



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 164 of 2007

MOHAMED TAILIL APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from a judgment of A.K. Mwicigi, DM II Isiolo

delivered on 23rd August 2007

JUDGMENT

The appellant was convicted and fined Kshs. 50,000/= on his own plea of guilt for the offence of being unlawfully present in Kenya contrary to Section 13(2) of the of the Immigration Act. According to the charge sheet laid before the court, the appellant, being a Somali National, is alleged to have been found at Eldera Trading Centre of Sericho Division in Isiolo District without the consent of immigration officer. The appellant as I have already observed pleaded guilty to the charge. He was fined Kshs. 50,000/= or 6 months imprisonment and was also ordered to be repatriated to Somalia. Being dissatisfied he filed the present appeal listing six grounds which can be condensed and summarized as follows:-

- (i) That the conviction was a nullity in law in the absence of a statement of facts read out and explained to the appellant.
- (ii) The sentence was excessive.
- (iii) That the trial magistrate erred in failing to treat the appellant as a child.
- (iv) That both the conviction and sentence were a nullity.

Arguing these grounds learned counsel for the appellant urged the court to allow the appeal as the facts forming the basis of the charge were not led by the prosecution. Secondly, he submitted that the appellant being a child the sentence imposed contravened Sections 187(1), 189 and 191 (1) (a) of the Children Act. While conceding the appeal learned counsel for the respondent submitted that the failure to lead facts by the prosecution was fatal. He however urged the court to order a retrial arguing that the omission was not of the prosecution's making.

I have considered these arguments. The appellant appeared before the trial magistrate on 31st August 2007 when the charge was read over to him and he pleaded guilty. But the prosecution instead of outlining the facts, the trial court record shows that the appellant was convicted on his own plea of guilt. It is a mandatory requirement that the statement of facts be narrated and explained to the accused person who must be given an opportunity to admit, dispute, explain or add any relevant facts. It is only when the accused admits the facts unequivocally that a conviction will follow. See **Ombena V. R.** (1981) KLR 450.

It was therefore fatal for the prosecution to fail to state the facts upon which the charge is based. On that ground alone the appeal would be allowed. The next issue is whether or not to order a retrial. The learned counsel for the respondent urged the court to order a retrial while counsel for the appellant pleaded that a retrial will serve no useful purpose.

In the case of **Muiruri V.R.** (2003) KLR 552 the court held, inter alia:

“3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

4. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant: whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”

The broad consideration according to **Dickson Mwaniki M’Obici & Evans Ndungu Kuria V. R.** Criminal Appeal No. 78 of 2006, is whether the retrial is likely to lead to a conviction given any potential admissible evidence which may be adduced at the retrial.

No evidence was adduced in this case as the appellant pleaded guilty. It is therefore not possible to ascertain the kind of evidence that is likely to be led. However, given the nature of the charge and the time that has elapsed since the faulty plea was taken, I have no doubt that the attendance of witnesses will be easily procured hence no prejudice or injustice will be occasioned to the appellant.

In the interest of justice, this is a suitable case for a retrial.

Before I conclude, learned counsel raised one matter regarding the sentence and the provisions of the Children Act. Section 189 of the Children Act prohibit the use of the words “conviction” and “sentence”, while Section 190 (1) provides that no child shall be ordered to imprisonment or to be placed in a detention camp. In this appeal the trial court erred by using the word “convicted.”

The court also fell in error by imposing a prison sentence in default of a fine. The court ought to have dealt with the appellant in terms of section 191 of the Children Act.

For the reasons stated, this appeal is allowed, the conviction quashed and sentence set aside. It is further ordered that the appellant will be produced before any other magistrate with jurisdiction at Meru Law Court, other than Mr. A.K. Mwicigi, DM II (Prof) for purposes of plea within five (5) days from the date of this order.

Dated and delivered at Meru this 16th day of May.... 2008.

W. OUKO

JUDGE