REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 11 OF 2016

(From original conviction and sentence in criminal case no. 36 of 2016 of the SRM Magistrate's court at Mandera – P.N. Areri – SRM)

UBAH ABDIRAHMAN HASSAN ..... APPELLANT

V E R S U S

REPUBLIC .....RESPONDENT

JUDGMENT

The appellant Ubah Abdirahman Hassan was charged in the Senior Resident Magistrates court at Mandera with two counts. Count 1 was for knowingly being in possession of a visa which could not be reasonably accounted for contrary to Section 54(1)(d) as read with Section 54(2) of the Citizenship and Immigration Act 2011. The Particulars of the offence were that on the 1st February 2016 at Mandera Airstrip in Mandera East Sub County within Mandera County, had in her possession a Kenyan Travel Visa which she could not reasonably give a proper account of its possession.

Count 2 was 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 2011. The particulars of the offence were that on the same day and place while being a Somali national was found unlawfully present in Kenya without a valid permit authorizing her to stay in Kenya.

She was brought to court on the 4th of February 2016, when she was recorded as having pleaded guilty to both counts. She was thus convicted, and sentenced to pay a fine of Kshs 5,000,000/- with respect to count one and in default to serve 5 years imprisonment. With regard to county 2, she was sentenced to pay a fine of Kshs 500,000/- and in default to serve 5 years imprisonment. The sentences were ordered by the court to run consecutively. The court also ordered that on payment of fine or completion of the sentences, the appellant be repatriated to Somalia, and further ordered that the exhibits which were the passport produced in court, be destroyed.

Aggrieved by the decision of the trial court, the appellant has now come to this court on appeal, of the appeal, on the following grounds:-

> The sentence is harsh, vindictive and manifestly excessive given the nature of the offence as charged.

1. The learned magistrate erred in law in handing a sentence that exceeded the maximum term let alone the fact that he ought not to have handed the maximum term as the appellant was a first offender.
2. The learned magistrate did not consider that the appellant was a first offender.

3. The learned magistrate misdirected himself in convicting the appellant in his own plea of guilty when she was not accorded an interpreter let alone be warned of the consequences.
4. The trial magistrate erred both in law and fact by giving undue weight to the offence before him terming them as serious.
5. The appellant pleaded guilty as a result of threats and intimidation as she had been warned of being branded a likely terrorist.
6. The learned trial magistrate failed to appreciate each of the elements of the charge facing the appellant and therefore reached a bad a reason decision by convicting her.

Though the appeal was filled by T.T Nganga & Associates Advocates, at the hearing of the appeal, the appellant elected to argue the appeal in person in the absence of her advocate.

The appellant submitted that the passport in question was hers but that she was cheated because she did not know how to read and write. She emphasized that she had appealed against the sentence imposed and asked to be taken back to her country Somalia. She further asked that she to be acquitted.

The learned Prosecuting Counsel Mr. Okemwa, submitted that this was one of the matters where un illegal sentence had been imposed by the Mandera trial court. According to counsel, though the appellant pleaded guilty to the charges and asked to be returned to her country, the court imposed a fine of Kshs 5,000,000/- for count 1 and a fine of Kshs 500,000/= fount 2, and in default to serve 5 years imprisonment in each of the two counts. Counsel pointed out that the 5 years imprisonment for count 2 illegal, as the maximum sentence provided by law was 3 years imprisonment.

Counsel submitted further that there existed no aggravating factors surrounding the offences such as the offences being committed in a group. Counsel submitted also that the visa was on the appellant's Somali passport, and that the order for destruction for the passport was inappropriate as there was no reason to create a bad precedent that Kenya would be destroying documents issued by neighbouring countries. Counsel submitted that the state did not oppose the appeal.

This is a first appeal. As a first appellate court, I am required to re-examine the entire record and come to my own conclusions and inferences.

Though the appellant was recorded as having pleaded guilty to both counts and was convicted and sentenced, the appeal herein is against both against conviction and sentence. The learned Prosecuting Counsel for the state has conceded to the appeal on sentence. He has not been specific in his submissions with regard to conviction.

