



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 32 OF 2016

MOHAMUD MOHAMED ALI 1ST APPELLANT

MOHAMED ALI RASHID NOOR 2ND APPELLANT

V E R S U S

REPUBLIC PROSECUTOR

(Appeal from original conviction and sentence in Mandera SRM Criminal Case No. 107 of 2016 – P. N. Areri – SRM).

JUDGMENT

This is a single appeal for the two appellants Mohamud Mohamed Ali (hereafter 1st appellant) and Mohamed Ali Rashid Noor (hereafter 2nd appellant) was filed by C. K. Nzili & Company advocates on 28th April 2016. Though in my view, separate appeals should have been filed for each appellant, that is a technical error which has not prejudiced either of the appellants or the State, therefore the appeals in my view are not defective.

The two appellants were charged in the magistrate's court at Mandera with attempting to depart from Kenya through a place that has not been specified as a point of exit contrary to regulation 15(1) as read with regulation 15(2) (a) and regulation 57 of the Kenya Citizenship and Immigration Regulations 2012. The particulars of the offence were that on 16th April 2016 at around 11.30 hrs at border point 3 in Mandera County being Kenyan citizens attempted to depart from Kenya through the said border point 3 area, which had not been specified as a point of exit in the fourth schedule of the Kenya Citizenship and Immigration Regulations 2012.

They were each recorded as having pleaded guilty to the charge. Each was convicted and sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, they have come to this court on appeal through counsel on the following grounds:-

1. The learned trial magistrate erred in law and fact in entering and convicting the appellants on a plea of guilty when the plea was not unequivocal.
2. The learned trial magistrate erred in law and infact in failing to warn the appellants the implication of their own plea or establish if they understood the plea.
3. The learned trial magistrate erred in law and in fact in failing to consider that the appellants were

first offenders.

4. The learned trial magistrate erred in law and fact by failing to consider the appellants mitigation hence handing the appellants excessive sentence.
5. The learned trial magistrate erred in sentencing the appellants and the sentence imposed was excessive.
6. The learned trial magistrate erred in law and in fact by giving an excessive sentence to the appellants particularly without an option of a fine.
7. The conviction and the sentence was illegal and unconstitutional.

Learned counsel for the appellants Mr. Nzili filed written submissions. The Director of Public Prosecutions(DPP) through Mr. Wanyonyi Senior Assistant Director also filed written submissions. Both the appellants counsel and the DPP elected to rely on the written submissions filed.

I have perused both submissions. The appellant's counsel relied on the case of **Adan –vs- Republic (1973) EA 445**, on recording pleas of guilty, and the case of **Njuki –vs- Republic (1990) KLR 305** – on the need to warn accused persons in serious offences, when they offer to plead guilty. The DPP opposed the appeal, but contended that for first offenders, the sentence imposed by the trial court was excessive.

I have perused the proceedings. I have considered the arguments on both sides.

Though there is a ground of appeal suggesting that the sentence was illegal and unconstitutional, counsel for the appellants did not pursue that ground. My own view after perusing the record is that that ground has no basis. I dismiss the same.

Indeed, the case of **Adan –vs- Republic (supra)** gives the comprehensive steps for taking a proper plea of guilty. The Criminal Procedure Code (cap.75) does not give such elaborate steps. However courts have been consistent in applying the steps elaborated in the above case. I agree with the principles and steps given in that case.

I also agree that in serious offences, a court should warn an accused person regarding the consequences of pleading guilty to the charge – see the case of **Njuki –vs- Republic (supra)**. In my view also in cases with minimum sentences, the court should warn an accused person on the sentence implications of pleading guilty.

In our present case, the record shows that English/Kiswahili and Kisomali languages were used in court. The appellants elected to respond to the charges in Kiswahili. They said the charges were true, and were thus found guilty. They agreed to the facts, and were convicted. They also gave their mitigation before they were sentenced.

The fact that the luggage they were carrying was not produced in court did not affect the conviction, as they were not charged with carrying luggage. The fact that the extract of the Regulations relied upon were not produced in court also cannot vitiate the conviction. The regulations are a schedule to the Act, and are thus common knowledge. In my view only in isolated cases where special ministerial orders are made, is there a need for such ministerial orders to be shown to the court, if they are challenged.

In my view, the pleas of the appellants herein were unequivocal. The conviction stands. I will dismiss the appeal against conviction.

On sentence, the magistrate considered the mitigation of the appellants before sentencing. However, the appellants having been treated by the prosecution as first offenders and there being no aggravating circumstances, and especially the fact that they pleaded guilty without wasting court's time, should have mean that they should not be handed down the maximum sentence for the offence. I however do not

think that a fine is an appropriate sentence in view of the security situation in the area. I will reduce the sentence to two years imprisonment.

Consequently, I dismiss the appeal against conviction, and uphold the conviction. I however set aside the sentence and order that each of the appellants will serve two (2) years imprisonment from the date on which he was sentenced by the trial court.

It is so ordered.

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

GEORGE DULU

JUDGE