REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 77 of 2008

FEISAL ABDI ADAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with two offences of forgery contrary to Section 349 of the Penal Code. He also faced the charge of uttering a false document contrary to Section 353 of the Penal Code. He was further charged with 5 other offences under the Immigration Act Cap 172 Laws of Kenya. The charges were laid by an Inspector representing the Immigration Department. The appellant was convicted on his own plea of guilty to all the offences.

On the first two counts of forgery the appellant was sentenced to 2 years imprisonment. On each of the rest of the counts he was fined Kshs. 20,000/= in default to serve 2 years imprisonment. The sentences were to run concurrently. The Learned trial Magistrate further ordered that after serving the said sentences and paying the fines, the appellant be repatriated back to Somalia or his country of origin.

The appellant was not satisfied with his conviction and sentences and has moved this Court on appeal citing five (5) grounds filed by the firm of Warsame, Hassan Advocates. The 3rd ground of appeal is important for purposes of this judgment. That ground is expressed as follows:-

"**3. That the Learned Magistrate erred in Law and fact in failing to appreciate the fact that the appellant being a foreigner may not have understood the nature of the offences facing him and/or that the charges and the plea taking were defective for want of proper interpretation as the language that the appellant understands is not disclosed."**

When the appeal came up for hearing the Learned State Counsel Mr.

Ondari conceded the appeal on the ground that the plea was not properly taken and further that Immigration Officers have no authority to try offences under the Penal Code.

The manner in which pleas of guilty should be recorded and the steps to be followed were set out in the case of **Adan – v- Republic [1973] EA 445.** The predecessor of the present Court of Appeal held as follows:-

i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

ii. The accused own words should be recorded and if they are an admission a plea of guilty should be recorded;

iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

iv. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

v. If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence, together with the accused's reply should be recorded.

When the appellant appeared for plea before the Leaned Resident Magistrate, the record shows that the interpretation was from English to Somali and vise versa. The record further shows that the charge was read over and explained to the accused who replied "Guilty" to all the 8 counts. It is plain that if the appellant only understood Kisomali, he could not have said "Guilty" as recorded by the Learned Trial Magistrate. The Court of Appeal in **Adan – v – Republic** (supra) was categorical that where an accused pleads guilty to a charge "the accused's own words should be recorded".

So on the authority of the above Court of Appeal decision, the Learned trial Magistrate did not properly record the appellant's plea. The subsequent conviction of the appellant was therefore unsafe as it is not certain that the appellant understood the charge. That finding alone is sufficient to dispose of this appeal. There is a further reason which emerged at the hearing of this appeal which renders the proceedings before the Learned Resident Magistrate, a nullity at least with respect to the offences under the Penal Code. The record shows that the Republic was represented by an Inspector Mlelo for Immigration. Yet the 1st, 2nd and 4th counts disclosed offences under the Penal Code. Clearly, the Immigration Officer had no authority to prosecute the appellant for those offences under the Penal Code. The 1st and 2nd counts are the offences that attracted custodial sentences. So even if the plea had been properly taken, the appellant's conviction for the offences under the Penal Code would still have been quashed.

In the end, the appellant's appeal is allowed. The conviction recorded against him is hereby quashed and the sentences are set aside. The appellant should be released from prison forthwith unless he is held for some other lawful cause.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Odera holding brief for Hassan for the Appellant and Mr. Onserio for the Respondent.

F. AZANGALALA

JUDGE

7TH JULY 2008