



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 58 OF 2017

ABDULLAHI ABDI KASSIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Manderu Senior

Resident Magistrate Criminal Case No. 588 of 2017

by Hon. P. N. Areri (SRM)

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Manderu with attempting to depart from Kenya through a place that has not been specified as a point of exit or entry contrary to section 15 (2) (a) as read with Regulation 57 of the Kenya Citizenship and Immigration Regulation 5 of 2012.
2. The particulars of the offence were that on 12th August 2017 at around 1100 hrs at Border Point 3 around Kenya Somali border in Manderu County of the Republic of Kenya, unlawfully attempted to depart Kenya to Somalia through Border Point 3 a point not specified as a point of entry or departure in contravention of this regulation.
3. When he appeared before the Magistrate's Court, he was recorded as having pleaded guilty to the charge. He was thus convicted and sentenced to pay a fine of Ksh.150,000/= and in default to serve four (4) years imprisonment.
4. He has now come to this court on appeal raising several grounds.
5. On the hearing date of the appeal, he made oral submissions in court and said that he took care of his elderly parents and was arrested at the border which was a common crossing for people.
6. Mr. Balongo the Learned Prosecuting Counsel opposed the appeal and said that the conviction was proper and the sentence within the law.
7. I have considered the appeal and perused the proceedings of the trial court. The appeal will succeed because of a technicality with respect to the charge sheet.
8. The appellant was charged with contravening section 15 (2) (a), without stating the Act of Parliament on which he was charged. Assuming that the charge was under the Kenya Citizenship and Immigration Act No. 12 of 2011, section 15 therein does not create an offence but relates to the rights of stateless people who were in Kenya on 12th December 1963 being recognized as lawful residents and eligible to apply for citizenship. It is thus not possible for this court in the appeal to know whether the appellant was convicted of contravening any written law. Since an accused person can only be convicted of a criminal offence contained in a written law and the sentence therefore provided in a written law, the charge facing the appellant was fatally defective, as it did not contain the section of the Act of Parliament that created the offence and sentence.
9. Secondly, though the charge sheet refers to regulation 57 of the Kenya Citizenship and Immigration Regulation 5 of 2012, in my view, that regulation if it exists cannot create an offence and prescribe a sentence. The offence had to be created by the Act of Parliament, as there is no power donated under the Act to any person to create offences and determined sentences. There was also a defect in the description of the Regulations by not stating the Legal Notice number of the relevant Kenya Gazette. In my view therefore, that regulation might merely have designated points of entry and exits from Kenya and how to get permits to enter or exit from Kenya not otherwise.

10. Consequently, though the appellant was recorded as having pleaded guilty to the charge, he could not lawfully be convicted of non-existent offence. He was thus entitled to an acquittal by the magistrate, and the magistrate was wrong in convicting and sentencing him on a defective charge.

11. I thus find that both the conviction of the appellant and sentence are not sustainable. Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Garissa this 14th June, 2018.

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George Dulu

JUDGE