



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEALS NOS.31 & 32 OF 2014

(Appeal originating from the conviction of Hon. J. M. Munguti in Lamu Cr No.219 of 2014)

MUSA KHAMISI BAKARI 1ST APPELLANT

SHAMTE HUSSEIN MOHAMMED 2ND APPELLANT

VRS

REPUBLIC RESPONDENT

JUDGMENT

The appellants were charged with three different counts before the Lamu Senior resident magistrate's Court. The particulars of the offence for each count were:

Count 1

Making false declaration to obtain a visa, under section 54 (1) (a) as read with section 54 (2) of Kenya Citizenship and Immigration Act 2011. The particulars of the offence are that on the 22nd day of May 2014 at Lungalunga Border Control Office in Kwale County, the accused declared that they are coming for a holiday and medical reasons respectively a fact they knew to be false.

Count 2

Being in the county unlawfully under section 53 (1) (j) as read with 53 (2) of Kenya Citizenship and Immigration Act 2011 Laws of Kenya. The particulars of the offence are that on the 24th day of May, 2014 at Kiunga Village in Lamu County, it was discovered that the accused were in transit to Somalia. This is contrary to the pass issued to them which has now been invalidated by Regulations 31 (6) of Kenya Citizenship and Immigration Regulation 2012, and hence they are now in the country illegally.

Count 3

Knowingly misleading an Immigration Officer under section 53 (1) (a) as read with 53 (2) of Kenya citizenship and Immigration Act 2011, Laws of Kenya. The particulars of the offence are that on the 22nd day of May 2014, at Lunga Lunga border control in Kwale county, the accused misled an immigration officer who was seeking material facts in exercise of his powers under Immigration Act by informing him that they are coming to Kenya for a holiday and medical reasons respectively, only to come for a transit purposes.

The appellants pleaded guilty and were sentenced to serve five years imprisonment for the first count and

three years each for the 2nd and 3rd count. The grounds of appeal and written submissions are similar for each accused. The grounds are that the sentence is excessive, the appellants are students and also take care of their parents and that they are seeking for leniency. In the written submissions, it is contended that the plea was not properly taken. That the words recorded by the trial court only indicate “true” and this cannot be a proper plea and is contrary to the provisions of section 207 (2) of the Criminal Procedure Code. The facts were not read over to them.

Mr. Nyongesa, prosecution counsel opposed the appeal. Counsel submitted that the appellants pleaded guilty and can only appeal on sentence as per the provisions of section 348 of the Criminal Procedure Act. It is also contended that the plea was unequivocal. The sentences for each count are the maximum and are lawful only that the trial court did not indicate whether the sentences are running concurrently or cumulatively. Mr. Nyongesa urged the court to order that the sentence runs concurrently.

The main issue for determination is whether the plea was taken properly and whether the sentence is excessive. I have gone through the record of the trial court and it shows that the plea was taken several times. On 26/5/2014 the charges were read to the accused in Kiswahili and all the appellants pleaded not guilty. Matter was listed for mention on 28/5/2014. On that date the appellants informed the court that they wanted to change their plea. The three counts were once again read over to the accused in Kiswahili. The appellants pleaded guilty to counts I and III but not guilty for count II. The facts were read over to them and they indicated that the facts were not correct. The trial court properly recorded the plea as “not guilty”. The trial court fixed the case for hearing on 7/7/2014 and 8/7/2014. Mention was for 11/6/2014.

On 11/6/2014 the appellants requested the trial court to have the charges read over to them again. This was for the 3rd time and the appellants pleaded guilty to all three counts. On that date the police file was not taken to the prosecutor and the trial court fixed the matter for mention on 17/06/2014 so that the facts could be read over to the accused. On 17/6/2014 the facts were read over and the appellant confirmed that they were correct. The accused were convicted on their own guilty plea and allowed to mitigate.

Given the record of the trial court, I am satisfied that the appellants were properly convicted. The plea was unequivocal. The appellants were arraigned before the court on 26/5/2014. The guilty plea was entered on 17/6/2014. they appeared in court more than three times and had all the opportunity to deny the charges. They were not lured by anyone to accept the charges. The record of the trial court is quite clear and the conviction is proper.

The appellants are from Tanzania. They entered through Lungu Lungu Border Post lawfully on 21/5/2014 And were arrested in Lamu. The mitigation after conviction does not give any good grounds for their presence in Kenya. The migration officer suspected that they wanted to enter Somalia yet the border had been closed. The prosecution indicated that they were first offenders.

Given the circumstances of the case, I do find that the sentence of three years imprisonment or fine of Ksh.200,000/- and Ksh.300,000/- for counts II and III are proper. As regard to count I, I do find that five years imprisonment is quite excessive. It is the maximum sentence. The trial court had no previous records of the appellants as they are foreigners.

I do hereby set aside the five year sentence for count I and replace it with three years imprisonment or fine of Ksh.500,000/-. The sentence for counts II ad III are left undisturbed. In essence therefore the appellants shall serve three years imprisonment for each count and in the alternative pay fine as indicated herein. The three year sentence shall run concurrently. That is to say the appellants shall serve three years in prison. The appeal on conviction is disallowed.

Dated, signed and delivered at Malindi this 30th day of July, 2015.

SAID J. CHITEMBWE

JUDGE

