



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 28 OF 2017**

**OLUSEYE OLEDAJI SHITTU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Nairobi Cr, Case No.513 of 2016 delivered by of Hon. Oluoch, SPM delivered on 1<sup>st</sup> March 2017)*

**JUDGMENT**

**Background**

Oleseye Oledaji Shittu, Appellant herein was charged with three counts. In Counts I and II he was charged with being in possession of an article connected with an offence under the **Prevention of Terrorism Act, 2012** contrary to **Section 30 of the Prevention of Terrorism Act of 2012**. The particulars were that on 21<sup>st</sup> March, 2016 at Ongata Rongai area within Kajiado County, was found in possession of a Samsung mobile phone make SM-N910H, IMEA Number 355051068840754, which had an Airtel micro SIM card, serial number 89254031321066217159, of mobile number 0739559585 that had a video, VID-20160227-WA0000, for use in instigating the commission of terrorist acts.

The particulars of Count II were that on 21<sup>st</sup> March, 2016 at Ongata Rongai, was found in possession of a Samsung mobile phone make SM-N910H, IMEI number 355051068840754 which had an Airtel micro SIM card, serial number 89254031321066217159, of mobile number 0738559585 in which had articles, namely pictures, that were to be used in the instigation of the commission of terrorism acts.

The third count related to the offence of being unlawfully present in the country contrary to **Section 53(1)(j) as read with Section 53(2) of the Kenya Citizenship and Immigration Act, 2011**. The particulars of the offence were that on 21<sup>st</sup> March, 2016 at Ongata Rongai area within Kajiado County being a Nigerian National was found being unlawfully present in Kenya in that he did not have a valid visa, pass or permit to allow him to remain in Kenya.

The Appellant was arraigned before a court and after a full trial was acquitted in counts 1 and II and convicted in Count III. He was sentenced to a fine of Kshs. 300,000/- in default serve 12 months imprisonment. The court further ordered that upon completion of the sentence he be repatriated to his country of origin.

The Appellant was displeased with both the conviction and sentence and he preferred this appeal. He set

out his grounds of appeal in his memorandum of appeal filed 13<sup>th</sup> March 2017. He was dissatisfied that he was convicted based on an incomplete Immigration Officer's Report, that the trial court failed to take note that he held second valid passport, that the trial court did not consider a response from the Nigerian High Commission dated 30<sup>th</sup> March, 2016 that the Appellant had registered for a new passport which was ready for collection and that the period he had spent in custody was not taken into account in sentencing.

### **Submissions**

The appeal was canvassed by way of oral submissions on 1<sup>st</sup> August 2017. The Appellant who was in person submitted that he had been in Kenya since 1996 and that documents from Immigration proved this. That in May 2016 a letter was written by ATPU requesting his travel history and it was confirmed by PW3, an Immigration Officer he had two passports issued by the Nigerian government. He submitted that he could not have traveled on an expired passport. Furthermore, the witness had confirmed to the court that the report he produced in court regarding his travel history on the passports he held was inconclusive. He urged the court to take into account that he was married to a Kenyan woman, one Jane Wanjiru Oluseye and owns property in Kenya. He urged the court to look at Article 15(1)(2) of the Constitution which supported his claim that he was in Kenya legally. This, he submitted, was buttressed by entry in the Department of Immigration system dated 2<sup>nd</sup> March, 2016 together with other documents he presented to court which showed that he was in the country legally. He urged the court to consider the documents that he had produced in court which confirm that he was in the country legally. On sentence, he urged the court to also consider that he had been in remand for 1 year during the trial. He pleaded with the court to quash the repatriation order if the appeal is allowed.

In opposing the appeal, learned State Counsel, Ms. Sigei submitted that PW3 confirmed that the Appellant had two passports; A 4164862 and A 0496889. The latter passport expired on 25<sup>th</sup> July, 2010 but that the Appellant had used it to travel. Thereafter, the Appellant never regularized his stay in Kenya and he never gave a reasonable defence to show that he had valid passport or permit when he was arrested. It was clear that his visa had expired. With regards to passport A4164862 she submitted that no evidence was adduced concerning it but that a letter from the Nigerian High Commission did show that a passport had been issued but the same had not been collected. She submitted that the police only recovered one passport from the Appellant and the visa in that passport had expired which pointed to the Appellant's guilt.

On sentence, counsel had no objection to the court taking into consideration the period the Appellant had spent in remand. In conclusion, she submitted that Count III was *proved beyond a reasonable doubt and the appeal ought to be dismissed*.

