REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 24 of 2005

(From original conviction (s) and Sentence(s) in Criminal case No. 183 of 2005 of the Chief Magistrate's Court at Nairobi (A.O. Muchelule – C.M.)

AUSTIN MADU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The Appellant **AUSTIN MADU** is a Nigerian National. On the 24th January 2005, he was found in Nairobi, along Kirinyaga Road by Immigration Officers. When he was asked to produce his passport or any document that permitted his stay in the country he had none. The Immigration Officer was unable to establish how or when he entered Kenya. He had however been in the country for over 90 days and yet had not registered as an alien. He was therefore arrested and charged with four counts which he admitted before the trial court. They were;

Count 1. Refuses to produce a document when required to do so contrary to

section 13(20 (b) of the Immigration Act.

Count 2: Being unlawfully present in Kenya contrary to

Section 13(2) (i) of the Immigration Act.

Count 3: Failing to Report Entry to the nearest Immigration

Officer contrary to Regulation 3(l) as read with 3(6) of the Immigration Regulations.

Count 4: Failure to register as an Alien contrary to Regulation 4(1) of the Aliens

Registration order as 3 read with Section 3(3) of the Aliens Restriction Act.

He was convicted of his own plea of guilty and sentenced to 2 months imprisonments

in Count 1, 4 months imprisonment in Count 2, 3 months imprisonment in count 3, and 1 month imprisonment in count 4. He had lodged this appeal against sentence only.

MR. SIMIYU, counsel for the Appellant argued basically that the offences in all four counts charged were misdemeanors and that since the Appellant was a first offender and fines were given as an option in sentence, the learned trial magistrate ought to have opted to give a fine sentence. **MRS. GAKOBO,** learned counsel for the State opposed the appeal and submitted that the learned trial magistrate had exercised his discretion in determining the mode of sentence to impose as provided in the law. MRS. GAKOBO submitted that the learned trial magistrate's discretion could not therefore be faulted.

MR. SIMIYU submitted that the learned trial magistrate's exercise of discretion could be faulted basically because had the trial magistrate felt that a fine was not an appropriate sentence, he ought to have stated so before imposing the sentence. He relied on the unreported case of **KULMIYA vs. REPUBLIC HCCA No. 128 of 2002. MR. SIMIYU** maintained that the learned trial magistrate did not consider the Appellant's mitigation.

I have re-evaluated the facts of this case as led by the prosecution. It is clear that the Appellant admitted having been found in the streets of Nairobi without any documents permitting his stay in the country. That is quite a serious offence which ought not to be condoned especially by the Courts. What the learned counsel for the Appellant terms to be mitigating factors do not fit that description. From the record of the proceedings, the Appellant through counsel stated he had legal papers which had expired in November 2004. He did not produce the papers. That aggravated the first count against the Appellant. The Appellant further stated he had a Kenyan wife. He did not substantive that fact and that rendered the statement character to change from being a mitigating factor to being evidence from the bar. In other words the Appellant's guilty in all counts were reinforced even in hismitigation.

The learned trial magistrate observed that the Appellant was a first offender and had pleaded guilty to the charge. He also stated that he had noted his mitigation. The learned trial magistrate then went ahead to pass sentence giving no option of fines in any of the counts.

I agree with **MRS. GAKOBO** that the learned trial magistrate had the power to exercise his discretion in passing whichever sentence he felt fitted the Appellant. I also agree with **MR. SIMIYU** that in exercise of that discretion, the learned trial magistrate ought to have given reasons as to his choice of sentence. The law provided fine options for each of the offences charged. I agree with MR. SIMIYU that if the learned trial magistrate felt that the circumstances of the case were such that a fine could not suffice as a sentence option, he had a judicious duty to give reasons for that decision. From the record before me, the learned trial magistrate gave no reasons. Failure to give reasons was a serious omission since it denied the appellate court the opportunity to determine the sustainability of the sentence and the matters taken into consideration before the sentence was arrived at.

Accordingly this court has no option but to set aside all the sentences imposed. The sentence provided in law for the offences of under Section 13(2) (b) and (c) of Cap 172 is a fine not exceeding twenty thousand shillings or imprisonment for a term not exceeding one year or to both.

For the offence under **Regulation 3(1)** as read with **Regulation 3(6)** of **Immigration Regulations** under **Cap 172** the sentence applicable is a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding one year or to both. (See **Regulation40 of Cap 172**).

For the offence under **Regulation 4(1)** of the **Aliens Registration Order** as read with **Section 3(3)** of the Aliens Restriction Act, the sentence applicable is a fine not exceeding three thousand shillings or imprisonment term not exceeding six months or to both.

I have considered that the Appellant has served 51/2months out of the 10 months imprisonment sentence imposed. I am informed that the Appellant has one month to go before completing his sentence. The Appellant has therefore served a substantive part of the sentence. Accordingly I will substitute the sentence to the period already served. I will however not interfere with the recommendation by the

learned trial magistrate that the Appellant should be repatriated back to his home country. The Appellant's advocate request that the Appellant be allowed a short stay in the country is declined. In fact the Appellant should remain in custody until the Minister in charge of Immigration determines whether to honour the courts recommendation for repatriation.

It is so ordered.

Dated at Nairobi this 8th day of July 2005.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of,