REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 45 OF 2019

HUSSEIN RAJAB.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Mitigation Appeal on sentence from the plea of guilty, conviction and sentence on 5.8.2019 by Hon. Dr. Julie Oseko (CM)

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Appellant in person

JUDGMENT

The appellant pleaded guilty to a charge of being unlawfully present in Kenya contrary to Section 53 (1) (j) as read with Section 53 (2) of the Kenyan Citizenship and Immigration Act No. 12 of 2011.

He was convicted on his own plea of guilty and sentenced to two (2) years imprisonment. He now appeals to this court against sentence.

On appeal, he has relied on Article 49 (1) of the Constitution on the rights of an arrested person. The written submissions so filed, appellant contends that the plea was equivocal and therefore not fit to be admitted by the trial court. That on his arrest, the confession he made to the police and used in court as evidence was in contravention of Section 25 (A) of the Evidence Act.

Further, the appellant argued and submitted that in the spirit of the East African Community Immigration treaty on integration, the citizens of the regime are expected to move freely without any restriction that yet notwithstanding the provisions of the treaty, the National Police Service of Kenya did effect arrest and preferred a charge of being unlawfully present in Kenya.

As a mitigation to the sentence the appellant submitted that he had no previous record, his age should be taken as a responsive factor and the fact that he regrets the commission of the offence.

On consideration of this appeal, the facts so presented to the trial court presents an unfortunate scenario. That on 13.7.2019 at Kijipwa area, within Kilifi, the appellant was arrested following a tip off from the members of the public on arrest and interrogation by the police, the appellant informed them that he was travelling to Somalia to join **Al-Shabab** – group enroute through Garissa.

The question of importance is what the appellant told the court during the time of plea. The appellant reply to the plea of guilty on prosecution of facts by the prosecution read as follows:

> ***"It is true, I was going to Somalia, I intended to pass through Garissa. At Garissa I wanted to go ask around there. My intention was to go to Somalia to join Al Shabaab. It is a group that is fighting for Islam. I knew that they kill people. I am aware that if I went there I would be given the job of killing people. I said all this is threat. I had no permission to be in the country."***

It is against this background of facts that I come to consider the legal position.

Analysis and determination

It is trite that under the principles illuminated in the case of **Okeno v R {1957} EA,** the first appellate duty is to extenuate, scrutinize and

evaluate the record of the trial court a fresh to ascertain whether there was a misdirection on the facts and to the Law by the Learned trial Magistrate before arriving at the impugned decision.

A guilty plea by itself does not bar the High Court to entertain the appeal where the court recognizes that the plea of guilty prejudiced or occasioned a failure of justice against the appellant or where the very claim and the nature of guilt reflects antecedent of constitutional violation.

The doctrine basic principle is provided for under Section 382 of the Criminal Procedure Code. In this case there is no evidence that the appellant expressly or implicitly waived his constitutional right to enter a plea of guilty. On all these complaints, I have examined the record and it does confirm that the trial court was perfectly entitled to find that the plea was unequivocal. "See the detailed exposition of the Law in the case of **Adan v R {1973} EA 445 at Pg 446**. As this court appreciates and understands the proceedings and the claims in issue here, they do not seem to contradict the terms of the indictment or the written plea – as recorded by the Learned trial Magistrate.

The record further shows that the appellant appreciated the nature of the charge of being unlawfully present in Kenya and his admission of facts went far beyond just being unlawfully present without visa or permit under the Immigration Act.

That upon admitted the facts the appellant gave a detailed explanation why he travelled all the way from Tanzania and that his final destination was in Somalia to join the **Al-Shabaab Terrorist Group**.

The guilty-plea conviction was not vague or ambiguous but unequivocal intended to admit the statutory offence.

The grounds of appeal advanced by the appellant and at best mitigation lack merit to impeach the decision by the Learned trial Magistrate. The sentence of two (2) years is not illegal. I see nothing to persuade this court to fault the Chief Magistrate's exercise of discretion to convict and sentence the appellant as outlined in the trial court record.

Accordingly, and applying the provisions of Section 382 of the Criminal Procedure Code no failure of justice had been occasioned in the present case to alter the order on conviction or sentence.

Consequently, the appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 27TH DAY OF FEBRUARY , 2020.

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R. NYAKUNDI

JUDGE