



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 20 OF 2017**

**ADEN ISSACK ALI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Mandera SPM Court No.278 of 2017 – PN Areri SRM)**

**JUDGMENT**

1. The appellant was charged in Magistrates court at Mandera with being unlawfully present in Kenya contrary to Section 53 (1) (j) as read with Section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence were that on 10<sup>th</sup> March, 2017 at 2032 hours at Bulla Power in Mandera township within Mandera County being a Somali national was found unlawfully present in Kenya without a valid passport or permit authorizing him to stay in Kenya.
2. When he appeared before the Magistrates court on 13<sup>th</sup> March, 2017, he was recorded as having pleaded guilty. He was thus convicted and sentenced to pay a fine of Kshs. 300,000/= and in default to serve 5 years imprisonment and ordered on completion of sentence to be repatriated back to Somalia.
3. He has now come to this court on appeal on sentence since he says that he pleaded guilty the charges and that the fine and imprisonment sentence were too harsh and excessive and asks leniency in view of the fact that he came to Kenya due to difficult circumstances obtaining at that time.
4. The appellant also filed written submissions to the appeal, in which he stated that he lived on the border between Kenya and Somalia and crossed to Kenya due to drought, search for pasture for livestock and also to purchase provisions and was then arrested by the police. According to him, though he pleaded with the police to be released and explained to them his circumstances, they charged him in court and was then handed down an unreasonably harsh sentence though he pleaded guilty in court to the offence and asked for leniency. At the hearing of the appeal, he added verbally on appeal that he was a poor man and could not afford to raise the amount of fine imposed.
5. Learned Principal Prosecuting Counsel, Mr. Okemwa in response submitted that though the prosecutor in the trial court made a mistake by taking a shortcut in saying that the facts were as per the charge sheet, the conviction was proper. The sentence was however excessive as the appellant had raised the touchy issue of his circumstances in court when he stated that his animals and children had died due to drought, which issues the appellant had raised in his written submissions in this court.
6. Counsel further added that since there was no clear line demarcating the border between Kenya and Somalia at Mandera, the appellant deserved a sentence which could serve merely as a warning instead of

the harsh sentence that was imposed by the magistrate. Counsel also stated that the default sentence of 5 years imprisonment was unlawful as the maximum default prison sentence for the offence was 3 years imprisonment.

7. I have considered the appeal, the grounds of appeal as well as the submissions of the appellant and the respondents, both written and oral. I have also perused the record.

8. When the appellant appeared in the magistrate's court, he pleaded guilty. The prosecutor then stated that the facts were as per the charge sheet, which in my view was a mistake because the particulars in the charge sheet sometimes are different from the facts in witness statements. In my view, proper compliance with the requirements set out in the case of ADAN -VS- REPUBLIC (1973) EA 445 will need a prosecutor to give a summary of facts extracted from the recorded witness statements which should then be compared by the trial court with the allegations and the particulars in the charge sheet to determine whether the particulars and facts agree and whether from the same it can be deduced that an accused committed the offence alleged in the charge sheet.

9. From the facts of this case however, and since the appellant does not challenge the facts of the charge sheet, I find that the conviction was proper. The irregularity committed by the prosecutor did not prejudice the appellant and is curable under Section 382 of the Criminal Procedure Code (Cap.75).

10. With regard to sentence, the maximum sentence provided by the law for the offence is a fine of Kshs. 500,000/= or imprisonment for a term not exceeding 3 years imprisonment. Section 53(2) of the Act clearly provides as follows:-

**“Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for term not exceeding three years or to both.”**

The default sentence of 5 years imprisonment was thus unlawful and will be set aside.

11. With regard to the sentence generally, even the sentence of fine, from the circumstances of the case was harsh and excessive. I agree with the Principal Prosecuting Counsel that in view of the border situation in Mandera town which spreads from Kenya to Somalia, and due to the pastoral life of the inhabitants and the explanations given by the appellant before the trial court, that the learned magistrate should have considered a more lenient sentence.

12. I am aware that sentencing is an exercise of discretion by a trial court and that an appellate court should be slow in interfering with the exercise of such discretion power. However, in the circumstances of the present case, where a first offender had explained the magistrate touch, circumstances under which he crossed the border, the trial court in my view, should not have handed down a fine which was almost the maximum sentence, and also an illegal sentence of imprisonment in default.

13. I thus have to set aside the sentence, and order that since the appellant has served part of the prison term for about a year now, the sentence of the imprisonment already served be deemed to be adequate punishment.

14. As for the repatriation orders back to Somalia, the order will be upheld because the appellant cannot lawfully stay in Kenya without valid documents.

15. In conclusion, I find that the conviction of the trial court was proper and uphold the same. I however set aside the sentence imposed and order that the prison sentence already served by the appellant is adequate punishment to him. He will thus be released forthwith from prison custody handed over to the Immigration authorities and repatriated to his home country of Somalia.

16. I order the Deputy Registrar to forward a copy of this judgement to the learned magistrate for information and guidance.

**Dated and delivered at Garissa on 23<sup>rd</sup> January, 2018**

**George Dulu**

**JUDGE**