



**Mohamed v Republic (Criminal Appeal E057 of 2022)  
[2023] KEHC 2767 (KLR) (Crim) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2767 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL APPEAL E057 OF 2022**

**JM BWONWONG'A, J**

**FEBRUARY 22, 2023**

**BETWEEN**

**IBRAHIM ISSACK MOHAMED ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence imposed by Hon. G. Shikwe, P.M, on 7th March 2022 in Milimani Chief Magistrate's Court in Criminal Case No. 1693 of 2017 Republic vs Ibrahim Issack Mohamed and 3 others)*

**JUDGMENT**

1. The appellant was charged with others not before the lower the court and after a full trial was convicted on 6 counts of smuggling human beings contrary to section 53 (1) (p) as read with section 53 (2) of the [Kenya Citizenship and Immigration Act](#) No. 12 of 2011.
2. He was also convicted for being in possession of another person's identity card contrary to section 14 (1) (f) of the [Registration of Persons Act](#) (Cap 107) Laws of Kenya.
3. He was sentenced to a fine Kshs. 20,000 for each of the first six counts and Kshs. 10,000 for the seventh count. In default, he was to serve 12 months imprisonment in respect of each count.
4. Being dissatisfied with the conviction and sentence, he filed a petition of appeal raising five grounds.
5. In grounds 1 and 2, the appellant faulted the trial court in convicting him without the evidence of the key witnesses. Further, that there were glaring contradictions and inconsistencies in the evidence of the prosecution. In ground 3 the appellant complained that the trial court failed to consider his defence before convicting him. In grounds 4 and 5, the appellant stated that the charges against him were not proven and as such his appeal should be allowed and the conviction and sentence be quashed.



6. In response, the respondent filed grounds of opposition dated 8<sup>th</sup> November 2022. The grounds raised are that the appeal is an abuse of the court process, since the appellant was properly convicted and the prosecution discharged its burden of proof. Secondly, that the appellant has not demonstrated any special or unusual circumstances to warrant the appeal being allowed.
7. Finally, that the appeal lacks merit and should be dismissed.
8. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno vs. Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs. R* [2013] e-KLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
9. No. 98563 PC Leonard Mwalime (Pw 1) testified that he is attached to ATPU Nairobi Headquarters as an investigator. On 26<sup>th</sup> July 2017, he accompanied PC Wachira, PC Gitorea and PC Saina to an operation involving a case of alleged smuggling of illegal immigrants into the country. At around 4 pm, they spotted the bus registration No. KBQ 708C. It was flagged down in Ruiru along Nairobi-Garissa road. The occupants of the bus were taken to Kasarani police station for questioning.
10. He told the court, that they scrutinised the identification documents of the occupants and realised that they did not belong to them. Further, they were informed that the said documents had been issued by the appellant, who was the conductor to enable them have easy access on the roads. They had no documents authorizing them to be in Kenya. The appellant, the turn boy and the driver, who were manning the vehicle were subsequently charged and the passengers charged in another case.
11. No. 92768 PC Victor Gitonga (Pw 2) gave evidence similar to that of Pw 1. He testified that the appellant failed to account for the national identity card found in his possession. On cross-examination he told the court that the appellant was not the one issuing tickets to passengers who had boarded the bus. That he relied on information from the passengers who informed them that they were Somali nationals.
12. No. 79324 CPL Benard Ndirangu (Pw 3) told the court that on 26<sup>th</sup> September 2017, he received intelligence on an alleged case of smuggling of immigrants into the country. In the company of PC Wachira, PC Mwarune, PC Gitonga and PC Saina intercepted the bus carrying the alleged immigrants in Ruiru along Nairobi Garissa road. They identified themselves and proceeded to search the vehicle. The occupants were from Somalia. The driver, turn boy and conductor (appellant) were arrested and the bus detained. The passengers were arrested and charged in court after they were found to be illegally in the country.
13. He further testified that the appellant was found in possession of an identity card no. 21xxxxxx in the name of Ahmed Abdinor Muhamed, which did not belong to him. He could not explain how he acquired the identity card. The same was produced in court as an exhibit. He also testified that the passengers were also charged with being unlawfully in Kenya. They pleaded guilty and were subsequently deported to their country of origin, after their sentence.
14. On cross-examination, he told the court that during his investigations, he found out that it was the duty of the appellant to ensure that the passengers were issued with receipts and identification documents. However, the arrested persons had no receipts and their identification documents were not genuine. Since they had already been repatriated to their country of origin, they could not be called as witnesses in the case.



