



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.577 of 2004**

**AYODEJE OLWALE BALOGUN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, AYODEJI OLAWALE BALOGUN, was convicted on two counts, namely BEING UNLAWFULLY IN KENYA contrary to Section 13(2) (C) of the Immigration Act, and FAILURE TO REGISTER AS AN ALIEN, contrary to section 4(1) of Alien's Registration Order as read with Section 3(3) of the Alien's Restriction Act.

He pleaded "guilty" on both counts and was thus convicted on his own plea. He was then sentenced to a fine of Kshs 20,000/= on count 1, in default of which he was to serve 6 months in jail. And, on count 2, he was fined Kshs 1,000/=, in default of which he was to serve one month in jail. Finally, the court recommended the repatriation of the appellant.

Being dissatisfied with the sentence, the appellant lodged an appeal, in which he raised the following three issues:-

"1. The learned Magistrate erred in law in failing to provide the appellant with an opportunity to suitably mitigate or at all the alleged offence with a view to deciding the appropriate sentence considering, inter alia, the fact that the appellant was not represented by an advocated.

2. The learned magistrate erred in law in failing to evaluate the appellant's character and antecedents for purposes of sentencing otherwise the learned Magistrate would have found out, inter alia, that the appellant is an undergraduate Bachelor of Commerce Student at Daystar University.

3. The sentence particularly the repatriation order is extremely harsh, callous and excessive in the circumstances and would no doubt occasion a gross miscarriage of justice."

When canvassing the appeal, Mr. Njagi, advocate for the appellant, asked this court to take judicial notice of the fact that the appellant was arrested at Nyayo House, which is the place at which Immigration matters are sorted out. He also said that the appellant had gone to Nyayo House for the purposes of regularizing his immigration status. In the said circumstances, the trial court was faulted for having failed to take cognizance of the facts, when meting out the sentence.

It was also his contention that the prosecution failed to describe the appellant adequately. He believes that the appellant ought to have been described as a student. The other issue which was raised was the failure by the trial court to give the appellant an opportunity to mitigate. In that regard the appellant relied on

CHANDER KANTA SETHI V REPUBLIC (1962)EA 523 at 527, as authority for the proposition that the determination of the nature of the punishment to be inflicted should depend on the circumstances of the case.

It was the appellant's contention that as he is a student, the order for his repatriation was harsh, callous and oppressive. He therefore asked that the said sentence be set aside. In response to the appeal, the learned State Counsel Ms Okumu, submitted that it was wrong for the appellant to find fault with the sentencing, whereas the issues he was now raising had not been brought to the attention of the trial court. She pointed out the fact that S.216 of the Criminal Procedure Code, which provides for mitigation was not mandatory. Therefore, as far as the learned State Counsel was concerned, it depends on the trial magistrate whether or not to allow the accused person to mitigate.

But as the appellant did not mitigate, the learned State Counsel submitted that this court ought to order for his retrial. In her view, that would provide the appellant with an opportunity to tell the court whatever he may not have been able to state on the first occasion.

As regards the appellant's invitation to this court to take judicial notice, I can only say that the said invitation is not useful to him. I say so because even if it be true that immigration matters are normally sorted out at Nyayo House, that would not necessarily imply that if a person went to that building, he was going there to have his immigration status regularized. He could have gone to that building for a host of other reasons, such as to attend to the renewal of a driving licence, or to visit a friend. I am therefore not prepared to assume that simply because the appellant was arrested at Nyayo House, he had gone there to regularize his immigration status.

The other issue raised by the appellant was the contention that he had not been adequately described in the charge sheet. He feels that he should have been described as a student. I am afraid that I do not find any merit in that submission. There is no requirement, in law, that the designation or status of an accused person be disclosed in a charge sheet. Section 137 of the Criminal Procedure Code stipulates that a charge should contain a statement of the offence with which the accused is being charged. The statement of offence is to contain a description of the offence in ordinary language, and without necessarily stating all the essential elements of the offence. But if the offence is one created by enactment, the statement of offence shall contain a reference to the section enacting the offence.

After the statement of the offence, the particulars are to be set out in ordinary language.

As far as I can see, the charge with which the appellant was charged herein, was in compliance with the provisions of section 137 of the Criminal Procedure Code. The fact that the appellant was a student was not an ingredient of the offences which he was charged with. It was therefore not necessary to incorporate it into the charge sheet. The other issue canvassed by the appellant was in relation to the failure by the trial court to allow him to mitigate. It is clear from the record that the appellant was not given an opportunity to mitigate. That fact is conceded by the state. However, the state feels that the said omission was not fatal, as mitigation is merely discretionary, as opposed to being mandatory.

Section 216 of the Criminal Procedure Code provides as follows: "The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made."

The use of the word "may" connotes the absence of compulsion. In other words, it is not a must that in all cases the trial courts have to receive such evidence as may help it inform itself as to the sentence or orders properly to be passed or made. But therein lies the very problem.

On the one hand, the statute says that the court is not under an obligation, but on the other hand it is acknowledged that the receipt of such further evidence would be of assistance to the court in determining the correct sentence to be passed. In the case of CHANDER KANTA SETHI V REPUBLIC (1962) EA 523 at 527, Rudd Ag. C.J and Edmunds J. held as follows:

“The determination of the nature of the penalty to be inflicted should depend mainly on the facts and the circumstances of the case.”

That being the case, when an accused person pleads “guilty”, and is convicted on that plea, the only material that is then placed before the court are the facts, as set out in the charge and the particulars thereto. Therefore, if the court did not then accord the accused person, the opportunity to mitigate, the court would not become aware of the circumstances of the case.

It is little wonder therefore that the learned State Counsel should be saying that the learned trial magistrate was not aware of the appellant’s circumstances. I believe that the implication of that submission is that perhaps if the trial court had been aware of the mitigating factors, the sentence could have been different. However, all that is conjecture.

In these circumstances, should the court order for a retrial, as suggested by the state? The appellant was ordered to pay fines on the two counts. He has paid the said fines, and thus he has already served the sentences. It would therefore be prejudicial to him to have to undergo another trial. For that reason I decline to order a retrial. But as the trial court did not give the appellant an opportunity to mitigate, the sentence was not an informed one.

It is my considered view that the interests of justice would be best served if the said sentence was varied. I therefore set aside the sentences, and in lieu thereof impose the following:

(a) On count 1, for being unlawfully present in Kenya, the fine is reduced to Kshs 10,000/=

(b) On count 2, for failure to register as an alien, the fine of kshs 1,000/= is retained

(c) The recommendation for the appellant’s repatriation is revoked.

The foregoing sentences are deemed appropriate as the appellant is a student, who had applied to the relevant authorities, for the regularization of his immigration status. His application was still under consideration, and therefore the delay by the relevant Kenyan authorities to either reject or grant the applicant a student visa, ought not to be blamed on the student. However, on a technicality, he has still committed an offence. On the other hand, it would be very oppressive to repatriate a student whose only crime is to be in college whilst awaiting regularization of his immigration status.

It is so ordered.

**Dated at Nairobi this 25th day of May 2005**

**FRED A. OCHIENG**

**JUDGE**

**Njagi for the Appellant**

**Mr. Odero court clerk**