

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 15 OF 2016

ADAN ABDILLE DEESOW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(From the conviction and sentence in Mandera SPM Criminal Case No. 5 of 2016 – P. N Areri
SRM)**

JUDGEMENT

1. The appellant was charged in a Magistrates 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 15th January, 2016 at Qarsadamu area of Mandera Central District within Mandera County being a Somali citizen was found unlawfully present in Kenya without passport or permit.

2. He appeared in court on 21st January, 2016 when he was recorded as having pleaded guilty to the charge. He was convicted and sentenced to pay a fine of Kshs. 400,000 or in default to serve 5 years imprisonment. He was also ordered to be repatriated to Somalia on completion of the sentence.

3. He has now come to this court on appeal on sentence, though his appeal seems to challenge the conviction also. Though started his grounds of appeal by saying that he had pleaded guilty to the charge, he also stated that he had gone to Elwak police station to seek help to be escorted to Hagadera Refugee Camp and that the evidence of the prosecution was conflicting in view of the fact that he did not hear or see any witnesses. That in my view shows that he is also challenging the conviction.

4. At the hearing of appeal, the appellant stated that he was physically challenged and was looking for his cows at the border when he was arrested. He asked to be repatriated back to his country as he was finding it difficult to eat prison food. He also complained that people convicted of similar offences had been sentenced to serve only 6 months imprisonment.

5. The learned Principal Prosecuting Counsel, Mr. Okemwa, in response submitted that the charge against the appellant was entering Kenya without a passport or permit. It however referred to Section 34 (1) as read with Section 53 (1) (j) (2) of the Kenya Citizenship and Immigration Act and was thus defective. Counsel submitted that Section 34 (1) related to asylum seekers and could not be read with Section 53 relating to unlawful presence in Kenya to create the offence charged. He stated that the reference to the two conflicting sections of the statute gave the impression that they related to the same offence, which was not the case and must have been confusing to the appellant.

6. The Counsel submitted further that the default prison sentence of 5 years was illegal as the provisions of the Act provided a maximum sentence of 3 years imprisonment. According to counsel, the trial magistrate also did not take into account the mitigation that the appellant who had crossed the border looking for his cows in sentencing.

7. This being a first appeal from a plea of guilty, I am required to examine the record of the trial proceedings afresh and the evidence which support the charge together with the charge sheet and sentence.

8. I will start by saying that as stated by the Principal Prosecuting Counsel, in my view, the charge is defective as it mixes two sections of the statute which relate to very different issues. The appellant now says on appeal that he told the police that he wanted to be taken to Hagadera Refugee Camp, though he did not say so before the trial court. However, the fact that the charge sheet refers to Section 34 of the Act which relates to entry and removal of immigrants from Kenya convinces me that he must have informed the police that he came to Kenya to seek asylum even if that was not the true situation. Section 34 of the Act also does not have a penalty section but confers on the Cabinet Secretary powers to remove the person to his/her home country. That is a totally different situation from the offence defined under Section 53 of the Act, of unlawfully entry or presence in Kenya which has a penal section. In my view, the prosecution should have chosen either to proceed under Section 34 or Section 53. It was wrong for the state to combine both sections in acting against the appellant.

9. The charge sheet is therefore incurably defective, and cannot be cured under Section 382 of Criminal Procedure Code (Cap.75). The appeal will thus be allowed on that account and conviction quashed as the appellant pleaded guilty to a charge which was incurably defective.

10. With regard to the sentence, the default sentence of 5 years imprisonment is illegal, as the maximum sentence provided by law under Section 53 (2) of the Kenya Citizenship and Immigration Act is 3 years imprisonment. The illegal sentence would thus have to be interfered with even if the conviction was to stand. Now that the conviction is quashed, the sentence will also be set aside. The appellant will however be repatriated to his home country of Somalia.

11. Consequently, I allow the appeal and quash the conviction herein as the charge is defective. The sentence imposed is also set aside as the conviction has been quashed. The appellant will thus be set at liberty from prison custody forthwith unless otherwise lawfully held. He will however be handed over by the prison authorities to the Immigration Department for repatriation to his home country of Somalia.

12. The Deputy Registrar will forward a copy of this judgement to the trial magistrate for guidance.

Dated and delivered at Garissa on 24th January, 2018

George Dulu

JUDGE