15. After the close of the prosecution's case, the trial court found that the appellant had a case to answer and put him on his defence. He opted to give sworn evidence and did not call any witnesses. He testified that he was the conductor of the bus in respect to this matter. His role was to ensure passengers had boarded using the manifest. He denied assisting any individual enter the country. He told the court that he collected the national identity card found in his possession in the bus and did not know its owner. He denied the assertion that it was recovered in his possession. He told the court that Pw 1 did not come to the scene as alleged.

### **Analysis and determination.**

16. In grounds 1 and 2, the appellant challenged the decision of the trial court to convict him without the evidence of key witnesses. Further, that there were glaring contradictions and inconsistencies in the prosecution's evidence. The appellant submitted that the three prosecution witnesses, who testified gave hearsay evidence which was not corroborated. Further, the alleged witnesses whom the court relied on to convict him were never called as witnesses.
17. In response, the respondent submitted that the prosecution adduced evidence that indeed the bus was ferrying foreigners and it was the appellant who had ferried them into the country. The bus was singled out for investigation by police. The illegal foreigners were arrested, charged and on their own plea of guilty and after conviction, they were repatriated back to their country of origin. It was the respondent's case that the prosecution had proved the offence of smuggling beyond reasonable doubt.
18. On whether the prosecution's evidence was hearsay, it was submitted that the Somali nationals were separately charged and their charge sheets were admitted into evidence without the appellant's objection. In addition, the respondent argued that the prosecution sufficiently proved that the appellant was found in possession of a national identity card, which did not belong to him.
19. By virtue of section 62 of the *Evidence Act* (Cap 80) Laws of Kenya, all facts, except contents of documents, may be proved by oral evidence. Oral evidence is defined under section 63 (1) and (2) of the same Act to mean direct evidence. This is evidence by a witness which that witness has perceived in the normal manner using the five senses of touch, smell, sight, taste and hearing. Any other evidence given in court by a witness who did not perceive the fact in the manner defined is hearsay. Generally, hearsay evidence is not admissible. But this must be clarified further. In *Subramaniam v Public Prosecutor* (1956) WLR 965 Justice De Silva had this to say on hearsay evidence:

“A statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible. If however, the statement is offered in evidence, not to prove the truth of the facts contained in the statement but only to prove that the statement was in fact made it is not hearsay and it is admissible.”
20. This is to say that if what was stated by the witness, who was not called as a witness is offered in evidence to prove the truth of the facts contained in the statement, this is hearsay. However, if it is not meant to prove the truth of the statement, but only to prove that it was in fact made by that person it is not hearsay and is admissible.
21. In the case before me, Pw 1, Pw 2 and Pw 3 told the court that the appellant was arrested while smuggling illegal immigrants into the country. That he had issued the said individuals with national identity cards to facilitate easy travel into the country. He was arrested in possession of an identity card, which did not belong to him.



22. On the face of this statement, it is hearsay and not admissible if it was offered to prove that what the illegal immigrants told the police was the truth. However, it is not hearsay if it was meant to inform the court that this is what they were informed in an effort to determine how they were in the country.
23. A fact can be proved by evidence of a single witness. Care must however be taken to ensure there is no miscarriage of justice. Of the 8 illegal aliens who were arrested, none was called as a prosecution witness. The evidence of the prosecution witnesses, though corroborated remained to be hearsay evidence. The trial court in admitting their evidence did not warn itself against the use of hearsay evidence to prove a fact. The trial court further relied on the charge sheets of the 8 illegal immigrants and the fact that they had pleaded guilty as proof that indeed they were telling the truth.
24. On whether the prosecution was able to prove the charges against the appellant, the answer is in the negative. Without corroborating evidence, the evidence relied upon by the trial court was not sufficient to convict the appellant on the charges of smuggling or the charges of being in possession of another person's identity card.
25. In the premises, the appellant's appeal succeeds. The trial court's the conviction and sentence are quashed.
26. The appellant is hereby ordered set free unless he is otherwise held on other lawful warrants.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY 2023.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of-**

Mr. Kinyua court assistant

Mr. Bosire for the appellant

Ms. Edna Ntabo for the Respondent

