



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 13 OF 2016

(From original conviction and sentence in criminal case No. 37 of 2016 of the SRM Magistrate's court at Mandera – P.N Areri SRM).

1.FADUMO ANSHUR MOHAMED.....1ST APPELLANT

2. SAKARIE ABDALLA AHMED.....2ND APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

JUDGMENT

The appellants herein Fadumo Ashur Mohamed and Sakarie Abdalla Ahmed have come to this court on appeal under the same appeal file No. 13 of 2016. Each is represented by a separate advocate and filed a separate petition of appeal. The appeals were consolidated and heard together. Their grounds of appeal are in summary as follows:-

1. The plea of guilty was equivocal.
2. The Magistrate failed to consider the legality and propriety of the charge.
3. The magistrate erred in failing to conduct proceedings before the court in accordance with the provisions of fair trial under Article 50 (2)(b) of the Constitution.
4. The magistrate failed to offer a chance to the appellants to mitigate and ended up handing down excessive sentences in the circumstances.

Learned counsel for Fadumo Mr. Nzili filed written submissions to the appeal. In addition Mr. Nzili who appeared for that appellant during the hearing of the appeal, relied on the written submissions filed and urged the court to quash the conviction of his client and sentence.

Mr. Ngala learned counsel who appeared at the hearing of the appeal on behalf of Sakarie the 2nd appellant, made oral submissions highlighting especially the provisions for fair trial under Article 50 of the Constitution.

Mr. Okemwa Learned Prosecuting Counsel, conceded to the appeals. However counsel submitted that the charge was not defective in form or content.

Counsel argued that the mitigation of the appellants stating that they were cheated amounted to change of

plea. In addition this was one of the cases from Mandera court in which the court handed down an illegal sentences of more than 3 years imprisonment for this type of offence. Counsel urged that the sentence be reviewed and the Magistrate's Court be supplied with copy of the judgment.

This is a first appeal. As a first appellate court I am required to re-examine all the record and come to my own conclusions though the appellants were convicted on a plea of guilty. I have perused the trial court record.

Fadumo Mohamed (1st Appellant) was charged with knowingly having in her possession a visa which could not be reasonably accounted for contrary to section 54 (1)(d) as read with section 54 (2) of the Kenya Citizenship and Immigration Act 2011. The particulars of the offence were that on 31st January 2016 at Mandera Airstrip in Madera East Sub County within Mandera County had in her possession a Kenyan travel visa which she knew she could not give a proper account of. She was also charged with being unlawfully present in Kenya Contrary to Section 53(1)(j) as read with section 53(2) of the Kenya Citizenship and Immigration Act. 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.

Sakarie Abdalla Ahmed (2nd appellant) was charged with two similar counts of offences committed on the same day and place.

The two were charged in the same Criminal Case Mandera Criminal Case 37 of 2016. Each of them was recorded as having pleaded guilty to the charge. Facts were then summarized by the prosecutor Mr. Amwai and both appellants were recorded as having admitted the facts and were convicted.

Before they were sentenced the 1st appellant was recorded as having said in mitigation as follows:-

“I was cheated by somebody who brought me the documents in Somalia so that I could use them to travel to Nairobi.”

The 2nd appellant in his mitigation stated as follows:-

“ I also reiterate what A1 has said I was also cheated. I pray that I be returned to my country.”

Thereafter the learned magistrate sentenced the appellants. Each was sentenced to pay a fine of Kshs 5,000,000/= and in default serve 5 years imprisonment for being in possession of a visa which they could not account for. Each of them was also handed down a fine of Kshs. 500,000/= and default prison sentence of 5 years imprisonment for being unlawfully present in Kenya.

Therefrom arose the present appeals.

Though counsel for the appellants have argued that the charge was defective, I have perused the charge sheet and find no defects on the same. The charge and particulars of charge are in accordance with the requirements of section 134 the Criminal Procedure Code (cap.75). I find no irregularity therein. I agree with Learned Prosecuting Counsel. I dismiss that ground.

Counsel for the appellants has submitted that the plea of guilty of the appellants was not unequivocal. This position was supported by the Prosecuting Counsel, because the appellants said that they had been cheated by somebody who brought them documents from Somalia so that they could use them to travel to Nairobi, when they were making their pleas in mitigation.

Depending on the offence, the response in mitigation can amount to a change of plea. However in the present case where the appellants were charged with possession of a visa which they could not explain,

and with being in Kenya illegally, the fact that they were misled by somebody to possess the documents could not be a possible defence nor could it be a denial of the offences. It is like a thief saying that one

was misled by the devil or a bad person to steal.

Though the Prosecuting Counsel was of the view that a full trial should have been held, what the appellants said in mitigation in my view was meant to be a mitigation and not a denial of the offence or a change of plea. It was not as if the appellants said somebody they did not know unknowingly planted the items in their bags. It is not as if they said that they lawfully or thought that they were in lawful possession of the documents or that they thought that they were lawfully present in Kenya.

In my view from the facts and circumstances of the case the trial court complied substantially with the requirements of taking a plea of guilty as stated in the case of ***Adan -vs- Republic (1973) EA 445***. I am satisfied that the charge or charges were read to them in English/ Somali language. They understood that language used and pleaded to the charges. The facts were then given by the prosecutor and documents produced and they admitted the facts and were thus convicted. In their mitigation they said that they intended to use the documents to travel to Nairobi. In my view the convictions were safe as the pleas of guilty were unequivocal.

As regards the sentence section 54(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011, provides as follows with regard to possession of a visa which cannot be reasonably accounted for:-

“54(2) any person convicted for an offence under this section shall be liable to a fine not exceeding Kshs 5,000,000/= or to imprisonment for a term not exceeding 5 years or to both.”

On the other hand, section 53(2) in relation to being unlawfully present in Kenya provides as follows:-

“53(2) any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding 500,000/= or to imprisonment for a term not exceeding 3 years or to both”.

As stated above the learned trial magistrate sentenced each of the appellants in default to serve 5 years imprisonment on both offences.

In my view the offence of knowingly possessing a visa which could not be explained, had a maximum sentence of 5,000,000/= fine and or 5 years imprisonment. As for the offence of being unlawfully present in Kenya, the maximum sentence is Kshs 500,000/- fine and or 3 years imprisonment. The default sentence of 5 years imprisonment therefore for the offence of being unlawfully present in Kenya handed down by the learned magistrate was an illegal sentence. It has to be set aside.

With regard to both sentences, in my view the magistrate has erroneously construed the word ***shall*** used in the section to mean that the sentence provided for is a mandatory sentence. That is not the position. The true position is that the penal section puts the sentence as the maximum because of the use of the words – ***“liable to a sentence not exceeding----”***.

The appellants did not have previous records. In my view therefore they should not have been handed a maximum sentence. I will thus interfere with the sentences.

As a result of the above findings, I uphold the convictions of the appellants. I however set aside the two sentences and order that the appellants will each pay a fine of Kshs 3,000,000/= (three million) for possessing a Kenya visa, and Kshs 300,000/= for being illegally Kenya. In default each will serve 3 years imprisonment in respect of each of the two respective counts. The sentences will still run consecutively and on completion of the sentences they will both be repatriated to Somalia as ordered by the trial court.

The Deputy Registrar will forward a copy of this Judgment to the trial court.

It is so ordered.

Dated and delivered at Garissa this 22nd day of July 2016.

GEORGE DULU

JUDGE