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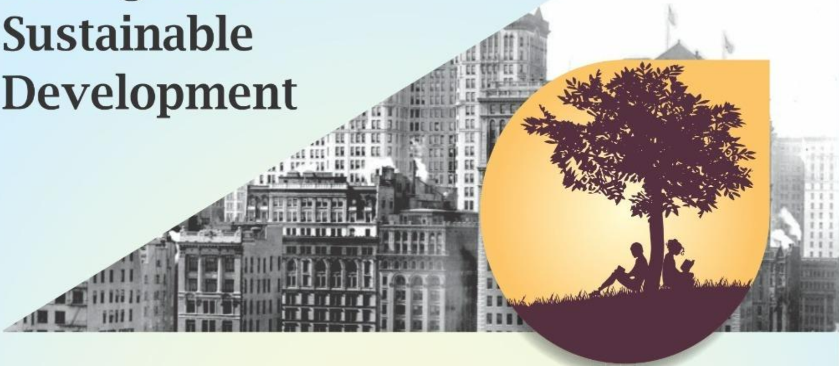

Realizing Environmental, Social and Governance Tenets for Sustainable Development — Kariuki Muigua

Assessing the Jurisprudential gains and Challenges in the Prosecution of Terrorism-related Offences in Kenya — Michael Sang

Who Speaks for Nature? Entrenching the Ecocentric Approach in Environmental Management in Kenya — Kariuki Muigua

Waking up to the call of Climate change: Challenges for Africa and Europe — Gichinga Ndirangu

Effective Public Participation in Environmental Impact Assessment Process: Assessing The Law and Practice in Kenya — Aaron Masya Nzembei & Angelah A. Malwa

An Appraisal of Kenya's National Cybersecurity Strategy 2022: A Comparative Perspective — Michael Sang

Safeguarding the Environment through Effective Pollution Control in Kenya — Kariuki Muigua

Resolving Intergovernmental Disputes in Kenya through Alternative Dispute Resolution (ADR) mechanisms — Vianney Sebayiga

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Assessing the Jurisprudential Gains and Challenges in the Prosecution of Terrorism-related Offences in Kenya

By: ***Michael Sang***[*]

Abstract

It is without a shadow of doubt that terrorism has become a tough nut to crack in Kenya. It is a serious offence that has left in its wake deleterious effects in our society. The objective of this study is to critically examine the jurisprudential gains and challenges in the prosecution of terrorism-related offences in Kenya. Using a desktop review of selected case studies, it brings to the fore systemic issues faced in our criminal justice system. It begins by outlining the legal framework for terrorism-related offences in Kenya while highlighting the efficacies. It then unpacks, using selected case studies, challenges in prosecution of these offences. It finally critically assesses problematic aspects in prosecution of these offences and proffers proposals for reform in bail, evidence and sentencing. It is hoped that the study will contribute positively and massively to the jurisprudence in prosecution of terrorism related offences in Kenya.

Key Words: *Terrorism, Prosecution, Jurisprudence, Gains and challenges, Reforms, Kenya*

1.0 Introduction

The greatest security challenge currently facing Kenya is the threat of terrorism, which has significantly altered the lifestyles of its citizens.[1] Kenya's terror-related problems can be traced back to 1976 when the infamous Entebbe hostage crisis incident in neighboring Uganda. In that

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[1] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection of Human Rights a Comparative Analysis of The Efficacy of Counter Terrorism Legislation and Policy:* Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

incident, members of an international terrorist group seized an Air France airliner and its 258 passengers.[2] About 30 people were killed in the subsequent hostage rescue mission, comprising both Israelis and Ugandans.[3] In 1980 terrorists linked to the Palestinian Liberation Organization attacked the Jewish-owned Norfolk hotel in Nairobi killing 15 people.

In 1998, the U.S. Embassy in Nairobi, Kenya and the one in neighboring Tanzania were bombed. According to official Kenyan government figures, 213 people were killed in the blast that gutted the U.S. Embassy building in Nairobi. This incident resulted in the killing of foreigners too.[4] In 2002, three suicide bombers attacked an Israeli-owned hotel, killing 11 Kenyans, 3 Israelis and wounding dozens. There have been sporadic terrorist attacks since 2002, but their frequency was intensified by the entry of Kenya Defense Forces in Somalia in hot pursuit of the militants after abducting an aged tourist. Since the late 2011, Kenya has seen an upsurge in violent terrorist attacks.[5]

The Kenyan government has previously asserted that many of the murders and blasts are carried out by the Al-Shabaab in retaliation for Operation Linda Nchi, a coordinated military mission between the Somali military and Kenyan military.[6] According to Kenyan security experts, the bulk of the attacks were increasingly carried out by radicalized Kenyan youth who were hired for the purpose. These include the attack on 10 March 2012, where six people were killed and over sixty were injured after four grenades were thrown into a Machakos bus station in Nairobi. The September 2013 Westgate mall attack claimed the lives of 67 people and left over 100 people

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[2] Ibid

[3] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection Of Human Rights A Comparative Analysis Of The Efficacy Of Counter Terrorism*
Legislation and Policy: Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

[4] Ibid

[5] Ibid

[6] Ibid

injured and millions of properties destroyed.[7] In April 2015 Kenyans woke up to yet another terrorist attack at Garissa University in which over 150 people lost their lives, the majority being students.[8] These are just a few of the terrorist attacks Kenya has experienced. The obligation of the state to ensure these offenders are brought to book cannot be stressed enough. It is against this backdrop that the study undertakes to offer jurisprudential gains and challenges in the prosecution of these terrorism related offences.

