



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 542 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 2508 of 2005 of the Chief Magistrate’s Court at Nairobi (A. Muchelule – CM.)

HAN HONG BO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 543 OF 2004

LI YONG HAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 544 OF 2004

ZIN ZEN HAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

HAN HONG BO, LI YONG HAI and ZIN ZEN HAI were separately charged with two counts each. Count 1 **KNOWINGLY POSSESSING AND USING A FORGED PASSPORT** contrary Section 13(1) (d) of the *Immigration Act* and Count II **BEING UNLAWFULLY PRESENT IN KENYA** contrary to **Section 13(2) (c)**. They each pleaded guilty to the charges and were convicted and sentenced to 3 months imprisonment in each count. They then lodged their appeals separately but which have now been consolidated since the charges were similar and the issues raised in appeal are the same. The Appellants are also close relatives.

MR. MAINA for all three Appellants argued the appeal only against the sentence. Counsel submitted that Section 13 of the **Immigration Act** for which the Appellants were convicted provided for the option of a fine in addition to imprisonment and argued that the learned trial magistrate should have considered

the option of fine. The learned counsel went on to submit that the learned magistrate did not consider the fact that the Appellants were first offenders and had pleaded guilty to the charge. Counsel also submitted that the learned magistrate took into consideration a matter he ought not to have, when he observed that the offences were prevalent. He 'begged' the Court to alter the sentence by awarding a noncustodial one. He relied on *NAOMI NDICHU vs. REPUBLIC HCC APP. NO. 99 of 2004*.

He did not however state what in that case he wanted this Court to consider.

MISS NYAMOSI for the State did not oppose the appeal. The learned counsel for the State observed that indeed the **Immigration Act in Section 13** provided for the option of a fine as well as non-custodial sentence. Counsel also submitted that the Appellants were first offenders.

I will start by saying that the term used by the counsel for the Appellants in his final address has no legal character. The word "beg the court" is one whose meaning, in legal terms, I am unable to comprehend or appreciate. Turning now to the matter at hand, the learned counsel for the Appellants complained that the learned trial magistrate did not award a fine option to the Appellants even though it was provided for under the Act. Learned counsel for the State seemed to agree with him even though not using so many words.

The Court does not alter a sentence merely because the trial court opted to impose one and not the other modes of sentencing applicable to the offence. The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower Court has acted upon some wrong principle or overlooked some material factor or the sentence is manifestly excessive in the circumstances of the case. See *NILSSON vs. REPUBLIC 1970 EA 599, WANJEMA vs. REPUBLIC 1971 EA 403 and SAYEKO vs. REPUBLIC (1989) KLR 306.*

In this case the Appellants pleaded guilty to the charge and that required recognition as a matter of principle. Contrary to the submission by the Appellants' counsel, the trial court did recognize that fact before passing sentence. The trial court also recognized that the Appellants were first offenders. **MR. MAINA** challenged the observation by the learned trial magistrate that the offences were prevalent and counsel felt that the Appellants were being punished for the wrongs of others. I do agree with **MR. MAINA** that the learned trial magistrate considered an extraneous matter before passing sentence. Nothing on record indicates where the information came from or on what basis the Court made such an observation. That can be considered on the same line as in a manner of slip of tongue. I have considered the issue of sentencing afresh. The offences were serious and cannot be underrated. The offence was compounded for reason that the Appellants used forged passports which meant they were not only lying that they had passports but also lied about their nationality. That offence was so serious that Parliament by Act No. 4 of 1999 revised the sentences for offences under Section 13(1) of the Immigration Act by enhancing the fine applicable from Kshs.20,000/- to 200,000/- and imprisonment to 3 years and also provided that both fine and imprisonment could be imposed contemporaneously. In that regard I find that the Appellants suffered no prejudice when the trial magistrate made an observation that was baseless, as far as the record goes, because considering the seriousness and the aggravated nature of the offence, the sentence imposed was neither illegal nor excessive. I find no good grounds to interfere with the trial courts exercise of its discretion in sentencing. The appeals are therefore dismissed. The Appellants should complete their sentences and thereafter considered for repatriation to their home country.

Dated this 20th day of December 2005.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

LESIIT, J.

JUDGE