



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 59 OF 2016**

**ABDIFATAH ABDULAHI SHEIKH WARSAME .....APPELLANT**

**V E R S U S**

**REPUBLIC .....RESPONDENT**

*(From the conviction and sentence in Garissa CM's Criminal*

*Case No. 607 of 2016 – M. Wachira CM)*

**JUDGMENT**

The appellant Abdifatah Abdullahi Sheikh Warsame was charged in the Chief Magistrate's Court at Garissa 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 No. 12 of 2011. He was charged together with 11 others and was the 6th accused.

The particulars of the offence were that on the 22nd July 2016 in a thicket near Hola junction along Mwingi-Garissa road within Tana River County in the Republic of Kenya, being Somali nationals were found to be unlawfully present in Kenya without a valid entry permit.

All the accused in the trial court were recorded as having pleaded guilty to the charge. They were thus convicted and each sentenced to pay a fine of Kshs. 500,000/= and in default to serve 2 years imprisonment. The trial court also ordered that each of them be repatriated to Somalia on completion of sentence.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal through counsel Paul Mugwe & Company advocates, on three grounds of appeal which are as follows:-

- 1. That the learned magistrate erred in issuing the maximum penalty despite the fact that the appellant pleaded guilty in the first instance.***
- 2. That the learned magistrate erred by failing to factor the appellant's mitigation in the sentence.***
- 3. That the learned magistrate erred in issuing the maximum penalty despite the fact that the appellant was a first offender".***

At the hearing of the appeal, Mr. Nyaga for the appellant submitted that the appellant pleaded guilty to the charge and made a plea in mitigated before the court and was remorseful and as such should not have been met with harsh sentencing. Counsel emphasized that it was clear from the record that the appellant

was seeking asylum in Kenya, and according to counsel, that was the reason why all the accused requested to be handed over to the UNHCR, which request the court rejected. Counsel submitted that the appellant was from war torn Somalia and that the order for the repatriation was thus not justified in the circumstances, as the appellant was a vulnerable person.

Counsel submitted also that, though the court had general discretion in sentencing and that though an appellate court would usually be reluctant to interfere with the trial court's exercise of discretion in sentencing, the maximum sentence of fine imposed herein was unwarranted and unnecessary. Counsel urged this court to reduce the sentence imposed.

The prosecuting counsel Mr. Okemwa opposed the appeal. Counsel submitted that the sentence imposed was neither excessive nor based on a wrong principle. Counsel emphasized that though the maximum sentence for the offence was fine of Kshs. 500,000/= and in default 3 years imprisonment, he felt that the trial court must have considered the surrounding circumstances of the case, in determining the sentence imposed. Counsel underscored the fact that twelve accused persons were found together moving en mass as a group, and urged the court to maintain the sentence.

I have considered the appeal and submissions of the appellant's counsel and the Prosecuting Counsel.

This is an appeal on sentence only. The appellant has been represented by counsel during the appeal. I have however perused the record of the trial court with regard to conviction. In my view the learned magistrate complied with the legal requirements in recording the plea of guilty of the appellant and convicting him. The conviction was thus in my view proper.

As I have said earlier in this judgment, the appeal herein is on sentence. The appellant was found in a thicket around 10pm with 11 others in suspicious circumstances at the Hola junction on the Mwingi – Garissa road. When they were interrogated they said that they were from Somalia and had come to Kenya illegally. They were arrested. After conviction, they said they were remorseful and that they wanted to be handed over to UNHCR for their status to be determined. They sought leniency from the court.

In sentencing the appellant and the others, the trial court observed that UNHCR had stopped being the institution with the mandate to register refugees in Kenya. The magistrate was of the view that the issue of refugee status was now determined by the Government of Kenya which was not currently registering refugees. The magistrate then went ahead to fine each of them Kshs. 500,000/= and in default to serve 2 years imprisonment.

On appeal, counsel for the appellant has underscored the fact that the appellant pleaded guilty to the charge and did not waste the court's time. Counsel also emphasized that the appellant was a first offender. Counsel further submitted that the appellant was looking for refugee status in Kenya.

Under section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011, the maximum sentence for the offence of being unlawfully present in Kenya is a fine of Kshs.500,000/= and in default 3 years imprisonment. The magistrate sentenced the appellant to a fine of Kshs. 500,000/= which was the maximum fine. The default sentence was however 2 years imprisonment which was not the maximum default sentence.

Indeed, it is unusual for courts to impose the maximum sentence for a first offender who has pleaded guilty to the charge and thus not wasted the court's time. In the present case however there were aggravating factors. Firstly, the security situation in the area in question has been very volatile. Secondly, the appellant and others were operating together which means they were acting as an organized group. Thirdly, they were hiding in a thicket at night and it was merely by chance that they were spotted and arrested. Lastly, their mission is still unknown.

Though they said that they be handed over to UNHCR they did not explain how they came into Kenya. They did not explain how they travelled all the way from the Somali border which was several hundred kilometres away and how they crossed the largest river in Kenya the Tana river. They also did not explain

why they were hiding in a thicket at night in the heart of the Republic of Kenya. So far their mission and purpose of coming into Kenya is not known.

In my view, there is no indication whatsoever that they came to Kenya to seek refugee status even if Somalia is a war torn country. In fact in my view if they were looking for refugee status, they would not have been hiding in the bush at night, but they would have felt happy that at last they had crossed the Somali border and made it for a long distance. They would thus seek for assistance from the locals or whomever they found, in order to be accommodated and then pursue the refugee status. None of the above is the case herein.

In the circumstances of this case, in my view, though the learned magistrate handed down the maximum sentence of fine, I do not find any misdirection or abuse of the magistrates discretionary power in sentencing. In my view, the circumstances of the case justified a deterrent sentence, and the trial court merely imposed a deterrent sentence which was appropriate in the circumstances.

Consequently, I find no merits in the appeal and I dismiss the same.

**Dated and delivered at Garissa this 24th day of November 2016**

**GEORGE DULU**

**JUDGE**