2.0 Legal Framework for terrorism-related offences in Kenya

This section provides an outline of the existing laws on terrorism-related offences in Kenya. It focuses on local, regional and international laws and will attempt to give their efficacy with regards to countering terrorism.

2.1 Kenyan laws

2.1.1 Constitution of Kenya, 2010

It is a general principle of law recognized by all civilized nations that a State has an obligation to protect its citizens.[9] Article 238 (1) defines national security as the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity and other national interest. This mandate is carried out by the national security organs.[10] Terrorism is a threat to national security and Kenya has a duty to counter it. The Constitution places this duty on the national security organs. This duty must be undertaken while taking into considerations the law on human rights.

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[7] Ibid

[8] Ibid.

[9] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection Of Human Rights A Comparative Analysis Of The Efficacy Of Counter Terrorism Legislation and Policy:* Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

[10] Article 239 (1): national security organs include: the Kenya Defense Forces, the National Intelligence Service and the National Police Service

Chapter Fourteen of the Constitution on the other hand provides for National security. Article 238 on principles of national security provides that the national security of Kenya shall be promoted and guaranteed in accordance with two principles.[11] First is that national security is subject to the authority of the Constitution and Parliament and secondly, national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental principles.

2.1.2 Prevention of Terrorism Act, 2012

The Prevention of Terrorism Act, 2012 (hereafter referred to as "POTA") was enacted in 2012 to provide measures for the detection and prevention of terrorist activities.[12] POTA was necessitated by sporadic attacks by the Al-Shabaab terror group. POTA also has a subsidiary legislation; the Prevention of Terrorism (Implementation of the United Nations Security Council Resolution on Suppression of Terrorism) Regulations, 2013. These regulations were developed by the Cabinet Secretary responsible for internal security pursuant to section 50 of the Prevention of Terrorism Act, 2012.[13]
Section 32 of POTA provides for the right to be released. Any person suspected of terrorism must be brought before a court of law within 24 hours. Further, remand may only be ordered by the Court as provided for under section 33 of the Act. The Court must have the following reasons so as to remand a suspect:

i) There are compelling reasons for believing that the suspect shall not appear for trial, interfere with witnesses or the conduct of investigations, or commit an offence while on release; ii) It is necessary to keep the suspect in custody for the protection of the suspect or where the suspect is a minor,

[11] Article238 (2) of the Constitution of Kenya, 2010
[12] Act No. 30 of 2012.
[13] Section 50 (2): where the Security Council of the United Nations decides, in pursuance of Article 41 of the Charter of the United Nations, on the measures to be employed to give effect to any of its decisions and calls upon member States to apply those measures, the Cabinet Secretary may by regulations make such provisions as may be necessary or expedient to enable those measures to be applied.

> for the welfare of the suspect; iii) The suspect is serving a custodial sentence; or iv) The suspect, having been arrested in relation to the commission of an offence under the Act, has breached a condition for his release.

Despite lack of international consensus on the definition of terrorism,[14] Section 2 of POTA provides an extensive definition of what encompasses a terrorist act. A terrorist act is defined as an act or threat of action which involves the use of violence against a person; endangers the life of a person, other than the person committing the action; creates a serious risk to the health or safety of the public or a section of the public and results in serious damage to property.[15]

Terrorism within the meaning of POTA also involves the use of firearms or explosives and the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment. It is an act which also interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services; interferes or disrupts the provision of essential or emergency services and prejudices national security or public safety. POTA also highlights the aims for carrying out such acts which are said to be; to intimidate the public, compel the government to do or refrain from something and destabilize institutions in a country.[16]

However, the study views this definition as inadequate and overbroad. Firstly, POTA fails to provide a threshold for the differentiation of similar crimes enlisted in the Penal Code and in the Act. The definition has adopted

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[14] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection Of Human Rights A Comparative Analysis Of The Efficacy Of Counter Terrorism*
Legislation and Policy: Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*
[15] Section 2 POTA.
[16] A disclaimer is provided in the subsequent paragraph that discredits demonstrations as terrorist acts if they do not give rise to the results in the definition

a 'catch-all' approach in that most penal crimes can be said to constitute terrorism; for example the prohibited use of explosives is provided for under Section 235 of the Penal Code and attracts a sentence of fourteen years,[17] whereas in POTA any person who possesses explosives is liable to face imprisonment for a period not less than twenty-five years.[18] Such conflicting and ambiguous provisions are open to abuse.[19] Harmonization of the punishments is required to avoid people colluding to prefer charges under the law that offers less punishment.

The United Nations Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has noted that precision in the definition is a critical requirement that includes a requirement that "the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct."[20]

For that reason a law on terrorism must be directed at terrorist activities in the narrow sense, and not just crime in general.[21] In addition, terrorism needs to be legally defined in line with the generally accepted definitions of what it is, rather than to leave it loose and allow other activities to fall within the confines of its definition. A law that permits many activities to be captured within it is seen to be in violation of international law.[22]

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[17] It reads as follows: 'Any person who unlawfully, and with intent to do any harm to another, puts any explosive substance in any place whatever, is guilty of a felony and is liable to imprisonment for fourteen years.'

[18] Section 12A of POTA

[20] E/CN.4/2006/98 (28 December 2005) para. 46.

[21] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection of Human Rights a Comparative Analysis Of The Efficacy Of Counter Terrorism Legislation and Policy:* Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

[22] Ibid

The central tenet of a counter-terrorism law should be aimed at preventing and dealing with violence and threats of violence. The fact that some the aspects of the definition of a "terrorist act", in the Act are not limited to dealing with the threat of, or actual use of violence renders the law problematic. For example, would crimes such as serious damage to property provided for in the Act automatically amount to a terrorist act?