The procedure, and steps to be taken by a trial court in recording a proper plea of guilty was clearly stated in the case of ***Adan -vs- Republic 1973 EA.***

The appellant has complained in the grounds of appeal that she was not provided with an interpreter. I have perused the record of the trial court. The Court Clerk present during the proceedings was Alikher. The record clearly shows that there was translation of the proceedings from English to Kisomali. The appellant is a Somali from Somalia. She also made a plea in mitigation during the proceedings in the trial court and asked to be returned to her county. In my view, it cannot be said that the appellant was not availed an interpreter to translate the proceedings into Kisomali her language from English. It cannot thus be said that she did not understand the charges or the proceedings.

On the recording of the plea of guilty as a whole, the charge was read to the appellant and translated into Kisomali language and she responded by stating that both charges were true. A plea of guilty was entered on each of the two counts by the trial court. Thereafter the facts were given by the prosecutor a Mr. Amwayi. The appellant thereupon stated that the facts and exhibits were correct. The court then proceeded to convict her on her own plea of guilty. In my view, the procedure laid down in the case of ***Adan -vs- Republic***(supra) was substantially followed by the learned trial magistrate.

It cannot thus be said that the magistrate acted in a prejudicial manner to the appellant, nor can it be said

that the appellant did not understand the proceedings and the plea taken.

The appellant has complained that she was not warned of the seriousness of the charges. Though the magistrate did not warn the appellant on the seriousness of the offence, I am not aware of any rule of law that a trial court has to warn an accused before he or she pleads guilty, except that the Court of Appeal has held that in more serious offences like murder, the court should warn an accused person before entering a plea of guilty. This being a case where both counts were punishable by a fine or imprisonment for a term not exceeding 5 and 3 years, I find that there was no requirement or obligation on the trial court to warn the appellant of the seriousness of the offence.

I will thus uphold the conviction.

I now turn to sentence. Sentencing is exercise of discretion by a trial court taking into account many factors such as prevalence of the offence, the conduct of the accused, whether the accused has previous convictions and the adverse effects that the offence has on the public, and whether the accused is remorseful and many other factors. The list herein is not exhaustive, and each case has to be treated on the basis of its special or peculiar facts.

The sentence has however to be a lawful sentence, and secondly a maximum sentence should generally not be imposed by a trial court for first offenders unless it is mandatory. A plea of guilty by an accused person is also a mitigating factor as the court's time and expenses of calling witnesses by the State will both have been saved by such plea, especially when the plea is recorded before trial commences.

In the present case the appellant pleaded guilty to the offence during her first appearance in court. The prosecution said that they did not have previous record criminal against her, so she was treated as a first offender. In mitigation, the appellant asked the court for forgiveness and return to her county Somalia.

The learned magistrate imposed an illegal default sentence under count 2. Whereas the maximum default sentence under Section 53(2) of the Kenya Citizenship and Immigration Act is an imprisonment for a term not exceeding 3 years, the magistrate imposed a default sentence of 5 years imprisonment. Such illegal cannot be sustained and has to be set aside and sentence within the law substituted.

For both offences the trial court pronounced the maximum sentence of a fine. In my view, though the trial magistrate had discretion to impose the sentence he deemed most appropriate, in the circumstances of this case where the appellant was a first offender, pleaded guilty, and asked for forgiveness, the maximum sentence imposed was harsh and excessive. In my view a lesser sentence of a fine and imprisonment would suffice. I will thus set aside the sentence of Kshs 5,000,000/- fine for count 1 and reduce it to a fine of Kshs 800,000/= and in default to serve 2 years imprisonment. With regard to count 2, I will reduce the fine of Kshs 500,000/- to Kshs 200,000/- and in default to serve 1 year imprisonment. The sentences will run consecutively. The order of repatriation to Somalia is upheld. The order for destruction of the exhibit or Somali passport does not appear to be grounded on the law. However, since the passport issued by Somalia had an entry for a Kenyan Visa that page should be destroyed.

In short I dismiss the appeal against conviction and uphold the conviction of the trial court. The sentence is however set aside and substituted with a fine of Kshs 800,000/- and in default to serve 2 years imprisonment on count 1, and a fine of Kshs 200,000/= and in default to serve one year imprisonment for account 2. The prison sentences will run consecutively. I set aside the order for destruction of the passport and order that the page on which the Kenyan visa entry was made be destroyed. The repatriation order issued by the trial magistrate is upheld.

Dated and delivered at Garissa this 31st day of May 2016.

GEORGE DULU

JUDGE