



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 60 OF 2018

GUYO ABUDO KARAYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from conviction and sentence in Wajir Senior Resident Magistrate's Court

Criminal Case No. 515 of 2017 delivered by Hon. Amos K. Makoross (SRM)

JUDGEMENT

1. The appellant was charged with another with offence of smuggling of human being contrary to section 53 (1) (1) as read with section 52 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011.
2. The particulars being that on the 9th day of November 2017 at Masalale Police Barrier in Eldas Sub-County within Wajir County being the driver and turn-boy respectively of motor vehicle Reg. No. KBS 384W Mitsubishi Fuso lorry were found smuggling twenty nine (29) Ethiopian citizens.
3. They initially pleaded not guilty and matter went into trial. However after PW3 testified, they sought to change their plea. Thus they pleaded guilty to the offence charged on 14/2/2018. The facts were read and both answered that the same were true.
4. When given chance to mitigate, appellant who was accused No. 2 stated that he was married and had 3 children. Both parents depended on him and thus he sought forgiveness.
5. They were both convicted and sentenced to pay a fine of Ksh. 500,000/- and in default serve 3 years imprisonment.
6. Being aggrieved by the aforesaid verdict, the appellant lodged an appeal and set out 6 grounds of appeal which amount only to two complaints namely;
 - (1) **He was just a turn-boy and owner who was also a driver had control of what was to be loaded in his motor vehicle without appellant consent or advise.**
 - (2) **He complains that he was not accorded fair trial.**
7. The appeal was argued by the appellant in person and State Counsel Mr. Mulati. The appellant complained that as a layman he did not know the law and that court was unfair to him. Being a turn-boy he was given same sentence with his employer yet he was not the owner of motor vehicle nor did he drive it or control what he was doing with the motor vehicle.
8. They were both fined same amount and in default 3 years imprisonment. He says he has been in custody for 1 year and 4 months and pleads with court to release him. He used to earn only Ksh.5,000/- per month thus could not pay fine as accused 1 did and got released.
9. The State opposed appeal as the plea of guilty was unequivocal and voluntary. However in sentence the State Counsel urged court to peruse the provisions on penalty and exercise its discretion on issue of the sentence meted out to the appellant. It was conceded that the appellant was awarded maximum fine of Ksh.500,000/- in default also a maximum term of 3 years.

10. The court has perused the record and the address made in court by both sides. The issues are:

(i) Whether plea was equivocal? If yes what is the appropriate order.

(ii) What is the order as to the sentences?

11. The record shows that on 10/11/2017 the 2 accused persons were taken to court and were recorded to be Borana by tribe. They were offered a Borana translator/interpreter. The charges were read and they pleaded not guilty. They were released on a bail of Ksh.200,000/- each.

12. When PW1 testified the appellant did not cross examined him despite being offered an opportunity. The same opportunities were offered after PW2 and 3 testified but he did not cross examine them.

13. After PW3 testified both accused then asked court to allow them to change plea and same be taken afresh. The charges were read to them and each of them said **“it is true.”** The facts were read. The facts read in court are as follows;

“Prosecutor: The facts are that on 9/11/2017 at about 6.30 am the 2 accused persons were stopped at Masalale Police Barrier while driving motor vehicle registration number KBS 383W Mitsubishi Fuso Lorry the 1st accused being the driver and the 2nd accused being the turn-boy. They were asked what they were carrying and they failed to disclose their cargo prompting the police officers from Eldas to check the motor vehicle and the police officers found a hidden compartment at the back of the lorry containing 29 people from Ethiopia destined to Nairobi. The 2 people being the custodians of the motor vehicle were asked to explain why they had the people in a hidden compartment and they could not explain. The police seized the lorry and the 29 people and the accused were charged with the present offence. The 29 people were found to be unlawfully present in Kenya and were also charged and they pleaded guilty in file Number 516 of 2017. The lorry and the driver’s licence of 1st accused were taken as exhibits and the 2nd accused’s ID card was also taken as exhibits.”

14. The appellant and his co-accused answered to the facts that facts are true. They were convicted and offered an opportunity to mitigate. The appellant said, **“I am married and I have 3 children. Both my parents depend on me and I ask for forgiveness.”**

15. From 14/12/2018 when appellant was convicted and sentenced he lodged appeal on 29/10/2018. The same was admitted on 11/12/2018. However the same was lodged too late in the day as the law provides appeal to be filed 14 days after conviction and sentence.

16. The time for lodging appeal lapsed on 28/2/2018. He filed appeal months late. He never sought to file appeal out of time thus the appeal is incompetent. However the court on its own motion after perusing the record it can invoke the powers of revision if the circumstances warrant the same.

17. I note that the sentence awarded was maximum. The prosecutor had stated that the appellant had no previous record. He mitigate he stated that, he had family and 3 children. He had also parents who depended on him. However on sentencing the court did not allude to his mitigation nor to sentencing guidelines such that plea of guilty saves court time and thus he ought to have had a credit to warrant a lesser sentence not maximum penalty.

18. Thus court is inclined to tamper with the sentence and make the following orders;

i) The sentence is set aside and substituted to the period served thus appellant to be released forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT GARISSA THIS 6TH DAY OF AUGUST, 2019.

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CHARLES KARIUKI

JUDGE