



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 22 OF 2018 AND 23 OF 2018 (CONSOLIDATED)**

**1. MASLAH MOHAMED**

**2. HUSSEIN IBRAHIM.....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Garissa Chief Magistrate Criminal Case No. 183 of 2018 by Hon. Cosmas Maundu (CM))**

**JUDGEMENT**

1. These two Appeals No. 22 of 2018 and 23 of 2018 were consolidated and heard together. The appellant in Criminal Appeal No. 22 of 2018 is Maslah Mohamed while the appellant in Criminal Appeal No. 23 of 2018 is Hussein Ibrahim.

2. The appellants were charged in separate criminal cases in the Magistrate's Court at Garissa which appear to have been consolidated under Criminal Case No. 183 of 2018. The consolidated cases were Garissa Criminal Case No. 181 of 2018 in which the accused was Muktar Jamale, while the accused in Criminal Case No. 182 of 2018 was Hussein Ibrahim, and the accused in Criminal Case No. 183 of 2018 was Maslah Mohamed.

3. When they appeared before the trial court on 9<sup>th</sup> March, 2018 they were all recorded as having pleaded guilty to the offence of 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. They were thus convicted on their own plea of guilty and each sentenced to pay a fine of Kshs.200,000/= or in default to serve one (1) year imprisonment. The trial court also ordered that upon payment of the fine or completion of the prison sentence, the accused persons be repatriated to Somalia.

4. The two appellants have now come to this court on appeal. Their appeals are not challenging the conviction but the sentence as being harsh and excessive.

5. At the hearing of the appeals, the 1<sup>st</sup> appellant Maslah Mohamed said that he knew that he was unlawfully present in Kenya but that he came from a poor family and could not afford the fine imposed.

6. The 2<sup>nd</sup> appellant Hussein Ibrahim on his part said that he knew that he was illegally in the country but asked this court to reconsider his sentence as he was from a poor family and could not afford the fine. He asked the court to set him free.

7. Mr. Balongo learned Prosecuting Counsel submitted that the fine imposed was excessive and conceded to the appeal.

8. This is an appeal on sentence. Sentencing is the discretion of the trial court and generally an appellate court should be slow in interfering with the sentence unless it is manifestly low or high. Where a trial court did not for example take into account relevant mitigating factors, the appellate court can interfere with the sentence. Also where the trial court did not consider relevant aggravating factors in sentencing, the appellate court can also interfere with the sentence. Additionally, where the sentence imposed is outside the parameters provided under the law or in other words it is illegal, the appellate court can interfere with the sentence. These are the few instances where appellate courts interfere with sentence imposed by a trial court.

9. For the offence in question herein, the sentence is provided under Section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011 as follows:-

**“35 (2) Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding Kshs. 500,000/= or to imprisonment for a term not exceeding three (3) years or to both.”**

10. The sentence imposed herein by the trial court was a fine of Kshs.200,000/= or in default a prison term of one (1) year. The appellants were first offenders as no previous record was brought to the attention of the trial court. They have now come to this court on appeal saying that they come from poor families. At the trial, however, they did not tell the magistrate that they came from poor families. They merely asked to be released. The learned Prosecuting Counsel has conceded to the appeal saying that the sentence imposed by the trial court was excessive.

11. With due respect to the learned Prosecuting Counsel, I am of the view that the sentence imposed by the trial court was not excessive as the maximum sentence provided by law is a fine of Kshs.500,000/= or in default imprisonment for a term of three (3) years or both. The offence is also serious and prevalent in this area and courts are entitled to impose sentences that would discourage illegal immigration.

12. I find no merit in the appeals, as in my view, the sentence was not excessive in the circumstances of the case. I thus dismiss the appeals and uphold the conviction and sentence and the deportation orders issued by the trial court.

**Dated, Signed and Delivered in open court at Garissa this 28<sup>th</sup> June, 2018.**

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**George Dulu**

**JUDGE**