



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.44 OF 2013**

***(An Appeal arising out of the conviction and sentence of MR. K.W. KIARIE – CM delivered on 28<sup>th</sup> February 2012 in Milimani CMC. CR. Case No.298 of 2013)***

**ABDIFATAH SHAFII OMAR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Abdifatah Shafil Omar, was charged with two offences. In the first count he was charged with **obtaining registration by false pretences** contrary to **Section 320** of the **Penal Code**. The particular of the offence were that on 16<sup>th</sup> October 2007 at Garissa District Registrar's Office, while being a Somali citizen, willfully and by false pretences procured registration as a Kenyan citizen and was issued with an identity card No.27083144. In the second count, the Appellant was charged 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, 2011**. The particulars of the offence were that on 27<sup>th</sup> February 2013 at New Eastleigh Primary School in Eastleigh within Nairobi County, being a Somali National, the Appellant was found unlawfully present in Kenya without a valid permit or pass in contravention of the said **Act**. When the Appellant was arraigned before the trial court, he pleaded guilty to the charge. He was convicted on his own plea of guilty. He was sentenced to pay a fine of Kshs.50,000/- in respect of the first count or in default to serve six (6) months imprisonment and Kshs.150,000/- in respect of the second count or to serve twelve (12) months imprisonment. The Appellant paid the fine.

He was however aggrieved by the conviction and the sentence and has appealed to this court. He has raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on a plea of guilty that was equivocal. He took issue that the trial court had not recorded the language in which the plea was taken. The Appellant contends that he is a *bona fide* Kenyan citizen and therefore the charge ought not to have stood. He was aggrieved that he had been sentenced to a sentence that was excessive in the circumstances taking into account the nature of the offence that he was charged with. He reiterated that he did not understand the language in which the plea was taken and therefore the plea of guilty that was recorded prejudiced him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence. The Appellant was not averse to being retried.

During the hearing of the appeal, Ms. Aluda for the State conceded to the appeal. She however urged the court to direct that the Appellant be retried. Ms. Chelangat for the Appellant was not opposed to the Appellant being retried. This court has re-evaluated the facts of this case. Being a first appellate court, it was clear to the court that the Appellant did not follow the proceedings in the trial court. He has told the court that he is a Kenyan citizen and could not therefore have pleaded guilty to the charge that he was a Somali citizen. This is an issue that the trial court will determine.

Since the State has conceded to the appeal, the Appellant's appeal is hereby allowed, his conviction is quashed and the sentence that was imposed upon him is hereby set aside. The Appellant will however be retried. He has suffered no prejudice because he paid the fine that was ordered by the trial court immediately after his conviction. The fine will be refunded to him. He is ordered to appear before the Chief Magistrate's Court Nairobi on 2<sup>nd</sup> December, 2014 with a view to taking plea in the retried case. It is so ordered.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER 2014.**

**L. KIMARU**

**JUDGE**