



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 68 OF 2015

- 1. SHUKRI MUHUDIN1ST APPELLANT
- 2. IKRA ABDI AHMED.....2ND APPELLANT
- 3. JAMILA ISE SHEIKH.....3RD APPELLANT
- 4. AYAN ABDULAHI4TH APPELLANT
- 5. ABIBA HUSSEIN.....5TH APPELLANT
- 6. DAUDI ABDIRAHMAN ALI6TH APPELLANT
- 7. ALI IBRAHIM7TH APPELLANT
- 8. ABBAS ABDI HUSEIN.....8TH APPELLANT
- 9. ABDIKADIR AHMED.....9TH APPELLANT
- 10. KHALIF OMAR AHMED.....10TH APPELLANT
- 11. ABDIRAHMAN MOHAMED MUSA.....11TH APPELLANT
- 12. ABDIKADIR HASSAN MOHAMMED.....12TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Mwingi SRM Criminal Case No. 444 of 2015 – M. W. Murage RM)

JUDGMENT

This single appeal filed through C. K. Nzili and Co. Advocates relates to twelve (12) appellants.

The appellants were charged together in the magistrates court at Mwingi with the same count of being unlawfully present in Kenya contrary to section 5 (3) (1) (j) as read with section 5 (3) (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence were that on 13th July 2015 at Ukasi Police Station barrier Mwingi East of Kitui County being Somali Nationals were found

aboard motor vehicle Registration No. KBU 547N FH Lorry which was travelling from Garissa to Nairobi being unlawfully present in Kenya in contravention of the immigration act in that they had no valid pass or permit authorizing them to be in Kenya.

They all admitted the charge. They were thus convicted on their own pleas, and each sentenced to pay a fine 200,000/= and in default to serve 1 year imprisonment. The court also ordered that on payment of the fine or completion of sentence they be escorted back to their home country.

This appeal was filed thereafter by counsel on the following grounds:-

- 1. That the learned trial magistrate erred in law and in fact in handing over an excessive sentence in the circumstances.**
- 2. The learned trial magistrate erred in law and in fact in granting a sentence contrary to national and international laws to which Kenya is a signatory.**
- 3. The learned magistrate erred in law and in fact in failing to appreciate the mitigation given by the appellants and the circumstances surrounding the matter.**
- 4. The learned trial magistrate erred in law and in fact in shifting the burden to prove mitigation and circumstances obtaining to the appellant when in law they had no duty to give evidence or justify they are asylum seekers.**
- 5. The learned trial magistrate erred in law and in fact in failing to consider the age and status of the appellants some of who were minors.**
- 6. The learned trial magistrate erred in law and in fact in ordering repatriation of the appellants contrary to international law.**

Before the hearing of the appeal, learned counsel for the appellants Mr. Nzili asked for official information from the Government on whether the appellants or some of them had actually been repatriated to Somalia. The court so ordered.

After many days Sergeant Irene Matu appeared in court and informed the court that Ukasi Police Station had received only two repatriation documents in relation to Ali Ibrahim and Daudi Abdulrahman who had paid their fine at the court in Mwingi. On yet another day, the OCS Ukasi Police Station Chief inspector Antony Kalisa attended court after summons had been issued. He stated that the convicts had been handed over to Dadaab Refugee Camp police officers. However there was no report to confirm that repatriation was done.

Gedion Mugambi, the OCPD Mwingi East also told the court that most of the convicts were initially not able to pay the fine except the two. The said two were dispatched to Dadaab Refugee Camp for repatriation while the rest were still in prison. He stated that they worked as a team with the Refugee camp and therefore they usually complied with court orders for repatriation.

On the hearing date of the appeal, Mr. Nzili indicated that he was relying on written submissions filed earlier by himself. Counsel submitted that appellants 1, 2, 4, 6, 8, 10 and 11 were all minors during the trial. However the court subjected them to a fine and repatriation orders, which were contrary to international law and the Kenya Refugee Act of 2006. He stated that it had been indicated in the mitigation of the appellants at the trial, that they were all people seeking refugee status in Kenya. The court however decided that there was nothing to show that they were refugees which was wrong. Counsel emphasized that Somalis were a vulnerable group and as such should be given the benefit of doubt.

