the contrary, to find that she uttered those words or that she was biased.

Shifting the burden of proof

I wish to address the twin issues of violation of rights to fair trial in presuming the appellants guilty and the shifting the burden of proof to the appellants together. It was submitted that by putting the appellants on their defence, the trial court shifted the burden of proof on them to prove their innocence and that the trial court chose not to believe them even after they testified that they had gone to sell Qurans. With due respect to the counsel, courts often place accused persons on their defence. This cannot be taken to mean that the trial court shifted the burden of proof. Neither can the trial court's discretion not to believe the defence of the accused. This claim has no merit.

However, the trial court seemed to shift the burden when she stated in her judgement that the appellants did not give an account as to what they were going to do in Somalia. I found no evidence that the two were going to Somalia as shown in this judgement.

Lack of proof

After reviewing the evidence in her judgement, the trial magistrate seems to understand the issue for determination before her. She stated as follows:

“The most important question for decision by this court will be whether the two accused persons engaged in organized criminal activities by being members of the Al shabaab a prohibited group as per Kenya Gazette Notice No. 12585 dated 18th October 2010”?

To determine that question, the trial magistrate was alive to the fact that she did not have direct evidence. She looked at the conduct of the two appellants and concluded that there was circumstantial evidence deduced in the manner the two conducted themselves and relying on the case of **Simon Musoke versus Republic [1958] EA 715**, she concluded thus:

“In the case before me, the inculpatory facts are that the two accused were headed to Somalia (Kismayu) when they were arrested which tends to point that since they were going to what was then an Alshabaab stronghold, they were members of that prohibited group. That is the inference drawn. There are also no co-existing circumstances which weaken or destroy such inference since the defence put up by the accused persons that they were going to sell copies of the Holy Quran is not as I have earlier discussed a credible defence.”

The trial magistrate in arriving at the above conclusion believed that the appellants were going to Somalia. It is true they were found with six copies of the Holy Quran which they claimed they were going to sell. However, they never said in their defence that they were going to sell them in Somalia but in Hargadera.

Let me re-visit the evidence to see what it says. PW1, the driver of the lorry alleged used to transport the appellants towards Somalia did not identify them as some of the passengers he carried. He said he was stopped by someone and asked to carry two passengers; that he never saw the passengers since it was at night and they sat at the back while he was in the driver's cabin; that even after returning to Hargadera to take injured to hospital following bandit attack he did not see the two passengers.

Where did police get evidence that the two passengers allegedly carried by PW1 were the appellants? Police Constable Paul Mwangangi, PW2, and Police Constable Elijah Kipchumba, PW4, the two officers who in company of others arrested the appellants from the lodging at Hargadera told the court that after arresting the appellants, they said they were headed to Somalia and that someone was to collect them from the border. They also said that they learned that the appellants had moved from Hargadera towards Somalia but the truck in which they were travelling in was attacked. PW4 said they arrested two young men who claimed to have been going to Somalia but did not explain the reason for going there.

Corporal Buxton Mavia, PW3, who is the investigating officer, said the members of public tipped the police that the two were intending to travel to Kismayu, Somalia. He said after interrogating PW1, this witness told him that he had been approached by one Somali man known as Samil who requested him to carry two passengers and drop them at Wermerera where he was headed and that the two would get transport to Kismayu from there. PW1 did not identify in his evidence the two appellants were these passengers.

On cross examination, PW3 said he had nothing to show that the two were headed to Kismayu. PW3 could not even remember the registration number of the lorry. He also said that the driver, PW1, and other sources informed him that the appellants were headed to Kismayu.

I have examined and evaluated this evidence. The problem is this: Inspector Mugeru (Mwongela)? who is said to have informed PW2 and PW4 about the appellants did not testify. The source of his information that the appellants were on their way to Kismayu is not disclosed. PW3 who investigated the case does not state how he got his information nor did he avail witnesses with information that the two appellants were traveling to Kismayu. PW1, whom PW3 says informed him the two appellants were travelling to Kismayu did not state so in evidence. PW3 admitted on cross examination that he did not have evidence that the two appellants were travelling to Kismayu and that the two did not tell him this is where they were going.

