

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 57 of 2007

SALIM ALI MOHAMMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Salim Ali Mohamed, was charged with the offences of Burglary and stealing contrary to Sections 304 (2) and 279 (b) of the Penal Code and for being unlawfully present in Kenya contrary to Section 3 (1) of the Immigration Act. The particulars of the 1st count were that the appellant, on 15th March 2007 at about 3.30 a.m. at Jeza (B) area in Kwale District within Coast Province, broke and entered the dwelling house of David Mwanzia with intent to steal and did steal from therein a Sony radio cassette serial No. 0166954, a Sony DVD player serial No. 2090819, 2 pairs of leather shoes, 2 bed sheets, one Luxtar wristwatch, 1 CD disc, 1 torch and caper all valued at Kshs. 3,850/= the property of the said David Mwanzia. The particulars of the second count were that the appellant on 15th March 2007 at about 3.30 a.m. at Jeza (B) area in Kwale District within Coast Province, being a Tanzanian, was found illegally present in Kenya without an immigration permit.

The appellant appeared before Ochenja, then a Senior Resident Magistrate on 19th March 2007 and pleaded guilty to both counts. The prosecution was however not ready with the facts of the case and the case was adjourned to 20th March 2007 for the same. Come that date, the Learned Senior Resident Magistrate reminded the appellant of the offences facing him but the appellant maintained his plea of guilty. The facts were then stated and the appellant was invited to react to the same upon which he informed the court that the facts were true. The Learned Senior Resident Magistrate then convicted the appellant on his own plea of guilty. The prosecution informed the court that the appellant be treated as a first offender. In mitigation, the appellant asked for forgiveness. The Learned Senior Resident Magistrate then sentenced the appellant to serve imprisonment for five years on each limb of count one. The sentences run concurrently. With regard to the second count the Learned Magistrate ordered that the appellant be repatriated back to Tanzania upon completion of the prison term.

The appellant was dissatisfied with the sentences and has appealed to this court on the ground as I understand it that the sentences of five years are manifestly excessive in the circumstances. The appellant maintains that he is a first offender and is remorseful. He then adds that he is the sole breadwinner of his family. In those circumstances the appellant prays that his appeal against sentence be allowed.

I have considered the record of the Learned Senior Resident Magistrate and note that the Learned Senior Resident Magistrate does not appear to have considered the mitigating circumstances of the appellant before sentencing him. It does not therefore surprise me that the Learned State Counsel does not support the sentences of imprisonment of five years on count one. Those sentences are in my view manifestly excessive in the circumstances of the case especially as all the items stolen were recovered. The appellant was a first offender and prayed for forgiveness. I am not persuaded that those circumstances were considered by the Learned Senior Resident Magistrate.

In the premises, I will interfere with the sentences of imprisonment imposed. The appellant has been in

prison for slightly over two years. He has learnt his lesson. His appeal against the sentences of imprisonment is allowed. The sentences of five years are set aside and substituted with sentences of imprisonment for the period already served. The appellant should be released forthwith unless he is otherwise lawfully held. As the order for the repatriation of the appellant to Tanzania remains undisturbed, the appellant shall forthwith be repatriated accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF APRIL 2009.

F. AZANGALALA

JUDGE

Delivered in the presence of the appellant and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

27TH APRIL 2009