



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 5 OF 2020

MOHAMED HASSAN SHEIKH OSMAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. This an appeal arising from the judgment of Senior Principal Magistrate Mandera, in Criminal Case No. 383 of 2018. In the said case the Appellant was charged with four offences as follows;

Count I: Being in possession of a forged passport contrary to Section 54(1) of the Citizenship and Immigration Act No. 12 of 2011.

Particulars whereof are that on the 26th day of August 2018 at Mandera Border Immigration Office within Mandera County in the Republic of Kenya the Appellant knowingly presented a forged passport purporting it to be a genuine document made and issued by the Somali Government.

Count II: Being unlawfully in Kenya contrary to Section 53(1) (j) as read with Section 53(2) of the Citizenship and Immigration Act of 2011.

Particulars whereof are that on the 26th day of August 2018 at Mandera Border Immigration Office within Mandera County the Appellant being a Somali national was found to be unlawfully present in Kenya without a valid visa or permit authorizing his stay in Kenya.

Count III: Presenting a false document for purposes of obtaining a visa contrary to Section 54(1) (c) as read with Section 54(2) of the Kenyan Citizenship and Immigration Act No. 12 of 2011.

Particulars whereof are that on the said date of the 26th of August 2018 at about 12 pm at the Mandera Immigration Office being a Somali national the Appellant knowingly presented false documents of Abdiwahab Ahmed being passport No. P00724786 in order to gain entry into Kenya with an intention of deceiving.

Count IV: Being in possession of another person's passport contrary to Section 54(1) (l) as read with Section 54(2) of the Citizenship and Immigration Act No. 12 of 2011.

Particulars whereof are that on the 26th of August 2018 at the Mandera Immigration Border the Appellant was found in possession of another person's passport which he could not give account of with intent to gain entry into Kenya.

2. The Appellant denied all the four counts and the matter proceeded to full trial. He was found guilty of the 1st and 4th counts and acquitted on the other counts.

3. Being dissatisfied with the judgement the Appellant appealed to this court. The grounds of appeal may be summarized as follows;

- **The evidence was flawed.**
- **The case was not proved to the required standard.**
- **The defence was not considered.**

SUBMISSIONS

4. The Appellant at the hearing of his appeal relied on both written and oral submissions to the effect that the evidence presented by the prosecution was contradictory, further no official from the Somali Embassy produced evidence to prove that the passport in his possession was fake, and the evidence before court did not meet the required threshold. Finally, the sentence meted out was harsh as the same were to run consecutively. He urged that the same ought to run concurrently and for the time he was in remand from the 24th of August 2018 to April 2019 be considered in commutation of his jail term.

5. The State objected to the appeal on grounds that the Appellant presented to the Immigration Office at Mandera a passport whose bio data could not be read by the scanner, investigations revealed that the passport was not genuine. Further the state submitted that the trial court considered the defence and the prosecution having proved its case beyond reasonable doubt devoid of contradictions as alleged the Appellant was convicted.

As for the sentences meted out the state submitted that they were within the law as both attract a fine not exceeding 5 million or a sentence not exceeding 5 years each. The State urged for the appeal to dismissed.

ANALYSIS AND DETERMINATION

6. The prosecution's case briefly is that the accused person entered and presented a fake passport to the Mandera Immigration Office in an attempt to enter Kenya knowingly aware that the Somali passport in his possession was not genuine. Further the National Police Service sought the assistance of the Embassy of the Federal Republic of Somalia which confirmed that Passport No. P00724786 that the Appellant had in his possession was not issued by the Department of Immigration and Nationalization in Mogadisho Somalia to one **Abdiwahab Ahmed Nur** whose name was superimposed on the said passport, the same was not genuine.

7. In his defence the Appellant alleged to have obtained the passport from the Somalia government, had not looked at the same on receipt and had not noted the name; **Abdiwahab Ahmed Nur**. Further he was not aware that it was a forged document as he had paid and obtained it legally.

8. This is a first Appellate Court and has considered, evaluated and analyzed the evidence on record as is required. And having considered the evidence for the prosecution and the defence it is clear that passport No. P00724786 that the Appellant presented to the Immigration Officer at Mandera was a fake document. The scanner at the Immigration Office failed to pick the details on the document as it would a genuine document. The suspicion by the Immigration officer in Kenya was fortified by the letter dated 6th November 2018 by the Embassy of the Federal Republic of Somalia which supported the 1st count. The explanation by the Appellant who professes to have travelled severally cannot come to his aid as it is not believable that the Somalia government would have issued him with a fake document. The 4th count was equally proved as the passport produced bore a name other than the known holder of the passport and appeared to have been superimposed, meaning that the passport was altered. It is not also believable that the Appellant on receipt of the passport never saw the names on the same are not his. Nonetheless the said passport was in his possession and he handed it over to the Immigration Officer and cannot run away from that liability.

Further from their evidence the three witnesses for the State were truthful and with no reason whatsoever to frame the Appellant and their evidence was supported by a document from the Embassy of the Federal Republic of Somalia. The Appellant did not object to the production of the said letter that was sent to the Kenyan Police at the hearing of his case.

9. This court therefore finds that **Count I and IV** were proved beyond reasonable all doubt and finds the conviction safe.

10. As it were, sentencing is discretionary and on appeal the court can only interfere if the sentence is exceptionally too harsh or is unlawful.

This court does not find the sentences exceptionally harsh, neither are the same unlawful.

However, this court finds that it was harsh and unreasonable for the trial court to have directed that the sentences do run consecutively. Further The trial court was obligated to consider the time the Appellant served in custody awaiting trial which it did not do.

Section 333(2) of the Criminal Procedure Code requires that where the accused has been held in custody, the sentence do take into account the period spent in custody.

11. Based on the sentiments expressed above the conviction is upheld. The appeal succeeds to the extent that the sentences are varied as follows;

(i) The sentence of 4 years on each count will run concurrently.

(ii) The sentences to take into account the period of 8 months the Appellant was in custody and will therefore run from the 26th of August, 2018.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 27TH DAY OF JANUARY 2022.

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ALI-ARONI

JUDGE