For the trial court to find that **“The conduct complained of is that the two accused were found inside a lodge at Hargadera market where they had been accommodated for the night as they headed to Kismayu which was then under the control of the Alshabaab militia group”** is a misapprehension of the evidence.

That the two appellants had travelled from Nairobi to Hargadera is not disputed. They so admit in their defence. They explained that their mission was to sell Kiswahili version Qurans. The trial court did not believe this evidence. She had her doubts about the truth of this story. There is nothing wrong with having doubts in a story like this one. The error the trial court committed is to state that, **“Evidence is on record that investigations by the anti-terror police revealed that the two accused persons had indeed travelled beyond Hargadera towards Kismayu had they not been caught up in a banditry attack on their transport lorry. This is confirmed by PW1 the driver of the lorry who testified that indeed he had been requested to carry two passengers**”

With respect to the trial magistrate, there is no such evidence. There is a missing link. PW1 never identified the appellants as the two passengers he carried and he never said the two were going to Kismayu.

The trial magistrate stated further as follows:

“Finally and in conclusion I do find that both the *actus reus* and the *mens rea* of engaging or intending to engage in criminal activities have been sufficiently demonstrated. The accused

were travelling to Kismayu Somalia, an Alshabaab militia stronghold for a reason up to now undisclosed and the court is entitled to a conclusion that they were engaging in organized criminal activities by being members of Alshabaab a prohibited group.”

Again, with respect to the trial magistrate, there is no evidence to demonstrate that the two appellants engaged in or intended to engage in criminal activities. The court made an erroneous conclusion based on misapprehension of the evidence that the 1st and 2nd Appellants were engaging in organized criminal activities by being members of Alshabaab.

I have found no evidence that the two appellants were travelling to Kismayu, Somalia. If police had this evidence, it was not availed to court. There is no evidence that the appellants travelled past Hargadera where they were arrested from. PW1 failed to connect the two appellants to the passengers he was carrying. If PW1 told the investigating officer that the two appellants were travelling to Kismayu, Somalia, then the least the officer could have done was to produce the statement of PW1 in court. The members of public who allegedly told the police that the two appellants were travelling to Kismayu did not testify. The two were not found with any material connecting them to any organized criminal activity.

Circumstantial evidence is stated in **R vs. Taylor Weaver and Donovan [1928] 21 CR.APP** in the following words:

“Circumstantial evidence is very often the best experience. It is evidence of surrounding circumstances which by intensified examination is capable of providing the preposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial

As stated elsewhere in this judgment, the circumstances of this case have a missing link to the appellants. With lack of evidence identifying them as the two passengers carried by PW1 the court is left with nothing to show they were the two passengers. Even if there was evidence identifying them as the two passengers, the court would still require evidence to show they were travelling to Kismayu to engage in Al shabaab related criminal activities.

The trial magistrate applied the principle found in **Musoke case** above wrongly in this case. There is no evidence of any kind, let alone circumstantial, to prove beyond reasonable doubt that the 1st and 2nd Appellants are members of Al-shabaab. The learned state counsel was wise in not contesting this appeal.

I wish to point out that the investigations, if any, were poorly done. I am aware it was at a time, and this continues to date, when this Republic was facing anxiety due to insecurity due to terrorism. The Police and all security agencies must play their part and do it well. The Judiciary must also do their part. However, the anxiety, fear or suspicion alone cannot be used as a basis of conviction where evidence is lacking. More needs to be done to ensure those found culpable face the consequences after due process. To prove a case beyond reasonable doubt is no mean task and the criminals know this. They can opt to remain silent and this cannot be used against them in a country like Kenya where Democracy has been embraced.

The outcome of my examination of the evidence and the analysis of the same leads me to make once conclusion, that this appeal has merit. It is hereby allowed. The conviction of Juma Njuguna and Mohamed Abdalla Kilume, 1st and 2nd Appellants respectively, is hereby quashed. The sentence against each of them is set aside. Each of them is set free forthwith unless for any lawful cause they are held in custody. It is so ordered.

Dated, signed and delivered this 19th day of June 2014.

S.N.MUTUKU

JUDGE