



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NOS. 188, 189, 190, 191, 192, 193 & 195 OF 2013**

**(CONSOLIDATED)**

**MOHAMMED SIYAT BARE.....1<sup>ST</sup> APPELLANT**  
**AHMED MOHAMMED HUSSEIN.....2<sup>ND</sup> APPELLANT**  
**OMAR MOHAMED .....3<sup>RD</sup> APPELLANT**  
**ABDIKADIR MOHAMED SAMA.....4<sup>TH</sup> APPELLANT**  
**ABDI MUHAMMED DUH.....5<sup>TH</sup> APPELLANT**  
**MOHAMMED SHEIKH DALIER.....6<sup>TH</sup> APPELLANT**  
**ABDIRAHMAN ABISLAH ALANE.....7<sup>TH</sup> APPELLANT**  
**KHADAR BASIR MOHAMMED.....8<sup>TH</sup> APPELLANT**  
**KANDAR BASHIR MOHAMUD.....9<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(Being an Appeal from the original conviction and sentence in Kajiado Principal Magistrate's Court Criminal Case No. 610/2013 by Hon. M.A. Achieng, SRM on 22/8/13)***

**JUDGMENT**

1. The appellants were charged with the offence of being unlawfully present in Kenya contrary to Section 53(1) (i) as read with Section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. Particulars thereof being that on the 16<sup>th</sup> day of August, 2013 at Majengo Area Namanga Township in Kajiado County being Somali Citizens were found in Kenya Contrary to the Act. They were found guilty, convicted and sentenced. Each appellant was fined Kshs. 200,000/=. In default of payment of the fine they were to serve two (2) years imprisonment.
2. Being aggrieved by the conviction and sentence they preferred the appeal. At the hearing counsel for the appellant. **Mr Itaya** withdrew the appeal against conviction. He mitigated on sentence. It

was his submission that the sentence was harsh in view of section 7(2) (b) of the Criminal Procedure Code which he said limits a fine imposed to Kshs. 20,000/=. He also faulted the trial magistrate for imposing a default sentence of 2 years imprisonment contrary to the requirement of Section 28 of the Penal Code which provides for a maximum of 12 months as a default punishment. He further submitted that the appellants were willing to be repatriated to their mother country. He prayed for setting aside of the sentence imposed.

3. **Mrs Abuga** the learned State Counsel opted to leave it to court to decide on review of sentence. Alluding to the Westgate attack he called upon the court to make a repatriation order.
4. I have considered rival submissions of both counsels. The appellants were charged with an offence stipulated by the Kenya Citizenship and Immigration Act. They were found having contravened the law as enacted by statute which expressly provides for the penalty of the offence described in Section 53 (2) that states thus;-

***“Any person convicted of an offence under this section shall be liable upon conviction to fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or both”.***

5. The provisions of the Penal Code and Criminal Procedure Code cited by counsel for the appellants do not apply herein. Therefore the trial magistrate did not misdirect herself by imposing the sentence provided for.
6. In enacting stringent penalties the intention of parliament was to deter illegal immigrants from entering the country. Courts would therefore be justified in meting out deterrent sentences that would discourage those intending to commit such an offence. However, as correctly pointed out by the learned State Counsel, acts of terrorism may be perceived to be committed by those sympathetic to illegal immigrants. In the circumstances we may not rule out prisons where such immigrants are held being a target. This would call for review of the sentence imposed now that it has been established that the appellants are not able to raise the fine imposed.
7. I therefore partially allow the appeal on sentence by setting aside the sentence imposed and substituting it with a fine of Kshs. 50,000/= or four (4) months imprisonment in default for each appellant.
8. The appellants being of Somali origin will be repatriated to their country of origin upon serving sentence.
9. It so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of OCTOBER, 2013.**

**L.N. MUTENDE**

**JUDGE**