REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 459 OF 2005

(From Original Conviction(s) and Sentence(s) in Criminal case No. 2000 of 2005 of the Chief Magistrate's court at Nairobi (A.O. Muchelule -C.M.)

MOHAMED SYLLA…………...……………………...……..……..APPELLANT

VERSUS

REPUBLIC …………………...………………………...……..RESPONDENT

J U D G M E N T

The Appellant **MOHAMED SYLLA** pleaded guilty to one count of **BEING UNLAWFULLY PRESENT IN KENYA** contrary to **Section 13(2)** (c) of the **Immigration Act Cap 172.** It was alleged that on 8th September 2005 at Jomo Kenyatta International Airport within Nairobi area he was found in Kenya without a valid pass or permit authorizing him to be in Kenya. He was sentenced to 2 months jail on 9th September 2005. Being dissatisfied with the conviction and sentence he lodged this appeal.

MR. WAMWAYI learned counsel for the Appellant argued the appeal. He relied on four grounds. He argued that the plea of guilty was equivocal on account of the language used in Court. The counsel submitted that the Appellant was from Guinea and urged the Court to take judicial notice that Guinea was a French speaking country. He argued further that the language used in Court was English and that the Court did not ascertain whether or not the Appellant understood the language.

MISS NYAMOSI learned counsel for the State conceded to this appeal. The counsel submitted that the language into which the interpretation was made was not indicated. The record reads as follows:

> ***"Coram***
>
> ***Magistrate A.O. Muchelule (Mr.) CM***
>
> ***Prosecutor – Chepkwemoi***
>
> ***Court clerk – Furaha/Dollie***
>
> ***Interpreted - English."***

Counsel submitted that even though the record indicated that there was interpretation it was not indicated into which language the interpretation was made.

MR. WAMWAYI also submitted that the Court record did not indicate who the prosecutor was. That if, he was a police officer, his rank was not indicated. **MISS NYAMOSI** conceded that the record did not give the rank of the person who prosecuted the case.

MR. WAMWAYI also urged the Court to find that the facts of the case did not support the charge. **MISS NYAMOSI** conceded that fact too.

The facts given by the prosecution in support of the charge were: -

> **"Prosecutor:** **The accused is Guinean National**
>
> **holder of passport No. 387604. He came to Kenya**
>
> **on 5/10/04 and extended his visa twice. It expired**
>
> **on 4/4/05. On 8/9/05 he was arrested at Jomo Kenyatta**
>
> **International Airport and charged."**

MR. WAMWAYI's contention was that the facts did not disclose that the Appellant had neither a Visa nor a pass. That by admitting to facts given, that plea could not be considered unequivocal in the circumstances.

I have considered this appeal together with the record of the trial court. The errors pointed out by the counsel for the Appellant are quite justified. The Court language used was indicated as English yet the Appellant, being a foreigner from a French speaking country, the Court should have found out from him whether he understood the Court language. I take judicial notice that Guinea is French speaking as counsel for the Appellant urged. The trial magistrate ought to have satisfied himself that the Appellant fully understood the language. In **Adan vs. Republic 1973 EA 445,** which counsel for the Appellant relied on is good law. In that case the Court observed at page 446: -

> ***"The courts have always been concerned that an accused person should not be convicted on his plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education and does not speak the language of the court…"***

In this case the Appellant was unrepresented. He was a foreigner from a country where English is not the national language.The record of the Court does not indicate whether any inquiry was made by the magistrate as to the language the Appellant could understand. In those circumstances, given the fact that the Court was put on notice from the very first sentence spoken by the prosecutor as he gave the facts of the case that the Appellant was from Guinea, a French speaking country, the failure to inquire from the Appellant on the record, whether he understood English, renders the proceedings defective.

I have also noted that the trial court did not indicate whether or not the prosecutor was a person qualified to conduct the prosecution of the case. It is not indicated whether the prosecutor was drawn from the State Law office, the Immigration Department or the Police Force, all who could prosecute such a case. The omission to indicate this is crucial and renders the proceedings defective in line with the case cited by the counsel for the Appellant to wit **JOHN KABUGA vs.REPUBLIC CVA No. 190 of 2002.** In fact the more recent case of **LOLIMA EKIMAT vs. REPUBLIC CA 151 of 2004** is even more to the point because in that case the Court of Appeal stated clearly that where the rank of the prosecutor is not indicated, then the appellate court cannot presume that he was qualified to conduct the proceedings in terms of **Section 85(2)** and **Section 88** of the Criminal Procedure Code. In the **Kabuga vs. Republic** (Supra) the prosecutor was a police constable. In **EKIMAT vs. REPUBLIC** (Supra) the rank of the prosecutor and even his name was not indicated. I therefore find that on this ground too, the proceedings were defective.

As to facts not disclosing the offe nce, the prosecution ought to have specified why it is that they arrested the Appellant and show, even by exhibiting his passport to the Court, why it is that they arrested him. The particulars of the charge indicated he had no visa or pass. The facts did not support that allegation but merely indicated that his Visa had expired and had not been renewed. 'Failure to have' and 'expired' have two different meanings and without an elaborate explanation, the facts of the prosecution case as given was ambiguous.

MR. WAMWAYI also argued that the plea was not properly taken. Even without delving into that last ground in detail, on the basis of the three grounds hereinabove, I agree with the counsel for the Appellant that the plea was improperly taken.

The upshot of this appeal is that the plea of guilty was equivocal and as such the appeal has merit and is allowed. Consequently I quash the conviction and set aside both the sentence and the order for repatriation. The Appellant has been in prison serving sentence since 9th September 2005. The sentence was imprisonment for two months. He has served one month and one week. Having served a substantial part of the sentence I find that the interests of justice would not require a retrial being ordered as it would prejudice the Appellant adversely. I decline to order a retrial. I order that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 17th day of October 2005.

………………….

LESIIT, J.

JUDGE

Read, signed and delivered in presence of;

…………………
LESIIT, J.
JUDGE