POTA provides for a number of offences including but not limited to; commission of a terrorist act,[23] provision[24] and possession of property for commission of a terrorist act,[25] dealing in property owned by terrorist groups,[26] supporting[27] and harboring suspected terrorist,[28] provisions of weapons to groups,[29] direction in the commission of a terrorist act,[30] recruitment[31] and training.[32] Financing of terrorist activities from within and outside Kenya is also prohibited under the Act.[33] The minimum sentence for any terror related offence is 30 years.[34] Life imprisonment is the maximum sentence that can be imposed for any person(s) convicted of an offence pertaining to terrorism that results in the loss of life of another person.[35]

In 2006 the UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism noted that the definition of terrorism at the domestic level should be defined:

[23] Section 4 of the Prevention of Terrorism Act 2012
[24] Section 5 of the Prevention of Terrorism Act 2012
[25] Section 6 of the Prevention of Terrorism Act 2012
[26] Section 8 of the Prevention of Terrorism Act 2012
[27] Section 9 of the Prevention of Terrorism Act 2012
[28] Section 10 of the Prevention of Terrorism Act 2012
[29] Section 11 of the Prevention of Terrorism Act 2012
[30] Section 12 of the Prevention of Terrorism Act 2012
[31] Section 13 of the Prevention of Terrorism Act 2012
[32] Section 14 of the Prevention of Terrorism Act 2012
[33] Section 22, 23 and 25 of the Prevention of Terrorism Act 2012
[34] Section 4(1) of the Prevention of Terrorism Act 2012
[35] Section 4 (2) of the Prevention of Terrorism Act 2012

> by the presence of three cumulative conditions: (i) the means used, which can be described as deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; (ii) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to do or refrain from doing something; and (iii) the aim, which is to further an underlying political or ideological goal. It is only when these three conditions are fulfilled that an act should be criminalized as terrorist; otherwise, it loses its distinctive force in relation to ordinary crime.[36]

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has argued that conduct must be defined as that which is "genuinely of a terrorist nature".[37] He also argued that terrorism includes only acts or attempted acts "intended to cause death or serious bodily injury" or "lethal or serious physical violence" against one or more members of the population, or that constitute "the intentional taking of hostages" for the purpose of "provoking a state of terror in the general public or a segment of it" or "compelling a Government or international organization to do or abstain from doing something."[38]

Thus, legislation dealing with terrorism cannot be so wide so as to restrict ordinary activities that are necessary in democratic societies. Such activities include legitimate opposition protests and speech. A law that deals with terrorism must not be used to curb the democratic rights of political opponents, civil society organizations, trade unions, or human rights defenders.[39]

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[36] A/61/267 (16 August 2006) para. 44.

[37] Id para. 17.

[38] Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/16/51 (December 22, 2010) para. 28.

[39] Ibid

Further, some scholars and members of the public have argued that the police have been given sweeping powers in the Act.[40] In the investigation of terror related offences, police are endowed with broad powers under the Act. Section 31 of POTA provides that a police officer may arrest a person if he has reasonable grounds to believe that the person has committed an offence pursuant to the Act. These arrests may be effected without a warrant. In essence, police are allowed to invade an individual's private property and arrest a suspect so long as there is reasonable suspicion that the individual has committed a crime under the Act.

Section 31 of POTA has been criticized as violating the right to privacy which not only entails privacy of personal information, but also prohibits unauthorized entry into private property.[41] This study, however, maintains that this provision is constitutional because the right to privacy under Article 31 of the Constitution of Kenya 2010 is not absolute.[42] Even so, the problem arises in the fact that many police officers abuse this power by unreasonably invading private property without justifiable grounds for suspicion of terrorism related activities.

2.1.3 Security Laws (Amendment) Act (SLAA) 2014

The Security Laws Amendment Act (hereafter referred to as "SLAA") is an Act of Parliament intended to amend the various laws relating to security. SLAA was highly criticized by political parties, civil society organizations among others for violation of the Constitution of Kenya, 2010, particularly, the Bill of Rights.[43] Several sections of the SLAA were challenged as

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[40] Kenya National Commission on Human Rights, *Report on Securing National Security & Protection of Human Rights a Comparative Analysis of The Efficacy of Counter Terrorism*
Legislation and Policy: Final Report (Kenya: ECPL, 2018) at 12 (*hereinafter KNCHR Report).*

[41] Ibid

[42] Only four rights are absolute under the CoK 2010 Article 25. Right to privacy is not one of them.

[43] *Coalition for Reform and Democracy (CORD) & Another v Republic of Kenya and Others* [2015] eKLR

unconstitutional in the case of *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya and Others*.[44]

For instance, Section 66(b) of the SLAA that amended section 33(10) of POTA provided that a person suspected to be a member of a terrorist group could be detained for up to 360 days before being produced in court. This is in direct contravention of the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay.[45] This is a fundamental right that cannot be limited as provided for under Article 25 of the Constitution of Kenya 2010. This study argues that to provide such a statutory period for remand would be a stretch and therefore subject to abuse by the police. Section 66(b) of SLAA is also unconstitutional for violating Article 49(1) (f) of the Constitution which provides that the statutory period of remand should be not later than 24 hours after being arrested.

