REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO. 22 OF 2016 AND 23 OF 2016 (CONSOLIDATED).

(From original conviction and sentence in criminal case No. 615 of 2016 of the Chief Magistrate's Court at Garissa – M. Wachira CM)

IBRAHIM ALI SALAT.....1ST APPLICANT/CONVICT

ESSER ABDULLAHI GED.....2ND APPLICANT/CONVICT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

The two applicants Ibrahim Ali Salat and Esser Abdullahi Gedi were charged in the Chief Magistrate's Court at Garissa with one Abdi Nasir Ali Salat with being unlawfully present in Kenya contrary to section 52(1)(j) as read with section 53(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011.

The particulars of the offence were that on 25th July 2016 at Bitamidow area in Dadaab Sub County within Garissa County, being Somali nationals were found present in Kenya without any valid identification documents.

They were each recorded as having pleaded guilty. Each was convicted and fined Kshs 500,000/= and in default to serve 2 years imprisonment. It was further ordered by the trial court that each would be repatriated to Somalia after either paying the fine, or serving the prison sentence.

The two have now come to this court asking for revision of their conviction and sentence relying on sections 190(1) and 191 of the Children Act, claiming they were children.

This court ordered medical assessment of their respective ages. Dr. Abdiaziz of Garissa Provincial General Hospital attended court and produced the age assessment reports.

The doctor stated that Esser Abdullahi Gedi was below 18 years, on the basis that the last molar tooth was missing. With regard to Ibrahim Ali Salat, the medical report also said the last molar (8) had not erupted, and as such he was not yet 18 years. This court admitted the two medical reports at this review stage.

Under the Children Act, this court can review the orders or decisions of a trial court, where the matter relates to children. Though the medical or dental examination clearly establish a borderline situation between childhood and adulthood, I give the convicts the benefit of the doubt and find that they are children and were children at time of the trial.

The Children's Act section 189 prohibits the use of the word "conviction" and "sentence" with regard to children. I set aside the word conviction, and replace it with a finding that they are each guilty. I also set aside the word sentence and substitute thereto the word order.

The facts as recorded establish that the convicts committed the offence charged. The sentence is however the maximum sentence of a fine. The offence is serious, taking into account the security situation. However, in my view the maximum sentence of fine is not called for in the circumstances herein as they pleaded guilty. It is of note that the maximum sentence is a fine of Kshs 500,000/= and in default 3 years imprisonment. I will set aside the sentence and make an order that each of the appellants pay a fine of Kshs 200,000/- and in default serve prison sentence of 2 years.

Arguments have been made by Ms. Nganga against the order of repatriation. The basis of the argument is that the two were asylum seekers, and that they were convicted within the window of 30 days allowed for making the request for refugee status.

Asylum seeking is a right applicable to adults as well as children. It is not a preserve of children. There might be a presumption in certain situation that somebody who crosses the border from a warring country to another country is an asylum seeker. However that is a rebuttable presumption.

The burden is always on the asylum seeker to show that he or she is an asylum seeker. In my view, it is not a heavy burden, but it has to be discharged by the asylum seeker. He or she can do so by so stating verbally or by signs that can be understood by any reasonable man.

When a person like the convicts here are arrested they should if they want to seek asylum, say or indicate so to the arresters. Short of that, they should say so or explain their circumstances to the trial court. If they do not do so, the court cannot impute asylum seeking on them. That would certainly be an expression of prejudice by the court. The people arrested might even be Kenyans. I find that the two were not asylum seekers and cannot be so treated, as there is no indication that they showed or suggested anything to establish they were asylum seekers.

I thus review the orders of the trial court in that I set aside the conviction and replace the same with a finding of guilty. I also set aside the sentence and order that the two convicts will each pay a fine of Kshs 200,000/= and in default serve 2 years imprisonment. The repatriation orders still remain in force.

Dated and delivered at Garissa this 25th day of October 2016.

GEORGE DULU

JUDGE