REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 325, 326 & 327 of 2007

KHALI ABDIAZIZ MOHAMMUD ……..……...…….1ST APPELLANT

AMINA MOHAMED MOHAMUD ……..…..…….2ND APPELLANT

ZAINAB NOOR JAMAA ……..……...……...3RD APPELLANT

-AND-

REPUBLIC ……..……RESPONDENT

(An appeal from sentence imposed by Senior Resident Magistrate

A. Ingutya on 15th May, 2007 in Criminal Case No. 223 at

Wajir Law Courts)

JUDGMENT

The appellants herein were among five persons charged with the offence of being unlawfully present in Kenya, contrary to s. 13(2) (c) of the Immigration Act (Cap. 172, Laws of Kenya

e particulars were that, on 9th May, 2007 at 9.52 a.m. at Lefaley Road-Block in Wajir District, within North Eastern Province, the accused persons, being Somali citizens, were found unlawfully present in Kenya, as they had no valid entry permits.

After the charge was read out an explained to the appellants herein, in the Somali language, which they understood, each one of them pleaded guilty. The prosecutor then made a brief statement, as follows: "*The offence was committed nine miles [from] Lefaley, within Wajir. They were found unlawfully present in Kenya". Each accused acknowledged those facts to be true; whereupon the prosecutor asked that they be treated as first offenders. Each accused then made a statement in mitigation. The learned Senior Resident Magistrate subsequently pronounced sentence, and, as regards the three appellants herein, the sentence was thus rendered:*

"The 1st, 4th and 5th accused are hereby sentenced to serve one year in prison. I have fully considered the mitigation tendered, and found no circumstances … to warrant a lighter sentence. I also bear in mind that the accused persons crossed into our country at a time when the borders [with] Somalia are closed, thus breaching our peace, security and sovereignty and posing potential danger to our country. [They be] repatriated after serving term."

In the petitions of appeal it is stated that:

(i) the trial Magistrate erred in law and fact, by imposing an excessive sentence of one-year imprisonment against the appellants without option of fine and/or repatriation;

(ii) the trial Magistrate erred in law and fact by not taking into account the mitigations given by the appellants;

(iii) the learned Magistrate erred in law and fact by not considering the option of imposing a fine;

(iv) the learned Magistrate erred in law and fact by not considering the fact that the appellant was a first offender, and on this account deserved leniency.

For hearing purposes, the three appeals were consolidated, at the request of both counsel in this matter.

Learned counsel *Mr. Mochache* stated that the appeals were only on sentence; and he urged that the sentences awarded were inordinately harsh; failed to take into account the mitigation pleas; did not incorporate the circumstance that the appellants were first offenders; and were primarily guided by the perception that the immigration offences committed by the appellants were prevalent in the Wajir area.

Mr. Mochache urged that this Court should take judicial notice of an obvious hardship-factor which should explain how the appellants found themselves in Kenya, contrary to the law: the appellants were the nationals of neighbouring Somalia, a country which had remained in a state of turmoil for longer than a decade. Counsel urged too that a realistic policy outlook be adopted by the Court: the appellants, if held in Kenyan prisons, would have to be maintained at the expense of the Kenyan tax-payer; this would not only affect for worse the Kenyan economy, it would also add to the institutional hardships of Kenya's over-stretched prison facilities. As the appellants' prayer was that they be subjected to alternative penalty, counsel urged that a fine, and repatriation, be preferred to prison terms.

Learned counsel urged that where the alternative to imprisonment, of fine was available, the Court's discretion on sentence should in principle be exercised in favour of a fine. On this point, there is relevant authority. In *Mita v. Republic* [1969] E.A. *Madan, J* (as he then was) had to consider the prison sentence imposed by the trial Magistrate without option of fine, in a case in which a distraught air-hostess, in a scuffle, bit the complainant on the chin. The following passenges in that persuasive authority may be set out (pp. 598-99):

"*Before passing sentence the learned Magistrate pointed out that the appellant was a first offender, [who] appeared sorry and repentant. He added that this was, however, a very violent and unattractive act, although the appellant may have been provoked by the attempt to expel her from the premises …*

"The learned Magistrate ended up by saying he did not think a fine would serve any purpose as the appellant appeared to be earning a lot of money …

With respect I think the learned Magistrate did not assign enough emphasis to the appellant's contrite condition and the fact that she was a first offender …

"I am also of the opinion that the learned Magistrate misdirected himself when he said the act of biting a man's face is hardly justifiable. At no stage has the appellant tried to justify her act …

"I think irrespective of an accused person's earning capacity it is not wrong to impose a fine unless the circumstances of the case irresistibly preclude this mode of punishment which is not the case here …

"I think the interests of justice will be met if I set aside the sentence of imprisonment and substitute therefor a fine of Kshs.400/=; in default, two months' imprisonment".