Counsel said that after appeal was filed, a lot of efforts were made by anonymous people to pay the fines for the convicts, which contravened the international law. Counsel emphasized that there was a Directorate of Refugees in Kenya and the manner in which refugees were to be treated was clearly spelt

out in regulations and rules, which should be complied with.

Counsel relied on a case of ***Cord Vs. DPP Petition No. 628 of 2014*** regarding sections 48 and 18A of the Security Laws Amendment Act which was found to be unconstitutional. Counsel also relied on a case of ***Abdulla Vs. Republic – Nairobi High Court Criminal Revision 98 of 2014*** which dealt with prima facie case to determine who a refugee was.

With respect to fines, counsel relied on a case of ***Wambua Kilonzo vs. Republic 2013 eKLR*** in which the High Court restituted the fines. Counsel urged the court to give the guidelines on treatment of refugees from Somalia.

In response, learned Prosecuting Counsel Mr. Okemwa opposed the appeal. Counsel submitted that all the appellants were charged for being unlawfully present in Kenya, and pleaded guilty. The sentence provided for by the law was a fine of 500,000/= or 3 years imprisonment. Counsel submitted that the appellants were sentenced to pay a fine of 200,000/= and in default to serve 1 year imprisonment after considering the mitigating and aggravating factors.

Counsel submitted that the sentences imposed by the court were lawful. It was clear that none of the appellants was an asylum seeker, as they travelled for more than 400kms from the border of Somalia and were arrested while heading to Nairobi. Counsel emphasized that the appellants were unable to demonstrate that they were asylum seekers. According to counsel therefore, the sentences were too lenient. Counsel submitted further that the situation in Mandera was a bit different as Mandera was very close to the Somali border, while the appellants herein were arrested in Mwingi County which was far away from any border District with Somalia.

Counsel agreed that Somalis were a vulnerable group, however counsel submitted that when they crossed the border into Kenya illegally and then travelled inland illegally, they made Kenyans vulnerable as Kenyans did not know their intention.

With regard to the order for the repatriation, counsel argued that the order was justified. Counsel stated that after being repatriated, the appellants could still come back to Kenya and apply for asylum in accordance to the law.

On international instruments, counsel argued that the security of the home countries were given first priority and thereafter that of the asylum seekers.

Counsel submitted that if all the appellants had already paid the fines, it would not be possible for the State to know who paid fines for them. In counsel's view, counsel for the appellants had an obligation to inform the court regarding the person who paid the fines.

On the minor children treatment, counsel submitted that they could be treated differently only if they were asylum seekers. However in the present case the host country was not aware that they were asylum seekers and the state could not be blamed for treating them like adults.

Counsel emphasized that the law and international instruments did not protect illegal immigrants who were not asylum seekers. Counsel emphasized that this incident occurred shortly after the attack by terrorist at Garissa University.

In response Mr. Nzili learned counsel for the appellants stated that the sentencing of the appellants was treated generally, including for the minors which was a mistake by the court, and contrary to international instruments.

Counsel submitted that the aggravating factors were not in the facts and emphasized that the appellants were not found in possession of anything. He reiterated that the State should give an explanation as to who had paid the fines.

On repatriation, counsel stated that it was for the host country to demonstrate that his clients should be repatriated.

I have considered the appeal and the arguments on both sides. I have perused the proceedings of the trial court.

The appellants were charged with one single global offence. They were represented before the trial court by Mr. Nzili advocate. They pleaded guilty to the charge and were convicted. No complaint was raised in the trial court, and no complaints has been raised on appeal on the charge and the recorded plea of guilty and conviction. The appeal herein is on sentence.

As regards the issue of who paid the fines, counsel for the appellant says that the fines were illegally paid by unknown people. The State says that counsel should know the persons who paid the fines for his clients.

