



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 430 of 2006

(From Original Conviction and Sentence in Criminal Case No.14225 of 2006 of the Chief Magistrate's Court at Nairobi, R. A. . Mutoka, (Mrs). SPM).

FARAH ABDIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This Appeal is against sentence only. The Appellant, ***FARAH ABDI*** was charged in the Chief Magistrate's Court, at Nairobi with one count of knowingly possessing and using a forged written authority contrary to Section 13 (1) (d) of the Immigration Act. The particulars of the charge were that on the 7th day of August, 2006 at Jomo Kenyatta International Airport within Nairobi Area, the Appellant was found knowingly possessing and using a forged emergency Certificate Number 018647.

Upon arraignment in Court on 9th August, 2006 and the charge having been read to him, the Appellant pleaded guilty to the same and was accordingly convicted on his own plea of guilty. Upon conviction he was sentenced to 4 months imprisonment and thereafter to be repatriated. The Appellant was aggrieved by the sentence and hence lodged the instant Appeal through the Firm of Messrs Ombeta & Associate Advocates. In his petition of Appeal dated 14th August, 2006 the Appellant claims that the sentence imposed was excessive, that the Learned Magistrate did not consider the mitigation tendered, that the Learned Magistrate should have considered the other option of imposing a fine and finally that the Learned Magistrate did not consider the fact that the Appellant was a first offender.

When the Appeal came up for hearing before me on 19th September, 2006, Mr. Bosire, Learned Counsel for the Appellant orally submitted that the Appellant's mitigation from the record was not considered when the Learned Magistrate imposed the custodial sentence of 4 months and made the order for repatriation. According to Counsel, the Appellant being a first offender, a non-custodial sentence would have sufficed.

Mr. Ekol, Learned State Counsel opposed the Appeal. Counsel submitted that the sentence imposed was legal. That in imposing the sentence, the Learned Magistrate was even lenient to the Appellant. Counsel finally submitted that the offence carries a maximum jail term of 6 months or a fine of Kshs.30,000/= or both.

Sentencing is generally a matter for the discretion of the trial Court. The discretion must however, be exercised judicially and not capriciously. The trial Court must be guided by evidence and sound legal

principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the Appellate Court would be entitled to interfere with the sentence imposed by the trial Court if it is demonstrated that the sentence imposed is illegal or is so harsh and excessive as to amount to a miscarriage of justice, and or that the Court acted upon wrong principle, took into account irrelevant and extraneous factors and finally if the Court exercised its discretion capriciously. See generally, OGALO S/O OWUORA VS REPUBLIC (1954) 19 EACA 270, JAMES VS REPUBLIC (1950) 10 EACA 147, NILSON VS REPUBLIC (1970) EA 599 and WANJEMA VS REPUBLIC (1971) EA 493.

The trial Court's notes on sentence in this matter are sketchy. In a case, as this one, where the trial Court has three options on sentence to impose i.e. a fine upto Kshs.100,000/= and not Kshs.30,000/= as submitted by Counsel or to imprisonment for a term not exceeding three years and not 6 months or to both, the trial Court is obliged to make detailed notes on the matters it took into account in arriving at the sentence imposed. Ofcourse such detailed notes are not essential in cases where only one sentence is provided for by the Penal Provisions. In the instant case, the trial Court did not give reasons why it preferred a custodial sentence to say, a fine. In my view, where the trial Court are faced with three options as regards the punishment to be meted out, the first port of call should be to impose a fine rather than a custodial sentence unless it is demonstrated that the Appellant was habitual or serial Criminal. In the instant case the Appellant was a first offender and a foreigner at that. Our prisons are stretched to the limits and it does not make sense to stretch the facilities any further by imposing a custodial sentence on the accused person when perhaps a fine and a recommendation for his repatriation would have sufficed.

I also note that the Learned Magistrate did not at all consider the Appellant's mitigation. Has she done so, perhaps she would have come to a different sentence. Mitigation is a very important aspect in sentencing. It helps the Court to mete a suitable and appropriate sentence. As it is we are not sure whether the trial Court in imposing the sentence acted capriciously, took into account irrelevant considerations and or failed to take into account relevant factors. That being the case, I am prepared to give the benefit of doubt to the Appellant.

I note that the Appellant was convicted and sentenced on 9th August, 2006. He was however released on bail pending Appeal on 15th August, 2006. He had therefore only served 6 days out of the 4 months imprisonment term imposed.

Taking all the foregoing into account I will interfere with the sentence imposed to the extent that I will substitute the 4 months imprisonment with a fine of Kshs.30,000/= in default to serve 4 months imprisonment. The Appellant is recommended for repatriation immediately upon payment of the fine or on serving the custodial sentence. Those shall be the orders of the Court.

Dated at Nairobi this 30th day of October, 2006.

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MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant: Present

Mr. Bosire: For state

Erick : Court clerk

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MAKHANDIA

JUDGE