2.1.4 National Intelligence Service Act, 2012

Some of the key functions of the National Intelligence Service (NIS) as provided for in the National Intelligence Service Act, 2012 (hereafter the "NIS Act") are as follows: to gather or share with the relevant State agencies, security and counter intelligence;[46] detect threats to national security;[47] safeguard and promote national security within and outside Kenya;[48] carry out protective and preventive security functions;[49] support law enforcement agencies in detecting and preventing threats to national security;[50] obtain intelligence about the activities of foreign interference[51] and liaise with intelligence of other countries.[52]

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[44] [2015] eKLR.
[45] Article 50 of the CoK 2010
[46] Section 5 (1) (a) of the NIS Act.
[47] Section 5 (1) (b) of the NIS Act.
[48] Section 5 (1) (d) of the NIS Act.
[49] Section 5 (1) (h) of the NIS Act.
[50] Section 5 (1) (j) of the NIS Act.
[51] Section 5 (1) (n) of the NIS Act.
[52] Section 5 (1) (o) of the NIS Act.

Section 42 of the Act provides that where the Director General has reasonable grounds to believe that a covert operation is necessary to enable the Service to deal with a threat to national security, he/she may issue written authorization permitting an officer of the Service to undertake such an operation subject to the Council's guidelines. A special operation refers to measures, efforts and activities aimed at neutralizing threats against national security.[53]

The written authorization must be specific and accompanied by a warrant granted from the High Court. Moreover, it permits an officer to obtain any information, enter a premises and access anything, search for information, materials or documents, monitor communication and install or remove anything.[54] There are however no guidelines on how the information seized is to be handled so as to maintain a degree of privacy even as investigations are ongoing. This contradicts Article 238(2) (b) of the Constitution which calls for respect for liberties while effecting principles of national security.[55] In the NIS Act, some rights are subject to limitations under the criteria set out in Article 24 of the Constitution. These rights include the right to access information[56] and the right to privacy.[57] The right to privacy may be limited if a person is under investigation or is suspected of having committed a serious crime. In addition, the privacy of a suspect's communication may be interfered with or monitored for purposes of gathering information related to the crime under investigation. Section 61 of the Act provides for the

[53] Section 42(1) of the NIS Act.
[54] Section 42 (3) of the NIS Act.
[55] Article 238 (2) (b) of the Constitution reads as follows:
The national security of Kenya shall be promoted and guaranteed in accordance with the following principles:

> (b) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;

[56] Section 37 of the NIS Act
[57] Section 36 of the NIS Act

prosecution of any member of the Service who discloses information gathered without authorization from the Director General.

It can therefore be concluded that the NIS Act has been quite instrumental in promoting national security while balancing human rights as it has provided for various safeguards when carrying out various security operations. The question then becomes whether this is implemented in practice or whether these provisions are only on paper.

2.2 Regional Instruments

2.2.1 OAU Convention on the Prevention and Combating Terrorism, 1999

The Convention was adopted at Algiers on 14 July 1999 by Member States of the Organization of African Union having deep concerns over the scope and seriousness of the phenomenon of terrorism and the dangers it poses to the stability and security of States. The Convention was determined to eliminate terrorism in all forms and manifestations. The legal provisions of the Convention that address rights of terror suspects include:

a. Article 4 (2) of the Convention which requires State parties to adopt any legitimate measures aimed at preventing and combating terrorist acts in accordance with the provisions of the Convention and their respective national legislation; and
b. Article 22 of the Convention provides that nothing in the Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and People's Rights.

This Convention has placed particular emphasis on legitimate measures being undertaken when carrying out security operations. In particular, special regard must be given to rights enshrined in the African Charter and general principles of International Humanitarian law when coming up with

counter-terrorism measures. This a progressive way of balancing national security with human rights.

2.3 International law

2.3.1 International convention for the suppression of the financing of terrorism 1999

Its objective is to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators. Article 17 of the Convention guarantees fair treatment for terrorist suspects. This demonstrates a clear balance between promotion of national security and protection of human rights.

3.0 Jurisprudential Gains and Challenges in the Prosecution of Terrorism-related Offences in Kenya: Analysis of Selected Case Studies

This section critically analyses some of the challenges encountered in prosecution of terrorism-related offences. This is achieved through a detailed analysis of selected case studies. The justification for choosing these cases is informed by the fact that they are recently decided cases that clearly bring out challenges in our criminal justice system when prosecuting terrorism-related offences. In addition, they bring forth significant gains in our justice system and are benchmark for proposing reforms.

3.1 Membership of a terrorist group *Abdirazak Muktar Edow v Republic* [2019] eKLR

This was an appeal against both conviction and sentence by the trial court where the learned Senior Principal Magistrate convicted the Appellant in count II and sentenced him to serve 10 years.[58] Count II was membership of a terrorist group contrary to Section 24 of the Prevention of Terrorism Act. The particulars were that he was found to be a member of a terrorist group

[58] Paragraph 1 of the judgment

namely Al-Shabaab which is an outlawed terrorist organization by the Kenya Gazette Notice No. 12585 of 2010.

The appellant argued, among other grounds, that there was no direct evidence of membership of the Al-Shabaab terrorist group and the available circumstantial evidence could not lead to the same inference.[59] He argued that the trial court had relied on hearsay evidence and conjecture. The Prosecution submitted that where the membership of Al-Shabaab is not confessed and/ or conceded, the court may infer such membership based on the conduct of the accused.[60]

The court concluded that having communicated the need to attend that meeting, which PW8 confirmed took place and Al-Shabaab flag was recovered, this led to an inference that the Appellant ascribed to the beliefs and activities of the proscribed group.[61] Additionally, flowing from the fact that some of the material recovered from the Appellant's phone contained information that advocated for terrorist activities such as, calling on the Kenyan youth to go to Somalia to fight the Kenyan government and exalting the *Al-Qaida* terrorist group, the court viewed these as sufficient grounds from which the court can infer membership of the Al-Shabaab group.[62]

The court added that the Appellant did not offer a rebuttal to the strong prosecution evidence and opined that the only inference that could be drawn from the message is that the Appellant was a member of Al-Shabaab. The court therefore upheld the conviction and sentence. One potential challenge with this finding is that the court ignored the accused's right to remain silent and consequently drew a negative inference. In *Sawe v Republic*[63] the Court of Appeal held:

[59] Paragraph 3e of the judgment
[60] Paragraph 93 of the judgment
[61] Paragraph 95 of the judgment
[62] Paragraph 96 of the judgment
[63] [2003] KLR 364.

