REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 16 OF 2016

EDWARD KAWESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Mandera SPM Criminal Case No. 22 of 2016 –P. N Areri SRM)

JUDGEMENT

1. The appellant was charged in the Magistrates Court at Mandera with being unlawfully present in Kenya contrary to Section 53 (1) (j) (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence were that on 19th January, 2016 at around 1947 hours at Mandera township within Mandera County being a Ugandan national was found unlawfully present in Kenya without a valid Kenyan entry visa or permit authorizing him to stay in Kenya.

2. He was recorded as having pleaded guilty to the charge and was thus convicted on his own plea and fined Kshs. 400,000/= and in default to serve 5 years imprisonment.

3. He has now come to this court on appeal on the following grounds:-

1. That he pleaded guilty to the charge during his trial.

2. That the convicting magistrate did not allow enough time for investigation to be carried out before trial.

3. That he was arrested on 19th January, 2016 at 0702 hours on arrival and escorted to Mandera Police Station where he was detained for 3 days at the police cells.

4. That he had a valid passport which he used to travel from Uganda to Mandera Kenya.

5. That parties have a right to demand the High Court to weigh the conflicting evidence bearing in mind that the court did not hear the case or see the witnesses.

6. That he was a father of 2 children who depend on him as the bread winner.

7. The sentence of 5 years imprisonment was excessive.

3. The appellant filed his appeal in person, but at the hearing of the appeal, Ms Nganga appeared for him

and argued the appeal.

4. Counsel for the appellant Ms. Nganga submitted that the appellant was convicted on 22nd January, 2016 at Mandera and filed his appeal on 15th February, 2016 through an application for leave to appeal out of time, which appeal was not for hearing.

5. Counsel informed the court that the appellant was a Ugandan, and that though the default prison sentence under the Act was 3 years imprisonment the court sentenced him illegally to serve 4 years which was beyond what the law allowed.

6. Counsel further lamented that it had taken very long for the appeal to heard which forced the appellant to file a number of letters in court enquiring about the progress of the appeal which was an injustice as by the time of hearing the appeal the appellant has already served 2 years in jail.

7. Counsel lastly emphasized that under Section 354 (3) of the Criminal Procedure Code (Cap. 75) this court had powers to alter the trial court findings, sentence, and nature of sentence. Counsel further stated that the appellant was remorseful and asked this court to consider the period already served by the appellant in prison in its decision so that the appellant returns to his family in Uganda.

8. The learned Principal Prosecuting Counsel, Mr. Okemwa, in response submitted that the charge should have referred to Section 53 (1) as read with Section 53 (2) of the Kenya Citizenship and Immigration Act. Counsel felt however that the irregularity on the charge was a minor mistake and this court had discretion to amend the charge.

9. Counsel also submitted that the prosecutor in the trial court made the mistake of taking a shortcut by stating that the facts were as per the charge sheet in summarizing the facts to the court. On this mistake however, counsel felt that it did not cause prejudice and submitted that the plea was unequivocal and conviction was proper.

10. With regard to the sentence imposed, counsel submitted that he did not understand where the magistrate extracted the sentence of 5 years imprisonment, as the maximum default sentence under the Act was 3 years imprisonment. Counsel felt however that the distance between Uganda and Mandera might have prompted the learned magistrate to pronounce a severe sentence.

11. I have considered the appeal and submissions of counsel on both sides. From the grounds of appeal filed, though the appellant stated that he had pleaded guilty to the charge, it is clear that he has appealed against both conviction and sentence. His counsel, Ms. Nganga however dwelt on sentence and urged that the delay in hearing this appeal was unnecessary.

12. As a first appellate court, even if the appellant did not appeal against conviction, I would still in my view be required to reconsider the record and the charge sheet to establish whether the plea of guilty was unequivocal.

13. I have perused the charge sheet. Indeed the charge should have read Section 53 (1) as read with Section 53 (2) of the Kenya Citizenship and Immigration Act. It did not. That was a defect on the charge sheet. However in my view it was a minor defect which did not prejudice the appellant in any way. I find therefore that the defect on the charge sheet is curable under Section 382 of the Criminal Procedure Code (Cap. 75).

14. The second mistake of the prosecution was that prosecutor took a shortcut by stating that the facts were as per charge sheet instead of giving a summary of the facts. In my view, he should have given a summary of the facts from the police file which would then be compared with what was in the charge sheet to determine if the two agree. This being a simple charge however, and since the particulars of the offence were not complicated, I find that the mistake was also minor and curable under Section 382 of the Criminal Procedure Code (Cap.75).

15. I will thus uphold the conviction of the trial court.

16. With regard to sentence, the appellant was a first offender, but did not say anything in mitigation. On appeal, he has talked about his family, which he did not raise before the magistrate. In my view, the appellant should have tendered his mitigation to the trial magistrate for consideration in sentencing. It is wrong for an appellant to bring his mitigating factors in the appellate court unless the same are consequential factors arising after sentencing. If he had a family he should have said so before the trial court. I dismiss his contention that the magistrate should have considered that he had a family in Uganda in sentencing as the trial court was not aware of that.

17. That said, I am of the view that the sentence of a fine of Kshs.400,000/= for a first offender without any aggravating factors on record was excessive. The prison sentence of 5 years imprisonment was also illegal as the law under Section 53 (2) of the Act provided a maximum default imprisonment of only 3 years.

18. I will thus set aside the sentence and instead order that the appellant will serve the prison term he has already served. This means that the appellant will be released from prison unless otherwise lawfully held. He will however be handed over by prison authorities to the Immigration Authorities for repatriation to Uganda.

19. Consequently, I uphold the conviction of the trial court. I set aside the excessive sentence of Kshs.400,000/= and the illegal sentence of 5 years imprisonment. In its place I order that the appellant serves the prison term which he has already served to date. He will thus be released from prison custody unless otherwise lawfully held and be handed over to the Immigration Department for repatriation to Uganda as he cannot continue staying in Kenya illegally.

Dated and delivered at Garissa on 25th January, 2018

George Dulu

JUDGE