



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 14 OF 2016

MOHAMED BASHWA MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Mandera SPM Criminal Case No. 4 of 2016- P. N Areri SRM)

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Mandera with entering Kenya without a passport or permit contrary to Section 34 (1) as read with section 53 (1) (j) (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence were that on 9th January, 2016 at Elwak township in Mandera central district within Mandera County being an Ethiopian citizen was found unlawfully present in Kenya without a passport or permit.

2. He was recorded as pleading guilty to the charge and was convicted and sentenced to pay a fine of Kshs. 400,000/= and in default to serve 5 years imprisonment. The court also ordered that he be repatriated to Ethiopia on completion of the sentence.

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

1. That he pleaded guilty to the charge.

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

3. That this court should weigh conflicting evidence bearing in mind that no witnesses were seen and the case was never heard.

4. That the sentence of 5 years imprisonment was excessive and oppressive

4. It will be noted that though the appellant started his grounds of appeal by stating that he had pleaded guilty, the contents of his other grounds of appeal suggest that he is also challenging the conviction. I thus treat it as an appeal against both conviction and sentence.

5. At the hearing of the appeal, the appellant made oral submissions and stated that he lived at Suk on the border between Kenya and Somalia caring for his five children who had no mother and that his mother and father had died. He admitted that he entered Kenya illegally but stated that the sentence imposed on

him was harsh as other persons who had committed similar offences had been sentenced to serve 4 months imprisonment. He emphasized that he did not have money and could thus not raise money even to pay for the drafting of his written submissions.

6. The learned Principal Prosecuting Counsel, Mr. Okemwa, in response submitted that the charge referred to Section 34 as read with Section 53 of the Kenya Citizenship and Immigration Act and as such was defective as it mixed two sections of the statute which related to two different situations, that is asylum seeking and illegal presence in Kenya in addition the prosecutor made another mistake of saying before the trial court that the facts were as per the charge sheet. Though the record showed that the appellant did not respond to the facts, the magistrate went ahead and convicted and sentenced him.

7. With regard to sentence, the Principal Prosecuting Counsel submitted that the prison term of 5 years imposed by the trial court was illegal as the maximum sentence for the offence provided by law was 3 years imprisonment.

8. Counsel concluded by stating that this court should take into consideration the above factors in determining the appeal as there was no doubt that the appellant was an Ethiopia living near the border of Kenya. Counsel noted that the appellant had been in prison since January 2016, about 2 years.

9. This is a first appeal arising from proceedings in which the appellant was convicted on his own plea of guilty. I thus have to reconsider the charge sheet and entire record to determine whether the conviction and sentence was proper.

10. The charge in my view is incurably defective, as there is no offence of entering Kenya without a passport or permit contrary to Section 34 as read with Section 53 of the Kenya Citizenship Immigration Act.

11. Though the appellant was said to have pleaded guilty, as the charge was fatally defective, the plea of guilty cannot be sustained, as the accused person to an offence known in law.

12. In addition to the above, the prosecutor added to the confusion by stating that the facts were as per the charge sheet thus compounding the confusion already existing in the defective charge. No doubt the appellant did not respond to the prosecutor's statement. Consequently, in convicting the appellant the court did not comply with the rules for taking a plea of guilty enlisted in the case of ADAN -VS- REPUBLIC (1973) EA 445. On this account also the conviction cannot be sustained and has to be quashed.

13. With regard to the sentence, the sentence provided under Section 53 of the Act is a maximum fine of Kshs. 500,000/= or in default a maximum prison term of 3 years. From the record, other than the fact that the sentence imposed by the learned magistrate of Kshs.400,000/= for a first offender was excessive, the default term of 5 years imprisonment was beyond what was allowed by law and thus illegal. Thus even if the conviction was to be upheld, the sentence would still have to be set aside and an appropriate sentence substituted. The sentence will hereby be set aside.

14. The repatriation order will however be sustained as the appellant, not being a Kenya citizen, cannot continue being in Kenya illegally.

15. In conclusion, I find that the plea of guilty of the appellant was not unequivocal and the conviction and sentence cannot thus stand. I thus allow the appeal, quash the conviction, and set aside the sentence. The appellant will be released from prison custody unless otherwise lawfully held. On release he will be handed over to the Immigration authorities for repatriation to his home country of Ethiopia.

Dated and delivered at Garissa on 25th January, 2018

George Dulu

JUDGE