



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 108 OF 2014**

**ABDI WAHAB AHMED NUR ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

***(From original conviction and sentence in Criminal Case no. 21 of 2014 of the CM's court at Garissa).***

**J U D G M E N T**

The appellant was charged in the subordinate court with five counts. Count 1 was for making a document without authority Contrary to Section 357(1) of the Penal Code. The particulars of the offence were that on unknown dates, time and place, with intent to deceive and without lawful authority or excuse made a document namely South African Passport No. A01625677 purporting it to be a genuine South African passport issued to him by South African Department of Home Affairs. Count 2 was for uttering a false document with intent to deceive contrary to Section 357 (b) of the Penal Code. The particulars of the offence were that on 2nd January 2014 at Ifo Trading Centre in Dadaab within Garissa County, with intent to deceive, knowingly uttered a forged South African Passport No. A01625677 to No. 70522 Corporal John Mutundi purporting it to be a genuine South African passport issued by South African Department of Home Affairs. Count 3 was for making a document without authority contrary to Section 357(a) of the Penal Code. The particulars of the offence were that on unknown dates, time and place, with intent to deceive and without lawful authority or excuse made a document namely South African Identity Document No. 9201010835083 purporting it to be a genuine South African identity document issued by the South African Department of Home Affairs. Count 4 was for uttering a document with intent to deceive contrary to Section 357(b) of the Penal Code. The particulars of the offence were that on 2nd January 2014 at Ifo Trading Centre in Dadaab within Garissa County, with intent to deceive knowingly uttered a forged South African Identity Document No. 9201010835083 to No. 70522 Corporal John Mutundi purporting it to be a genuine South African Identity Document issued by the South African Department of Home Affairs. Count 5 was for 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. The particulars of the offence were that on the 2nd January 2014 at Ifo Trading Centre in Dadaab within Garissa County being a South African National he was found to be unlawfully present in Kenya without a valid entry permit.

When the five charges were read to him he was recorded as having pleaded guilty to all the charges. Facts were then summarized to him by the prosecutor, and he agreed to the facts. He was thus convicted on each of the five counts. He was sentenced to pay a fine of Kshs 100,000/= on each of count 1, 2, 3 and 4 and in default to serve 12 months imprisonment. With regard to count 5, he was fined Kshs 50,000/= and in default to serve 6 months imprisonment. The trial court also ordered that, after serving the sentence he be escorted to the Department of Refugee Affairs at Dadaab for refugee status determination.

The appellant has now come to this court on appeal. His grounds of appeal are as follows:-

1. That he is remorseful and is therefore seeking leniency.
2. That the sentence be ordered to run concurrently and the fine be reduced.
3. That his wife and children stay at Ifo Refugee Camp whereas his mother and himself were citizens of South Africa therefore his intention had no malice aforethought other than visiting his wife who was a refugee in Kenya.
4. That his mother was born in Somalia and then shifted to South Africa where he was born.
5. That he married his wife while in Somalia but when he left her with her parents' war broke out and they migrated to Ifo Refugee Camp for safety.
6. That he had no other option except to try his level best to rescue her from calamities as his children were in distress.
7. That his passport had expired while he was in Kenya at the Refugee Camp.
8. That this court should have mercy upon him as he was suffering and sick due to the condition in the prison.

The appellant also filed written submissions to the appeal, which I have perused. At the hearing of the appeal the appellant emphasized that the sentence imposed was excessive. He asked the court to review the fine downwards to an amount which his relatives would be able to raise and pay.

Learned prosecuting Counsel Mr. Orwa, opposed the appeal. Counsel submitted that in his view the grounds of appeal were a mere mitigation and did not qualify to be called grounds of appeal. He stated that the said mitigation should have been put before the trial court not the appellate court. Counsel emphasized that the appellant admitted all the charges he faced and was thus convicted on his own plea of guilty and he could thus only appeal against sentence. However in this case the sentence was not harsh or excessive.

In response to the Prosecution counsel's submissions, the appellant stated that the fine imposed was excessive as he pleaded guilty to the charge without wasting the courts time, he did not expect to be handed over such a harsh sentence after. According to him the fine totaling Kshs 450,000/= was excessive.

I have considered the appeal and the arguments on both sides.

The appellant herein has not appealed against conviction. He has not complained about the way his plea of guilty was recorded. He has not stated that he did not understand the language used in court. He has appealed merely on sentence. He states that the total fine imposed was excessive.

In his submissions and grounds of appeal, the appellant has attempted to raise issues of a mitigation nature, which he did not raise before the trial court. When he was asked to mitigate in the trial court, he merely asked for leniency. He did not talk about his family or his mother. He did not talk about his history and how he came to Dadaab to see his family. In my view therefore the trial court was not enabled to consider the mitigation that the appellant is currently raising on appeal. The magistrate would thus only determine sentence on the basis of information placed before that court.

I agree with the Prosecuting Counsel, that the appeal court is not the appropriate forum to raise mitigation which an accused did not raise in the trial court. New and subsequent facts may be used on appeal when introduced in accordance with the law. However the mitigation raised by the appellant herein is not new and was known to him during the proceedings in the trial court. He cannot use this court to raise that mitigation and ask for review of sentence, as nothing prevented him from giving the information to the trial court. In my view therefore the appellant is misguided, and ill advised, in raising mitigation factors during appeal, which he denied the trial court.

On the sentence generally, the sentence for the offence of making a false document without authority or uttering a false document is imprisonment for a term not exceeding 7 years. Therefore in my view, the

sentence imposed of Kshs 100,000/= in default 12 months imprisonment for each of the four counts of making and uttering a false document and the fine of Kshs 50,000/= in default 6 months Imprisonment for being unlawfully present in Kenya was not harsh and excessive.

I find that this appeal has no merits. I dismiss the appeal and uphold the sentence imposed by the trial court. Right of appeal explained.

**Dated and delivered at Garissa this 27<sup>th</sup> July 2015.**

**GEORGE DULU**

**JUDGE**