In my view, the State cannot be blamed for the payment of the fines. As the sentence was imposed by the court. it was appellants, either on their own or through relatives or friends to pay the fines. In my understanding, there is no requirement that the identity of the person who pays the fine be scrutinized by the court officers who receive the fines or by the police. It is on record also that as this appeal was pending and as counsel for the appellants was seeking to know whether his clients had been repatriated, the trial court file was taken to Mwingi court for payment of fines and the fines were duly paid. In my view therefore, nobody is to blame for the payment of those fines, and such payment of fines did not contravene Kenyan laws or international laws and instruments. I dismiss that complaint.

The second issue is whether it was for the State to show that the appellants were not asylum seekers. In my view it was the appellants to show that they were indeed asylum seekers. The State could not go into the individual minds of people to determine that they were asylum seekers.

In the circumstances of the present case there was no indication at all that any of the appellants was an asylum seeker. They travelled more than 400kms from the Somalia border to Ukasi in Mwingi County where they were arrested. There is no indication from them that they sought or enquired about asylum all the way from the border of Somalia to Ukasi. When they were arrested, they were hiding behind empty crates in the back cabin of a lorry. Such conduct cannot be consonant or in line with asylum seeking, when one is already in the heart of the host country. If they were hiding behind empty crates either in Somalia or just at the border, one could presume that they were asylum seekers.

Even when they were arrested, there is no indication that any of them said he or she was an asylum seeker. When they were charged in court none of them raised that issue. The mitigation of the counsel talking about asylum is an issue which could not be proved one way or the other because that was a plea to seek mercy. It does not change the facts given, unless that plea is given by the convict in person which could only result in the entering of a plea of not guilty. Even now on appeal, counsel for the appellants has not stated that the appellants intended to change their plea to not guilty. Therefore in my view the statement in mitigation by counsel in the trial court did not affect the facts in the case that all the appellants were in Kenya illegally, as illegal immigrants.

Counsel for the appellants has argued very strongly about the sentence imposed on appellants who were minors. Indeed seven (7) of the appellants were minors aged between 15 and 17 at the time of conviction last year. One of them Abdi Hussein must now have turned 18 years, since it is more than an year from the time of the conviction.

Be that as it may, the law does not prohibit fining a minor or repatriating a minor. Again there was no evidence on record or from the facts which were given at the trial by both prosecution and defence, that any of the children was un accompanied.

Under section 191 of the Children's Act No. 8 of 2001, the law prohibits conviction of a child and states that once it is established that a child has committed an offence what should be recorded is that he or she

was found guilty of the offence. The law also prohibits the use of the word sentence with regard to a child, and also section 190 prohibits prison sentence. However the law does not prohibit punishment on a child who has been found to have committed an offence.

It cannot thus be said that the child cannot be fined. There is no prohibition under the laws in the country which says that a child cannot be deported to his country or her country of origin.

In my view therefore each case has to be dealt with under its own facts and circumstances. All the appellants were persons who were within the age bracket 15 and above, and in normal circumstances they surely know where they are coming from especially when they are accompanied by adults. None of them indicated to the court that he or she did not know where they were coming from, or that they were abandoned. They were also represented by a counsel. In my view therefore it cannot be presumed that some of them they were abandoned children.

In my view the sentence of a fine was proper, and I have been told that they have all paid the fine. At this point of appeal the complaints about imprisonment, which could have been contrary to the provisions of section 190 (1) of the Children Act becomes academic, because all have paid the fines. This court will not give guidelines on how to treat illegal immigrants or refugee seekers from Somalia. The law is clear.

To conclude, this appeal succeeds in part.

The appeal against sentence to the extent of the fine and with respect to the repatriation orders is dismissed. I however set aside the default prison term for the child offenders who should have been put under custody as provided for under section 191 of the Children's Act and not in prison in default of the payment of the fine. As I have said above, the mistake of the court on the default prison term for the minors is now academic as all appellants have paid the fines.

It is so ordered.

Dated and delivered at Garissa this 30th day of August 2016

GEORGE DULU

JUDGE