### **Evidence**

The prosecution's case was that the Appellant was arrested pursuant to disturbance complaint filed by his Kenyan wife with the police. He was arrested and escorted to the (Anti-Terror Police Unit) ATPU who found articles on his phone which were related to terrorism and therefore charged him. They also found that his passport was expired and therefore charged him with being in the country illegally.

**PW1, No. 62322224 CPL Moses Mwenda** attached to DCIO Ongata Rongai recalled that on 21<sup>st</sup> March, 2016 he was on night duty when he received a call from the DCIO, Mr. Benson Kasyoki, who informed him that there was a disturbance in Kamura within Ongata Rongai. They were given the number of the complainant who led them there. They found a lady called Jane who informed them that her husband was beating her. They interrogated the husband and found that he was a Nigerian national. The wife informed them of printing machines and other sundry related items that were in the house. They took possession of them after preparing an inventory that was signed by the Appellant and his wife. They also found that the Appellant's passport, number A0496889 had expired on 25<sup>th</sup> July, 2010. The Appellant's mobile phone was seized for safe custody by the police.

**PW2, No. 92578 CPL Lilian Munyinyi** of ATPU headquarters together with CPL Ndirangu collected

the Appellant from Ongata Rongai police station on 22<sup>nd</sup> March, 2016 and escorted him to ATPU. They took possession of the items recovered from the Appellant including an expired passport. In cross examination she stated that she did not see any other passport belonging to the Appellant except the expired one.

**PW3, Timothy Mbugua Njoroge** the Chief Immigration Officer at Nyayo House recalled that they received a letter from DCI-ATPU on 27<sup>th</sup> May, 2016 requesting confirmation that passport number A0496889 belonged to a Nigerian national called Oluseye Olageji Shittu, the Appellant. By a letter, dated 27<sup>th</sup> May, 2016 he informed the ATPU that there existed a passport number A4164862 with an entry on 2<sup>nd</sup> March, 2013 belonging to the Appellant. They attached a copy of his travel history to the passport. They also confirmed the particulars of passport number A0496889 in a letter dated 27<sup>th</sup> June, 2016. The latter passport number A0496889 had expired on 25<sup>th</sup> July, 2010 but had been used on 2<sup>nd</sup> March 2013.

In cross examination he confirmed that the expired passport was used in 2013 and that an immigration officer might have allowed him to travel with the passport in question. He testified that the report was not conclusive as it only reflected entries that were made in the system. Further that the entry stamps on their system informed them of his possession of a second passport.

**PW4, Samuel Owino** a liason officer at Airtel recalled that they received an affidavit on 6<sup>th</sup> October, 2016 requesting the particulars of telephone number 0739559585 and the identity card or document used to register it. He confirmed it was registered on 5<sup>th</sup> March, 2016 under Identity Card number 12230648 belonging to one Oleseye Oledaji.

**PW5, No. 235270 IP Nicholas Waringa** worked with the IT department at ATPU. By a request on exhibit memo form dated 23<sup>rd</sup> March, 2016 from CPL Benard Ndirangu he examined a Samsung phone-IMEI number 3555051068840754 which had a micro SIM card serial number 89250313621066217159, telephone number 0739559585. He testified that it had some videos and images related to terrorism. It also had images of the Appellant. The video was created on 27<sup>th</sup> February, 2016 at 10.39.37hrs and was received from WhatsApp but was never shared with anyone. The pictures were captured on 1<sup>st</sup> January, 2016 and were created on 21<sup>st</sup> March, 2016.

**PW6, No. 79324 CPL Benard Ndirangu** of ATPU Nairobi was the investigating officer. He corroborated PW2's evidence about the transfer of the Appellant to them. He summed up the evidence of the prosecution witness. In addition, by a letter dated 27<sup>th</sup> May 2016 he wrote to the Department of Immigration at Nyayo house to confirm the status of the Appellant's passport and received a report back as testified by PW3. He also wrote to the Nigerian High Commission on 24<sup>th</sup> March, 2016 to confirm the validity of the passport. By a reply dated 30<sup>th</sup> March, 2016 it was confirmed that passport number A0496889 belonged to Shittu Olesegu Oledaji and that the bearer had applied for a new passport. However, one could not be issued as the system had malfunctioned.

After the close of the prosecution case, the court ruled that a prima facie case had been established and put the Appellant on his defence. He chose to remain silent.

### **Determination**

It is now the duty the duty of this court to reevaluate the evidence on record and arrive at its independent conclusion. In doing so however, the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See: **Okeno v. Republic[1972] EA 32.**

After considering the evidence on record and the respective rival submissions, I have deduced the issues for determination to be whether Count III was proved beyond a reasonable doubt and whether the sentence imposed was proper.

