



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 14 OF 2020**

**ABDIRAHMAN ALI ISMAIL.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the conviction and Sentence delivered by**

**Hon. P.N.Areri Principal Magistrate, Mandera in Criminal Case**

**No. 469 of 2019 on 6<sup>th</sup> January 2020)**

**JUDGEMENT**

1. **Abdirahman Ali Ismail** was charged, convicted and sentence to five years imprisonment for the offence of giving false statement contrary to Section 20 of the Prevention of Terrorism Act, 2012.

2. The particulars of the offence are that on the 28<sup>th</sup> day of September 2019 around 1150Hrs at the Anti-Terrorism Police Unit (ATPU) Mandera Office, the appellant knowingly and willingly gave false information to No. 236093 I.P George Mburu and No. 66828 CPL Newton Mbogo. He reported to them that on the 26<sup>th</sup> day of September 2019 at around 2000Hrs, Bishar Yahya Osman delivered food stuff to suspected Alshabaab militants at Mlima Fisi using motor vehicle registration number KCU 117Q a fact he knew to be false.

3. Being aggrieved by the judgement of the trial court the appellant filed his Memorandum of Appeal on 10<sup>th</sup> March 2020 ostensibly stating that the prosecution did not prove its case beyond reasonable doubt and that the sentence meted out was harsh and excessive.

4. Both parties submitted orally.

On his part, the appellant submitted that he had been framed due to a property dispute. On being asked why the officers would frame him by this court, he changed the narrative told the court that they had a fight with Yahya's son and as a result he made a false report to the station and was remorseful. He did not know that he was making a serious mistake. He also informed the court that he is currently a student at Mandera Polytechnic studying electrical engineering grade C & D and his parents are elderly.

5. The Respondent supported the conviction and sentence submitting that the issues raised by the appellant during the appeal were not raised at the trial court.

**Analysis and Determination**

6. This being a first appeal it is the court's duty to re-evaluate the evidence and make its own conclusion. see **Okeno v Republic [1972] EA 32**

7. In the trial court, the prosecution called four witnesses. The prosecution case was that PW2 Ahmed Hussein Sheikh hired the appellant herein as a taxi driver but later dismissed him from his employment and gave the vehicle to PW1 Bishar Yahya Osman.

And not being happy by the dismissal the Appellant made a false report to the ATPU Mandera stating that PW2 was engaged in delivering foodstuff to Alshabaab insurgents in Mlima Fisi which was false. And that he had been asked to escort PW1 to Mlima Fisi where seven Alshabaab insurgents who carried guns and bazookas escorted them.

8. PW4 CPL Newton Mbogo and PW5, PC Elijah Nakeel conducted their investigations, when they found that the information was false and that PW1 actually delivered foodstuff to PW3 Yahya Osman Derro's wife, who resides in Mlima Fisi between Mandera and Nurahawa. PW3 Yahya Osman Derro confirmed that he has two wives and on 25<sup>th</sup> September 2019 he escorted his son PW1 to deliver foodstuff to his second wife.

9. Being put on his defence, the appellant narrated that he was wrongly arrested and that the police sought to implicate him as being in possession of a bullet. That he was taken to the police station, forwarded to ATPU and later charged with the alleged offence. He denied uttering the false statement.

10. The trial court considered the evidence and was of the view that the prosecution had proved that the accused had made the impugned statement. It was also the trial courts finding that the appellant had not provided any reason why the police officers would want to frame him with the charge.

11. This Court has considered the evidence on record and found that the prosecution had proved its case beyond reasonable doubt. Indeed, the appellant equally by his admission during the appeal conceded to the facts.

12. This court noted that the appellant had been in custody during the trial. The time served in remand was not taken into consideration during sentencing. The proviso to **Section 333 (2) of the Criminal Procedure Code** obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial as failure to do so impacts the overall period of detention which may result in an excessive punishment that is not proportionate to the offence committed.

13. Equally, Paragraph 7.18 of the Sentencing Policy guidelines Gazette Notice No. 2970 provides as follows;

**“... Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a noncustodial sentence.<sup>54</sup> The court should bear in mind the high rates of recidivism associated with imprisonment<sup>55</sup> and seek to impose a sentence which is geared towards steering the offender from crime.....”**

14. Though the conviction is affirmed, however the court finds the sentence excessive and takes note that the time spent in custody was not considered.

15. The court having considered the gravity of the offence, the age, the character and the criminal history of the appellant, the fact that he was remorseful, requested a probation officer to file a report on the possibility of placing the appellant on probation where he can receive counselling on anger management and be rehabilitated. The report was filed and the same is favourable to the appellant. The court finds this a proper case to place the Appellant on non-custodial sentence for the remainder of the term.

16. For the reasons above, the sentence is set aside and in its place, taking into account the time served in remand the appellant is sentenced to 3 ½ years. He has served 2 years 6 months since his arrest. For the remainder of the term which is 1 year he is placed on probation and at the same time, he will undertake anger management classes and counselling at Mandera Referral Hospital, under the supervision of an officer to be appointed by the County Probation Officer Mandera.

**DATED, SIGNED AND DELIVERED IN GARISSA THIS 24<sup>th</sup> DAY OF MARCH 2022**

**ALI-ARONI**

**JUDGE**

**In the Presence of:**

Appellant acting in person

Mr. Kihara State Counsel

Amina/martin Court Assistants