> *"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.....suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."*

Clearly, the burden of proof will always rest on the prosecution and the court should refrain from drawing a negative inference from the accused's silence. Another potential challenge is the reliance by the court on purely circumstantial evidence to convict a terrorist suspect. In *Abanga alias Onyango v Republic,*[64] the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case suffices to sustain a conviction. These are: (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; and (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.[65] The present study recommends that in future, courts should strictly comply with these standards when direct evidence is insufficient to secure a conviction.

[64] CR. A NO.32 of 1990(UR)

[65] Paragraph 11 of the judgment

3.2 Collection of information for commission of a terrorist act

***Republic v Victor Odede Bwire alias Abdul-Aziz* (2023) (unreported)**

In count II, the accused was charged with the offence of collection of information contrary to section 29 of POTA. The particulars were that in preparation or facilitating the commission of a terrorist act, the accused collected and transmitted information on security arrangement of Kenyatta International Convention Centre (KICC) using his mobile phone on Facebook account "Mohamed Yore Abdalah" which information was to be used in commission of a terrorist act.[66] The accused in his defense stated that the information collected was not meant to facilitate a terrorist Act but was for general awareness of Mohamed Yare who was an exhibitor intending to do a Somali cultural show at the KICC in mid-2019.[67]

The court opined that the prosecution largely relied on circumstantial evidence and not direct evidence.[68] Again, the challenge of purely relying on circumstantial evidence was brought to the fore in this case. The court addressed that issue by holding that that there were four key strands of evidence that connected the accused with the offence. These are:

> *Nature of engagement*:[69] The accused was asked whether he was ready for the job at hand; he was warned that it was not easy and warned never to trust anyone not even 'his own friends, wife or even Sheikhs; he is also warned that there was a lot of espionage and therefore need for secrecy. This kind of engagement, in the court's view, was consistent with a plan to engage in a terrorist activity.
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> *Concealment of identity*:[70] The court held that the fact that the accused was instructed and attempted to conceal his identity could be an indicator of his intentions. The accused was advised to drop use of his mobile phone number and asked to use Facebook accounts, he did not use his

[66] Paragraph 2 of the judgment
[67] Paragraph 33 of the judgment
[68] Paragraph 36 of the judgment
[69] Paragraph 39 of the judgment
[70] Paragraph 39 of the judgment

own phone number or name to open the Facebook accounts but used other peoples' numbers without their knowledge.

Nature of surveillance and movements:[71] The accused was asked to report on which he did, the number of police roadblocks on the way, the location of the roadblocks, whether the motor cycle was being stopped by the police, how many times if so and whether they asked for ID. He was also asked to carry luggage on the motorbike and a passenger and asked to confirm whether the luggage was being searched and whether the passenger ID was also being asked for. The court held that from this kind of information requested it can be deduced that the information requested was to assist in assessing the best mode of transport for the attackers who would naturally choose the least checked. It would also appear that they intended to carry some luggage and sought to know whether it was checked. The court opined that this kind of information definitely is critical for anyone wishing to perform a terrorist act.

The place of attack and surveillance:[72] From the conversations, the court viewed that several questions were asked about KICC; the nature of questions related to the entrance, number of entrance gates and location, the security at the gates, the distance from the gate to the building, doors to the building and the parking area locations. This information, the court held, was necessary if one was to perform a terrorist act at KICC as allegedly planned.

The court concluded that the information was for the purpose of carrying out a terrorist act. The court held that if Mohamed Yore wanted to do an event there was no need to disguise himself, or to secretly seek the security details stated above and in a secret manner.[73] The court held that count II had been proved beyond reasonable doubt, the accused was found guilty of the offence

[71] Paragraph 39 of the judgment
[72] Paragraph 39 of the judgment
[73] Paragraph 40 of the judgment

of collection of information contrary to section 29 of POTA and was convicted under section 215 CPC.[74]

This is a classic example of the court clearly interrogating the circumstantial evidence placed before it. Since relying only on circumstantial evidence can be problematic, the court went ahead to critically analyze the evidence and in doing so, established a rational link between the conduct of the accused and the offences. Drawing an inference of guilt can be challenging, it is upon the court to examine the evidence in totality.

3.3 Conspiracy to commit a terrorist act

***Benson Mwangi Maina v Republic* [2019] eKLR**

The Applicant was jointly charged with other two persons with terrorism related offences under the Prevention of Terrorism Act (POTA). The main charges were with respect to conspiracy to commit a terrorist act inside Kenya contrary to Section 23(2) of POTA. The particulars were that on or before 15th January, 2019 in the Republic of Kenya being persons inside Kenya conspired with others who were outside Kenya to carry out a terrorist act within the Republic of Kenya.[75]

The court questioned why the Applicant would procure an insurance cover in his name for a vehicle he does not own and that vehicle is later used in a terrorist attack. The court also noted that his father is deceased, yet he was able procure an insurance cover in his name for a vehicle that was never owned by him. The court questioned why an insurance company would allow procurement of insurance covers in the names of parties who do not own the vehicles.[76] The court therefore denied the applicant's application for bail due to the seriousness of the offence.[77]

[74] Paragraph 42 of the judgment
[75] Paragraph 1 of the judgment
[76] Paragraph 17 of the judgment
[77] Paragraph 18 of the judgment