With regard to the offence charged the prosecution was under a duty to demonstrate that the Appellant

was in the country illegally. Their evidence was that when they arrested the Appellant, he produced a Nigerian passport number A 0496889 which expired on 25<sup>th</sup> July, 2010. According to a certified copy of the passport that was filed as annexure LM1 in **H.C. Misc. Criminal Application 130 of 2016- Oleseye Oledayi Shittu v Republic** the passport in question was issued on 26<sup>th</sup> October, 2000 and was to expire on 25<sup>th</sup> October, 2005. In that application, the Appellant was seeking bail pending trial in Nairobi Cr, Case No. 513 of 2016. There was indication that no extension of validity was granted. A Kenyan three-month visa was however appended to the passport at the Namanga border on 26<sup>th</sup> April, 2010 thus granting the Appellant a legal status to be in the country until 25<sup>th</sup> July, 2010. This turn of events cannot be explained as the passport itself had expired. This court's further examination of the passport indicates that the passport in question had visas from *Tanzania, Uganda, Burundi and Rwanda affixed*.

Further, there are prima facie errors on two of the visas affixed that calls into question their validity. The first was in the Burundian visa which indicates that it was to expire on 25<sup>th</sup> July, 2010 but has an entry date of 19<sup>th</sup> January, 2010 yet the validity period was one month. Interestingly, this expiration date coincides with the date on the Kenyan visa. Secondly the visa from the United Republic of Tanzania was valid from 4<sup>th</sup> September, 2009 till 25<sup>th</sup> June, 2009 with the remarks stating that its validity ended on 25<sup>th</sup> July, 2010 which is clearly illogical. The irregularities raise serious concerns regarding the dealings on the passport in question.

There was also a contention that there was a second passport belonging to the Appellant being Nigerian passport number A4164862. The evidence regarding this passport was produced by PW3 who found that it had been entered in their system at the Namanga border post in 2013. The Appellant showed this court the said passport. It was entered into the system on 2<sup>nd</sup> March, 2013 as passport number A0496889. In a series of events that raise very serious concerns both passports were entered into the system on the date in question at the same time, 0037hrs. The trial magistrate when considering how the Appellant possibly traveled with an expired passport found that someone was possibly compromised. This court finds this to be an understatement given the grave concerns that are raised by the daring dealings on the passport. It is an issue I feel investigators should re-look at.

In this appeal, the Appellant contends that the second passport expires in 2020. I totally disagree with him. He is a foreigner and therefore his stay in the country must be validated by either a visa on the passport or a permit of whatsoever kind validating his stay in the country. These two very crucial documents were never shown to the court to mitigate his assertion. In the circumstances, I find that the Appellant has not established the legitimacy of his stay in Kenya. Accordingly, the learned trial magistrate did not misdirect himself in arriving at the conviction. The same was safe.

The Appellant also urged the court to look at **Article 15(1) and (2) of the Constitution** in submitting that he had lived long enough in the country to warrant him a *resident status*. *The said provisions read;*

***“(1) a person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.***

***(2) a person who has been lawfully citizen in Kenya for a continuous period of at least seven years and who certifies the conditions prescribed by an Act of Parliament may apply to be registered as a citizen.”***

I need not restate my finding that the Appellant has not demonstrated that he has legally been in the country since his passport expired on 25<sup>th</sup> July, 2010. Further that he never was in possession of a validated passport granting him permission to stay in the country. In addition, although he may have been married in Kenya or was staying in Kenya for a period of more than seven years, he has not taken the liberty to follow the lawful procedure so that he can be registered as a Kenyan resident. Needless to say therefore, is that he is in the country illegally.

On sentence, Appellant was sentenced to pay a Kshs. 300,000/- fine in default serve 12 months imprisonment. He urged this court to take into consideration the fact that he served 1 year in remand

during his trial. He took plea on 30<sup>th</sup> March, 2016 and as he could not meet his bail terms he remained in remand until his conviction on 1<sup>st</sup> March 2017. He spent approximately a year in remand. He has now served about five months of his sentence. He is not able to pay the fine and his continued stay in the country is an extra expense on the tax payers' money. And since he will, in the end, be repatriated, the best option is to find that he has served sufficient sentence. I do however note that the sentence was legal.

In the result, the appeal on conviction is dismissed. With regard to the sentence, I hold that the Appellant has served sufficient sentence. I order that he be forthwith set free. He shall be forthwith repatriated to his home country, Nigeria. He shall be released to the Industrial Area police Station, Immigration Department for processing of his repatriation. It is so ordered.

**Dated and Delivered at Nairobi this 16<sup>th</sup> day of August, 2017**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. Appellant present in person.*
- 2. M/s Sigei for the Respondent.*