REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 68 OF 2016

MESHIDI SELE SATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From conviction and sentence in Garissa Chief Magistrate's

Criminal Case No. 828 of 2016 –M. Wachira CM)

JUDGEMENT

1. The appellant was charged in the Chief Magistrate's Court at Garissa with another, for 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. He was the 2nd accused. The particulars of the offence were that on 9th October, 2016 at Modicar Police Road Block within Garissa County, being Ethiopian Nationals were found to be unlawfully present in Kenya without a valid entry permit.

2. Both were recorded to have pleaded guilty to the charge, and were convicted. The other accused was fined 200,000/= shillings in default to serve 1 year imprisonment while the appellant was fined Kshs. 300,000/= and in default to serve 2 years imprisonment. Both were ordered to be repatriated to Ethiopia after paying the fine of serving the sentence.

3. The appellant has now come to this court on appeal, in my understanding only against sentence. His grounds of appeal are as follows:-

1. That he pleaded guilty to the charge.

2. That he is remorseful.

3. That he had been released from prison and arrested before arriving at his destination as he was on his way back to his county.

4. That he did not intend to stay in Kenya.

5. The sentence was harsh and excessive.

6. That he could not afford to raise the fine.

7. That he begs that the sentence be reduced or quashed and that he be repatriated back to Ethiopia

8. That he promises to abide by the law when released.

9. That it was less than a month since he was released that he was charged with the same offence of being unlawfully present in Kenya.

4. When the appeal came up for hearing before me, a Borana interpreter was present in court but the appellant stated that he did not understand that language but that he understood only Ahmaric. However when an Amharic interpreter was not found immediately, the appellant addressed the court in fluent Kiswahili and said that he was arrested in 2015 and released and arrested again. According to him, he was a refugee and wanted to be taken to the refugee camp because he had escaped from Ethiopia.

5. The learned Principal Prosecuting Counsel, Mr. Okemwa submitted that the appellant had been convicted in 2015 and sentenced to 1 year imprisonment and ordered to be repatriated to Ethiopia. However, when he was released with others, and though the appellant was received at Moyale boarder point, he found his way back to Garissa.

6. Counsel stated also that though the appellant had stated on appeal that he was a refugee, he did not establish or demonstrate that status. Counsel thus urged this court to dismiss the appeal as the appellant was handed down a more severe sentence than his co-accused because of his previous criminal record.

7. This being a first appeal, I am required to re-evaluate all the record as the appellant was convicted on his own plea of guilty. I have thus to establish if the appellant understood the charge and the language used in court. I have to establish whether the trial court recorded the plea in accordance with the requirements of the law. I have also to establish whether the charge and the facts summarized by the prosecutor is closed to the offence alleged, even though the appellant herein has appealed only on sentence.

8. I have perused the charge. In my view the charge sheet is proper and not defective.

9. The law requires that the charge be explained to an accused person in a language which he understands. Thereafter, what he says in response should be recorded by the court, and if it is an admission of the offence, the facts have to be summarized by the prosecutor before a conviction is entered. See the case of Adan -Vs- Republic (1973) EA 445 where the steps to be taken by a trial court in recording a plea of guilty and conviction were clearly stated by the Court of Appeal for East Africa..

10. In the present case, the language used in the magistrate's court was Borana language. On appeal, the appellant said that he did not understand that language. He however made submissions in fluent Kiswahili. He has not raised a ground of appeal that he did not understand the language used in the trial court. In my view therefore, the appellant was not truthful when he said on appeal that he did not understand Borana language. I find that the appellant understood Borana language which was used in the trial.

11. The facts summarized by the prosecutor disclosed the offence charged. It is clear from the same facts that the appellant had been convicted on a similar offence in 2015 on his own plea of guilty. He admitted on appeal that he had been sentenced in a previous case for a similar offence and ordered to be repatriated to Ethiopia. In my view, the facts disclosed the offence charged and therefore the conviction was proper.

12. The appellant has come to this court saying that he was a refugee and wanted to be taken to a refugee camp as he had escaped from Ethiopia. In my view, this is a new dimension or an afterthought being introduced by the appellant on appeal. He did not say so before the magistrate in the 2015 case or in the later case in 2016 that he was a refugee. His grounds of appeal also do not state that he was a refugee. In my view the appellant is a mischievous person who wants to deviate from the facts for his own reasons and intentions and mislead the court.

13. I agree with the Principal Prosecuting Counsel that he appellant has not demonstrated that he is a refugee. This court will therefore not treat him as a refugee, and will not accept that the appellant was running from any danger in Ethiopia. He appears in my view, to be avoiding repatriation. That contention is dimissed.

14. Coming now to the sentence, the maximum sentence under Section 53 (2) of the Kenya Citizenship and Immigration Act is a fine not exceeding Kshs.500,000 or imprisonment for a term not exceeding 3 years or to both. The appellant was sentenced to a fine of Kshs. 300,000 and in default 2 years imprisonment because he was a repeat offender of the same offence. In my view the sentence imposed was justified and proper. It was not harsh or excessive. I dismiss the ground or grounds of appeal on the sentence.

15. The repatriation order will also be maintained as it is not unlawful and in any case, the appellant remaining in Kenya will continue committing the same offence unless his entry is legalized.

16. To conclude therefore, I find no merits in the appeal and dismiss the same. I uphold the decision of the trial court. For the avoidance of doubt the appellant will be repatriated back to Ethiopia as ordered by the trial court.

Dated and delivered at Garissa on 14th December, 2017

George Dulu

JUDGE