REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 113 OF 2015

(From original conviction and sentence in criminal case No. 1207 of 2015 of the Chief Magistrate's Court at Garissa – M. WACHIRA - CM).

IBRAHIM HASSAN MOHAMED …… 1ST APPELLANT

HASSAN MOHAMED IBRAHIM …….. 2ND APPELLANT

EDIN KULLOW ISSACK ……..……..…… 3RD APPELLANT

-V E R S U S –

REPUBLIC ……....……. RESPONDENT

JUDGMENT

The three appellants Ibrahim Hassan Mohamed (1st Appellant) Hassan Mohamed Ibrahim (2nd Appellant), and Edin Kullow Issac have come to this court through one appeal filed on their behalf by Ms. C. K. Nzili & Company Advocates. In my view, the three should have filed separate appeals. However, it take the technical mistake of counsel as curable under Article 159(2)(c) of the Constitution and section 382 of the Criminal Procedure Code (cap.75), as neither the appellants nor the State have been prejudiced as a result of the technical error.

This appeal has had a history. The memorandum of appeal was filed on 11th December 2015. On the same day, a request for review of sentence was file by the same counsel on behalf of one Adan Samow Eymoi claiming to be the owner of the lorry registration No. KCC 143F Mitsubishi Fuso claiming that he was not given audience by the trial court before forfeiture of the goods and the lorry was ordered. Again on 9th March 2016, the same counsel filed an application for release of the condemned goods to one Aden Issack Ibrahim.

As a consequence of the above, on 4th March 2016 this court ordered that the trial court should give the applicant Aden Issack Ibrahim audience to show whether he was the owner of the goods and also show cause why the goods be not forfeited to the State. This court's order was complied with by the trial court.

It is not clear from the record, if the issue of the lorry was dealt with by this court. The trial court in a ruling delivered on 21st June 2016 found that Aden Issack Ibrahim was not the owner of the goods, as the names in his identity card did not match the names of the applicant. The trial court in particular concluded as follows:-

"I reiterate that upon conviction the motor vehicle and the goods stood condemned and the same are forfeited goods and the same should be dealt with in the manner as earlier ordered by this court. The court orders that the said goods be destroyed in the manner ordered by this court on 11th December 2015. The Executive Officer of this honourable court to serve a copy of the court order of 11th December 2015 to the County commander, commissioner of KRA Garissa and Representatives of other offices mentioned in the court order for purposes of executing the orders".

Thereafter, this appeal, which was filed way back in 2015, was revived for hearing, thus resulting in substantial delay to its disposal.

I must state that the approach adopted in filing an appeal and then making separate applications for revision in the same matter by counsel merely helped to confuse issues. It should be avoided in future. The appeal would suffice and the grounds of challenging the forfeiture orders could still be included in the appeal, as the first appellate court, in appropriate cases, may admit additional evidence, and even grant stay of execution orders.

Coming to the appeal, it was been filed by counsel on four (4) grounds as follows, and even grant stay orders.

1. The learned trial magistrate erred in law and fact in finding the appellants guilty as charged when the plea was unequivocal.

2. The Learned trial magistrate erred in law and fact in relying on the uncorroborated facts.

3. The learned trial magistrate erred in law and fact by failing to consider the circumstances surrounding the offence.

4. The learned trial magistrate erred in law and fact by giving an excessive sentence without considering the appellants mitigation.

Learned counsel for the appellants also filed written submissions on 1st March 2016. Counsel relied on the case of ***Adan –vs- Republic(1973) EA 445, Njuki –vs- Republic (1990) KLR 334 and Fatehali Manji –vs- Republic (1964) EA 481***.

Mr. Nzili who appeared for the appellants at the hearing of the appeal, highlighted the written submissions. Counsel emphasized that no documents were produced to support the charge, and as such the plea of the appellants was equivocal. Counsel emphasized that Kenya Revenue Authority did not provide any report, on the alleged failure to pay taxes on the goods.

On sentence, counsel submitted that the mitigation of the appellants was not considered by the trial court before sentencing.

The Prosecuting Counsel Mr. Okemwa opposed the appeal and stated that the Kisomali language which was used in court was understood by all the appellants. According to counsel, if the appellants thought they had paid part of the duty, then it was for them to prove so.

Counsel concluded by stating that sentencing was an exercise in discretion by a trial court, and that the sentence imposed was lawful and merited in the circumstances of the case.

I have considered the appeal and the arguments on both sides. The appeal is against both conviction and sentence. The appellants were recorded as having pleaded guilty to the charges, and were thus convicted and sentenced.

Indeed, in the case of ***Adan –vs- Republic (Supra),*** the then Court of Appeal for East Africa clearly elaborated the steps to be taken by a trial court in recording a plea of guilty.

The language used herein at the trial court was Kisomali which the appellants understood. In my view, the issue of language does not arise.

However, the charge is a technical charge of failing to pay taxes. From the record, the Kenya Revenue Authority who are the experts on taxable goods and payment of taxes, were not consulted, nor was a report obtained from them to back up the allegations of failing to pay taxes.

In addition, it is on record that the appellants purported to produce documents to the police showing that they had paid duty, after they were arrested.

In my view, with the above situation, the proper action to have been taken by the trial court was to enter a plea of not guilty and hear the evidence on both sides. Such action would give a chance to the prosecution to prove their allegation against the appellants beyond reasonable doubt.

The failure of the magistrate to enter a plea of not guilty in the face of the above situation, meant the plea of guilty entered was not unequivocal. I will allow the appeal on conviction.

I will however order for a retrial before a magistrate other than M. Wachira – CM to allow for transparency and in the interest of justice – see ***Fatehali Manji –vs- R (1964) EA 481*.** In my view this is a suitable case for a retrial to be conducted in the interests of justice.

Consequently, I allow the appeal quash the conviction and set aside the sentence. I however order a retrial to be held before a magistrate with jurisdiction other than M. Wachira – CM. The appellants will thus be charged in the magistrate's court with the same offences and in the meantime the items that is goods and the lorry will remain in police custody to be used as exhibits at the trial court.

Dated and delivered at Garissa this 31st October 2016.

GEORGE DULU

JUDGE