REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 429 of 2006

(From Original Conviction and Sentence in Criminal Case No.1424 of 2006 in the Chief Magistrate's Court at Nairobi, R. A. Mutoka, (Mrs.). SPM).

FATUMA HASSAN SALO ……..……..APPLICANT

VERSUS

REPUBLIC…….....……..……..….RESPONDENT

JUDGMENT

FATUMA HASSAN SALO, hereinafter referred to as "***the Appellant"*** was on 9th August, 2006 arraigned before the Senior Principal Magistrate (Mrs. R. A. Mutoka) on one count of knowingly possessing and using a passport issued to another person contrary to Section 13 (1) (f) of the Immigration Act. The Appellant pleaded guilty to the charge and was accordingly convicted on her own plea of guilty and sentenced to 4 months imprisonment without an option of a fine.

The Appellant was aggrieved by the sentence imposed and accordingly lodged the instant Appeal through Messrs Ombeta & Associates, Advocates. In the Petition of Appeal, the Appellant raised four grounds to wit:-

(i). THAT the Learned Magistrate erred in law and fact by imposing an excessive sentence of four months imprisonment without an option of a fine and repatriation given the circumstances.

(ii). THAT the Learned Magistrate erred in law and fact by not taking into account the mitigation given by the Appellant.

(iii). THAT the Learned Magistrate erred in law and fact by not considering the other option of imposing a fine on the Appellant and finally,

(iv). THAT the Learned Magistrate erred in law and fact by not considering the fact that the accused was first offender and hence have leniency on the Appellant in the circumstances.

When the Appeal came up for hearing , Mr. Bosire, Learned Counsel for the Appellant orally submitted in support of the Appeal that the Appellant in her mitigation explained to the Court her predicament with a view to obtaining a non-custodial sentence. That the Appellant being a first offender, ought to have been sentenced to a non-custodial sentence. Finally Counsel submitted that given the circumstances and being a mother of 5 young children a non-custodial sentence should have been preferable.

Mr. Ekol, Learned State Counsel opposed the Appeal. Counsel submitted that the Court was infact lenient in imposing a custodial sentence on the appellant. According to Counsel, the maximum sentence that the offence attracts upon conviction is 6 months imprisonment or a fine of Kshs.30,000/= or both. It was the view of the Counsel that the Learned Magistrate exercised her discretion properly in sentencing.

I must at this stage point out that the submission by Learned State Counsel that the offence attracts a maximum sentence of Kshs.30,000/=fine or six (6) months imprisonment is erroneous. I do not know how he came by such information. According to Section 13 (1) as amended by Act number 4 of 1999:-

"*….. A person who.....*

(A). …….…….

(b). ……..……

(c). ……..…..……..…..……

(d). ……..……..…..……

(e). ……..……..…….

(f). Uses as a passport, entry permit, pass, written authority, consent or approval issued to him, an entry permit, pass, written authority, consent or approval issued to another person or

(g) ……..……..…….

(h). …..……..…….

(i) ……..…….……..

Shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding three years or to both……"

It does appear to me therefore that neither Counsel for the Appellant nor the Learned State Counsel were aware of this amendment which is regrettable.

Be that as it may, for an Appeal on sentence to succeed the Appellant must show that the trial Court exercised the discretion in sentencing capriciously, or that the trial Court took into account extraneous or irrelevant factors, when imposing the sentence, or that the sentence imposed is illegal or it is so harsh and excessive as to amount to a miscarriage of justice.

See generally, ***JAMES VS REPUBLIC (1950) 10 EACA 147, OGALO S/O OWUORA VS RPEUBLIC (1952) 19 EACA 270, NILSON VS REPUBLIC (1970) EA 599*** and ***WANJEMA VS REPUBLIC (1971) EA 493.***

The trial Court's notes on sentencing in this matter are extremely sketchy. In a case such as this one, where the trial Court has been given by statute three options of the sentences to be imposed upon conviction, I think that the trial Court seized of the matter is obliged to make detailed notes on the matters it has taken into account in arriving at the one of the options of punishment available. I would have expected the Learned Magistrate in her sentencing notes to justify her preference for custodial rather than non-custodial sentence.

Sentencing is a matter for the discretion of the trial Court. The discretion must however, be exercised judicially. The trial Court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous or irrelevant factors. In the absence of detailed sentencing notes, it is not possible to tell what went on in the mind of the trial Court in arriving at the

sentence imposed. It is possible that it may have taken into account extraneous or irrelevant factors. It is also possible that it may have taken into account relevant factors and exercised its discretion judicially. That being the case, I would give the benefit of doubt created to the Appellant.

The Appellant was a first offender and not a career Criminal. In those circumstances, the most appropriate sentence would have been non-custodial considering our already overstretched prison facilities.

In the case of ***MITA VS REPUBLIC (1969)EA 598*** Madan J as he then was had this to say on sentencing where the court as in the instant case had various options of punishment available:-

"…….***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…...".***

And in the case of ***ANIS MIHIDIN VS REPUBLIC HCCRA NO 98 OF 2001*** (Unreported) Justice Mwera had this to say:-

"…***This court has also said it so many times in the past that unless the circumstances obtain which irresistibly lead a trial court from imposing a fine first when the law provides for the fine in default of a prison term the option of a fine must be visited first. That is a sound and tested principle in the art of sentencing…."***

I entirely agree and endorse the aforesaid restatement of the law. Suffice to add that where an option of a fine is given the court has to give reasons as to why a fine is inappropriate. Certainly in the circumstances of this case a fine would have been the most suitable punishment to impose on the appellant.

It also apparent that the trial Court did not consider the Appellant's mitigation. In sentencing, mitigation is critical for it enables the Court to arrive at an appropriate and suitable sentence. Failure to consider mitigation as in this case may lead the trial Court imposing a sentence that is unreasonable, excessive or grossly inadequate.

When all these circumstances are considered, I am of the view that the trial Court imposed a sentence that calls for my intervention. Accordingly I will set aside the sentence of 4 months imprisonment imposed on the Appellant, and substitute therefor with a fine of Kshs.30,000/= in default to serve 4 months imprisonment.

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

……

MAKHANDIA

JUDGE