The elements of proving this offence were well set out in the case of *Christopher Wafula Makokha v Republic,* [78]where the court had this to say regarding what constitutes the offence of conspiracy:

> *"In Archibold: Writing on Criminal Pleadings, Evidence and Practice, the learned writers observed at pages 2589 and 2590 that: 'The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons ...so long as a design rests in intention only, it is not indictable; there must be agreement ... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.'"*[79]

The court went on to cite a Canadian Case of *R v Noseworthy*,[80] where the court stated:

> *"Conspiracy is an agreement between two or more individuals to act together to achieve an unlawful object. In Papalia v. The Queen,*[81] *the Supreme Court of Canada explained the offence at 276:*
> *... On a charge of conspiracy, the agreement itself is the gist of the offence: ... The actus reus is the fact of agreement: .... The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additionally, persons may join the ongoing scheme, while others may drop out. So long as there is a continuing, overall, dominant plan, there, may be changes in methods of operation, personnel or victims without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to*

[78] [2014] eKLR.
[79] Paragraph 11 of the judgment

[80] 2018 NLCA 69(Can LII)
[81] 1979 Can LII 38 (SCC), [1979] 2 S.C.R. 256, 93 D.L.R. (3d) 161 at 276

> *which all of the alleged offenders were privy ... the Crown is simply required to prove a meeting of the minds with regard to a common decision to do something unlawful, specifically the commission of an indictable offence."*[82]

Following from the above decisions, the dominant aspect of the offence of conspiracy is the presence of an agreement or a meeting of the minds. The challenge here is how the courts can successfully infer that there was such meeting of the minds. *Mens rea* in such cases becomes a tough nut to crack. Nevertheless, the study proposes that this could easily be inferred by a careful examination of the conduct of the accused based on the evidence presented.

3.4 Possession of explosives

***Republic v Ahmad Abolfathi Mohammed and Another* (2019) eKLR**

The case of *Republic v Ahmad Abolfathi Mohammed and Another*[83] (hereinafter the *RDX* case) was an appeal before the Supreme Court of Kenya. The respondents had been charged before the Magistrate's Court with, inter alia, the offence of being in possession of explosives contrary to section 29 of the Explosives Act, Cap. 115 Laws of Kenya as per count three. The particulars were that at Mombasa Golf Course along Mama Ngina Drive in Mombasa City within Mombasa County, they had in their possession 15 kilograms of RDX explosive for unlawful object.[84] In addition to that, they put an explosive substance namely Cyclotrimethylenetrinitramine (RDX) at the Gold course with intent to cause grievous harm to the golf players.

The Chief Magistrates Court convicted the respondents of the offences and sentenced them to life imprisonment on the first count. The respondents appealed to the High Court and the conviction was upheld but the life sentence was set aside.[85] The case proceeded to the Court of Appeal which

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[82] Paragraph 43 of *Republic v Victor Odede Bwire alias Abdul-Aziz (2023) (unreported)*

[83] [2019] eKLR (hereinafter *RDX Case*)

[84] Paragraph 3 of the judgment

[85] *Ahmad Abolfathi Mohammed & another v Republic* [2016] eKLR

quashed the conviction by the High Court and set aside the sentence.[86] This prompted the state to appeal in the Supreme Court.

The court, in allowing the appeal, upheld the conviction by the magistrate's court and stated that the respondents should serve the remainder of their imprisonment term. The court was of the view that Kenya has suffered many acts of terrorism 'which have been satanically planned and executed with ruthless bestiality against innocent people and that such heinous crimes must be harshly punished.' By a Ruling delivered on 28th September, 2018, the Supreme Court certified the Appeal as one that raises matters of great public importance under Article 164(3) (b) of the Constitution.[87]

One of the challenges which the court faced in the *RDX* case was (i) 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 an admission or confession, and (ii) whether such information is admissible under the provisions of section 111(1) of the Evidence Act.[88] The Supreme Court opined that a distinction must be made between an 'admission' and a 'confession'.[89] The court held that an admission is an acknowledgement of "*... fact from which the guilt may be inferred by the jury*" while a confession is "*the express admission of guilt itself.*"[90] A confession must be obtained in conformity with Articles 49(1)(b), (d) and 50(2)(a) and (4) of the Constitution, sections 25 to 32 of the Evidence Act and The Evidence (Out of Court Confession) Rules, 2009 for it to be admissible in evidence. The Supreme Court further held that a confession is a direct acknowledgement of guilt on the part of the accused while an *admission* is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction.[91]

[86] *Republic v Ahmad Abolfathi Mohammed & another* [2018] eKLR
[87] *Republic v Ahmad Abolfathi Mohammed and Another* (2019) eKLR
[88] Paragraph 27 of the judgment
[89] Paragraph 31 of the judgment
[90] Paragraph 33 of the judgment
[91] Paragraph 28 of the judgment

The Supreme Court concurred with the trial Court and the first appellate court that the 1st respondent indeed led the Police to the discovery of the RDX explosive in the Mombasa Golf Club golf course along Mama Ngina Drive.[92] That act was an admission of the respondents' possession of that explosive. The Supreme Court also found that the Court of Appeal erred in holding that the respondents' conviction was based solely on circumstantial evidence.[93] It was partly based on that admission and the circumstantial evidence on record corroborated that admission. These two factors sealed the guilt of the accused. The court therefore allowed the state's appeal and the earlier conviction was affirmed.

Another challenge faced by the Supreme Court in the *RDX* case was how the court could balance an accused's right to a fair trial and public interest. The court held that for judges and judicial officers, their vigilance has to be within the confines of the rule of law.[94] They cannot, for instance, act on public outrage of the offences of terrorism and ignore the law. While they must jealously guard an accused person's right to a fair trial, the courts should equally guard public interest by ensuring that those who commit or plan to commit terrorist offences do not escape punishment.

