REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.E017 OF 2021

1. METHERMI ZEMI

2. MUSEE ELIUS

3. AFREM TERESTAGABR

4. AYNON ANDEMICHAEL

5. SAMIEL GHIDE

6. AMAN FUTSUM

7. TEMESGEN SOLOMON

8. WINTA NEGGASI

9. DANAIT EYASU

10. SUSAN KASETE.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

[1] The ten appellants appeared before the Senior Principal Magistrate at Busia charged with being unlawfully present in Kenya, contrary to **s.53** (**1**) (**J**) as read with **s.53** (**2**) of the **Kenya Citizenship** and **Immigration Act No.12 of 2011**. It was alleged that on 14th July 2021 at around 1830 hours at Joyland Guest House within Busia County, being Eritrean nationals and not being excluded persons they were found unlawfully present in Kenya without valid entry visa or permit.

[2] After the charge was read over and explained to them through the aid of a translator, they pleaded guilty and were eventually convicted. Each was sentenced to pay a fine of ksh.100,000/= or serve one (**1**) year imprisonment in default.

An order was made for their repatriation to their country of origin upon completion of the jail term or payment of the fine.

[3] Being dissatisfied with the conviction and sentence, the appellants preferred the present appeal on the basis of the grounds set out in the petition of appeal dated 29th July 2021.

The appeal was opposed by the state/respondent represented at the hearing by the learned prosecution counsel, **Mr. Gibson Mayaba**. The appellants were represented by learned counsel, **M/s Nabulindo**.

[4] The hearing proceeded by way of written submissions with both parties filing their respective submissions. These were given due consideration by this court whose duty was to re-visit the case and draw its own conclusions.

Ideally, this should be an appeal on sentencing alone. However, the appellants have challenged their conviction on the basis that the charge was read to them in a language not understood by them.

[5] The implication here is that the trial court erred in the manner of taking the plea and ended up convicting the appellants on a charge which they neither knew or understood inasmuch as the language used in the proceedings was foreign to them. A faulty plea taking procedure would definitely upset the accruing conviction and sentence even if the accused seemingly entered a guilty plea upon which he was convicted of the offence. This would therefore provide an exception to **Section 348** of the **Criminal Procedure Code**.

[6] In any event, a faulty conviction would translate into an illegal sentence. In the premises, this appeal is proper and competent for a determination by this court. However, it is only ground one (**1**) and four (**4**) of the petition of appeal which are relevant. Grounds three (**3**) and two (**2**) are merely pedestrian and tantamount to a challenge of the discretion of a competent court.

[7] A perusal of the lower court record shows that other than English, the other languages used during the plea taking process were Kiswahili and Arabic which it is reflected was understood by the appellants and for which a competent translator was provided at the behest of the appellants legal counsel, **Mr. Jumba**, who actually indicated to the court that the appellants understood neither English or Kiswahili but Arabic. This led to the charge being read over and translated to them in the Arabic language which they understood and admitted the offence/charge, agreed with the facts of the case and pleaded for leniency in mitigation.

[8] Clearly, language was herein not a barrier or impediment to proper plea taking process. It could not therefore be said that the trial court flouted or ignored the guidelines for proper plea taking set out in the leading authority on the matter, **Adan vs Republic (1973) EA 445**. It would therefore follow that ground one of the appeal is devoid of merit and is hereby overruled.

[9] Consequently, the appellants conviction by the trial court is hereby affirmed. On sentence the offence carried with it a maximum fine of five hundred thousand shillings (**Kshs.500,000/=)** or to imprisonment for a term not exceeding three years or both. Therefore, the sentence of ksh.100,000/= fine and in default, one year imprisonment was proper and lawful and is hereby upheld.

[10] It was alluded herein that the appellants were victims of a civil war in the tigray region of Ethiopia and Eritrea but there was no evidential confirmation of the fact. In any event, if the appellants were fleeing from their county to seek refuge in other countries then they should have presented themselves to the United Nations High Commissioner for Refugees (**UNHCR**) or to the Immigration officers at the Busia border of Kenya/Uganda instead of entering the country through "**panya routes**" only to be flushed out from their hiding places by the police acting on a tip-off.

[11] Judicial notice must be taken of the fact that cases of human trafficking are quite prevalent in the African region and continue to rise. It would therefore not be farfetched for this court to opine that the appellants were at most victims of human trafficking criminal gangs or syndicates rather than victims of a civil war.

In sum, this appeal is hereby dismissed in its entirety.

J.R. KARANJAH

J U D G E

[Delivered & signed this 21ST day of OCTOBER 2021]