More recently, my brother *Makhandia, J*, in *Hamdi Hale Ahmed v. Republic*, Criminal Appeal No. 19 of 2007 has culled quite similar principles from existing case law, such as *James v. Reg*. (1950) 10 EACA; *Nilsson v. Republic* [1970] E.A. 599; *Wanjema v. Republic* (1971) EA 493 and has thus observed

(in an immigration offence case, like the instant one):

"*I do not think … that was good-enough reason to tilt [the learned Magistrate's] hand towards a custodial rather than a non-custodial sentence. The same result can be obtained by imposing stiffer fines. The record also [reveals] that the learned Magistrate did not even consider the appellant's mitigation and the fact that he was a first offender. The appellant having been a first offender, a foreigner and considering our already over-stretched prison facilities, I would imagine that the most appropriate sentence would have been a fine and a repatriation order. Why should the Government be called upon to maintain a person in prison who is bound to be repatriated on completion of the prison [term]? Does it not make more sense that such a person be fined and repatriated forthwith, rather than the Government being called upon to spend the meagre resources on him in prison!*"

It is clear too from other High Court decisions, as I have noted from the judgment of *Makhandia, J* aforesaid, that there is now a trenchant body of jurisprudence on *sentencing,* which carries a policy discouraging overkill in the imposition of prison terms, where the outcome of a prison term, far from inuring to the benefit of Kenya and Kenyans, merely dispenses vengeful penalty against aliens. Rather than teaching-a-lesson to an alien who will in any event depart, the policy of the law should be no more than to discourage a repeat of the offence; and the positive element in this policy will be advanced by allowing the alien to return to his own country with the good-will to be law-abiding there, among his compatriots.

Mwera, J in *Annis Muhidin Nur,* High Court Criminal Appeal No. 98 of 2001 has stated the relevant policy in sentencing, most appropriately:

"*… unless circumstances obtain which irresistibly [impede] a trial Court from imposing a fine first where the law provides for a fine in default of a prison term, the option of a fine must be visited first. This is a sound and tested principle in the art of sentencing …*"

The foregoing case analysis shows the merits of *Mr. Mochache's* contentions in this appeal. He noted that the offence of being unlawfully present in Kenya under s.13 (2)(c) of the Immigration Act (cap. 172) provides for fine, as an alternative to imprisonment; and he urged that the appropriate sentence in the circumstances of this case, would have been the *fine,* and not imprisonment.

Such a position, which makes eminent sense to this Court, was graciously accepted too by learned State Counsel *Mr. Makura*. He was in agreement that the learned Magistrate had not exercised his sentencing discretion judicially. The law provided for a maximum fine of Kshs.20,000/=, or imprisonment for a term not exceeding one year; but the learned Magistrate had imposed the maximum term of imprisonment, with no alternative of a fine.

It is obvious, in my opinion, that the sentencing discretion had not been exercised in accordance with the relevant principles of law, and the trial Court was thus in error. This is the basis upon which I had made the orders of 14th June, 2007. The said orders, which are an integral part of this Judgment, may be restated here:

1. *The appeal on sentence is allowed.*

2. *The Judgment of the trial Court is set aside.*

3. *In place of the one-year term of imprisonment imposed on each appellant by the trial Court, I substitute a fine of Kshs.12,000/=; and upon payment of the said sum of money by each appellant, each shall be set at liberty unless lawfully held in a different cause.*

4. *Each appellant shall be repatriated to his or her country of nationality, upon being set at liberty.*

5. *The fines imposed by this Court shall be paid into the High Court Cash Office in Nairobi; and the orders herein as well as the records of payment, shall be served without delay upon the Senior Resident*

Magistrate's Court at Wajir, to facilitate the repatriation of the appellants as ordered herein.

DATED and DELIVERED at Nairobi this 24th day of September, 2007

J. B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the Appellants: Mr. Mochache

For the Respondent: Mr. Makura