3.5 Travelling to a terrorist designated country

Joseph Juma Odhiambo and another v Republic [2022] eKLR

The appellants were charged with various offences. In count 1, they were charged with travelling to a terrorist designated country without passing through designated immigration exit points contrary to Sections 30B(1)(a) & 30B (2) (b) as read with Section 30C (1) of the POTA. They were found to have travelled to Somalia a terrorist designated country.[95]

The court also found that the route in question that the Appellants used is normally used by Al-Shabaab.[96] The court relied on section 30C on

[92] Paragraph 51 of the judgment
[93] Paragraph 51 of the judgment
[94] Paragraph 64 of the judgment
[95] Paragraph 1 of the judgment
[96] Paragraph 12 of the judgment

presumption of travelling to a country for purposes of being trained as a terrorist, which states that 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 points shall be presumed to have travelled to that country to receive training in terrorism.

The court further held that the law states that it matters not that they did not yet receive the training and further that if one travels to such a country without passing through a designated area then such person is presumed to have travelled to that country to receive training in terrorism.[97] Based on the evidence on record, the court resonated with the findings of the trial court, affirmed the convictions and sentences, and found the Appeal lacking in merit and the same was therefore dismissed.[98]

This was a straightforward case that established the link between the conduct of the accused and the offences they were being charged with. The only challenge that would be potentially faced by the court would be vigilance in examining the evidence placed before the court, ensuring that the facts point undeniably towards the guilt of the accused. This was well addressed by the court.

4. Analysis of problematic aspects and proposals for reform

This section addresses some of the prominent problematic areas in prosecution of terrorism-related offences and proffers proposals for reform. The arguments are buttressed with relevant case law and statutory provisions.

4.1 Bail/Bond

The most prominent issue when it comes to bail is the reluctance by courts to grant it in serious offences like terrorism. The paramount consideration in granting bail is whether an accused person would honor attendance to the hearing whenever they are required to do so. This cardinal principal was

[97] Paragraph 21 of the judgment
[98] Paragraph 26 of the judgment

enunciated by the case of *Republic v Danson Mugunya and Another*[99] where the court stated: "The main function of bail is to ensure the presence of the accused at the trial…Accordingly, this criterion is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above."[100]

The Court went on to observe as follows:

> *"As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with a capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanor, like affray. The distinction between capital and non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature."*

The Bail and Bond Policy Guidelines[101] published by the National Council on Administration of Justice requires the court to lean towards granting bail to accused persons unless the prosecution proves that there are compelling reasons to deny the accused persons bail pending trial. In the case of *Watoro v Republic*[102] Porter J (as he then was) stated "… I think I have made it clear over a number of rulings in bail application that l take the view on authority that the paramount consideration in bail application is whether the Accused will turn up for trial…"[103]

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[99] [2010] eKLR

[100] Paragraph 10 in *Benson Mwangi Maina v Republic* [2019] eKLR

[101] The Judiciary Bail and Bond Policy Guidelines of March 2015

[102] [1991] KLR 220 at Page 283

[103] Page two in *Lydia Nyawira Mburu v Republic* [2019] eKLR

Bail pending trial is a constitutional right of an accused person under Article 49(1) (h) of the Constitution of Kenya, 2010. It provides that every arrested person has the right to be released on bond/bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. The Constitution does not spell out what constitutes compelling reasons. One thing is clear though is that the onus of discharging the burden of demonstrating that there exists compelling reasons lies with the prosecution.[104]

The aspect of what constitutes 'compelling reasons' is problematic. The case of *Benson Mwangi Maina v Republic*[105] attempted to cure this lacuna. The court stipulated that what constitutes compelling reasons has been settled by case law and is also spelt out in the Judiciary Bail and Bond Policy Guidelines.[106] Among the major factors for consideration include: the nature of the charge, the seriousness of the attendant penalty to the charge itself, the strength of the prosecution case, the likelihood of interference with the witnesses, the need to protect either the victim of the crime or the accused person, the antecedent of the accused person, whether the accused person is in gainful employment, the previous record of conviction of the accused person, and for public order, peace and interest. Each case must however be considered on its own merit.[107]

Further, it is also apt to be mindful of the presumption of innocence, that an accused person remains innocent until otherwise proved. [108] This presumption, coupled with the factors cited above, should guide courts in deciding whether to grant bail even in serious offences like terrorism.

[104] Paragraph 12 in *Benson Mwangi Maina v Republic* [2019] eKLR
[105] [2019] eKLR.
[106] Paragraph 14 of the judgment
[107] Paragraph 14 of the judgment
[108] Article 50(2) (a) of the Constitution of Kenya, 2010.

4.2 Evidence

In most terrorism related cases, courts, including the prosecution, tend to place heavy reliance on circumstantial evidence and not direct evidence.[109] This has been hugely problematic and sometimes disadvantages the accused persons. Circumstantial evidence is "indirect [or] oblique evidence … that is not given by eyewitness testimony."[110] It is "an indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact."[111] It is also said to be "evidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence…."[112]

In the *RDX* case, the Supreme Court opined that on its application, circumstantial evidence is like any other evidence.[113] Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case, and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact, it should never be given a derogatory tag.[114]

Jowitt's Dictionary of English Law, 4th Edition, states thus of circumstantial evidence: "… with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, … a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, … [or where there is] a … DNA match between the accused's control sample and genetic material recovered from the scene of the crime …."[115]

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[109] This has been shown in the case studies above.
[110] Paragraph 55 of the RDX case
[111] Jowitt's Dictionary of English Law, 4th Edition, Vol. 1, P. 418.
[112] The Black's Law Dictionary, 9th edition, page 636 [2015].
[113] *RDX* case para 56.
[114] Paragraph 56 of the RDX case
[115] Jowitt's Dictionary of English Law, 4th Edition

However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court "should proceed with circumspection when drawing firm inferences from circumstantial evidence."[116] The court should also consider circumstantial evidence in its totality and not in piece-meal.[117] As the Privy Council in *Teper v. R* stated that: "Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another."[118]

To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative[119], but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established…."[120] As was stated in the case of *Kipkering Arap Koskei & Another v. R*[121], a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the "... the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, …"

As was further stated in the case of *Musili v Republic*[122] "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt."[123] The chain must never be broken at any stage. In

[116] *Teper v R* [1952] A.C. 480 PC at [489].
[117] *S v Reddy & others* 1996 (2) SACR 1 (A).
[118] *Teper v R* [1952] A.C. 480 PC at [489].
[119] Barker, Ian. Circumstantial evidence in criminal cases. Bar News: The Journal of the NSW Bar Association, Winter 2011: 32-39. ISSN: 0817-0002. Available at https://search.informit.com.au/documentSummary;dn=597461518818069;res=IELHSS accessed 27 January 2023
[120] *Hanuman vs The State of Madhya Pradesh*, AIR 1952 SC 343, 1953 CriLJ 129, 1952 1 SCR 1091.
[121] (1949) 16 EACA 135.
[122] CRA No.30 of 2013 (UR)
[123] Paragraph 60 of the RDX case

other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt."[124]

It is therefore imperative that courts uphold the above guidelines so as to critically examine circumstantial evidence in unearthing the guilt of the accused.

4.3 Sentencing

Furthermore, another issue encountered in prosecution of terrorism cases is whereby courts impose excessive and harsh sentences not within the law and without proper consideration of the evidence presented. Another issue is uniformity in sentencing. An appellate court would interfere with a sentence where the sentence, inter alia, is not within the law. This was well captured in *Mustafa Elimlim Emekwi v Republic*,[125] where the Court of Appeal sitting at Eldoret, while upholding the decision of the Superior Court stated as follows:

> *"The High Court (Ochieng, J) considered the Appellant's appeal but the learned judge dismissed the appeal by stating inter alia: 'In any event, the sentences meted out are both within the law. I find no reason to fault the manner in which the learned trial magistrate exercised his discretion in that regard. Accordingly, the sentences are both upheld. In the result this appeal is dismissed' ...we agree with the learned judge of the Superior Court that the sentences imposed were lawful."*[126]

There is also some legislative guidance on sentencing. Section 354(3) of the Criminal Procedure Code provides as follows;

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[124] *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported).

[125] Criminal Appeal No. 127 of 2007.

[126] Page two of the judgment

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -in an appeal from a conviction -reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence; (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence; (c)... Nothing in Sub-section (1) shall empower the High Court to impose a greater sentence than might have been imposed by the court which tried the case."*

In addition, section 4 of the POTA provides punishment for the offence of commission of a terrorist act as a term of not exceeding 30 years. Where a person carries out a terrorist act which results in the death of another person, such person is liable, on conviction, to imprisonment for life. Attempted murder is punishable by imprisonment for life under section 220 of the Penal Code, as it is an offence that endangers human life. This presents a potential conflict in the said legal provisions. One would argue that a terrorist act, considering that it endangers human life, should attract as harsh penalty as that of murder or attempted murder and that the 30 years imprisonment is unnecessary.

To point out the absurdity in an example, consider an accused person getting life imprisonment for attempting to poison another person. Consider also an accused person getting less than 30 years for planting an explosive at an entertainment joint that was generally considered a terrorist act because nobody was killed. It really does not add up because both instances endanger human life and should attract the same penalty, even if nobody was killed.
Uniformity in terrorism legislations is therefore needed to avoid such conflicting provisions. It is recommended that a uniform sentence of life imprisonment be meted out in all terrorism offences. In addition, the sentences meted out must be within the law. Sentencing is a judicial discretion and can only be interfered with if the same is too harsh as to cause

an injustice or is illegal. Otherwise, an appellate court will see no justification to interfere with the judicial exercise.[127]

The sentence imposed must be commensurate with, not only the offence, but the circumstances of the case. More so, bearing in mind that terrorism is a menace not only in Kenya but all over the world and must be deterred at all costs. Kenya as a country has borne the brunt of effects of terrorism. It is important therefore, to discourage the vice by adhering to sentencing guidelines under the law.

5. Conclusion

The purpose of the study was to critically analyze challenges in the prosecution of terrorism related offences in Kenya. The study began by outlining the efficacy of the prevalent legal framework in Kenya addressing terrorism. These legislations have been shown to exhibit various conflicts and gaps. Using distinct case studies, the study has pinpointed various challenges encountered in the prosecution of terrorism-related offences. Some of the challenges identified include lack of uniformity in legislative provisions addressing terrorism, use of circumstantial evidence and not direct evidence, balancing an accused person's right to fair trial with public interest, burden and standard of proof among others.

The study has recommended various proposals for reform including uniformity in legislative provisions, vigilance when examining circumstantial evidence by the court, ascertaining that sentences are within the confines of the law, courts acknowledging the proportionality principle among others. Terrorism is a serious offence that requires vigilance by the state during prosecution. It is vital that courts comply with the set standards and precedents and prosecute cases in strict compliance with the law. Only through this vigilance can we ascertain a criminal justice system that treats terrorism cases with fairness but also upholds public interest.

[127] *Joseph Juma Odhiambo v Republic* [2022] eKLR

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