



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Republic (Criminal Appeal E033 of 2021)
[2023] KEHC 19503 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19503 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E033 OF 2021**

JN ONYIEGO, J

JULY 3, 2023

BETWEEN

MOHAMED ADAN ALI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon.
M.Kimani senior Resident Magistrate Mandera law courts delivered
on 16th March 2021 in criminal case number E053 of 2020)*

JUDGMENT

1. The appellant herein was arraigned before the Mandera Senior Resident Magistrate's court on 6th November 2020 charged with five counts. Count I, he was charged with the offence of being in possession of ammunition without a licence/certificate c/sec 4A (1) of the firearm act No.40 of 1953. Particulars were that on the 25th Day of October 2020 at around 0245 hours at soko miraa market in Mandera township within Mandera county without any lawful justification was found illegally in possession of one (1) round of ammunition of 7.62mm ordinary.
2. Count II he was charged with the offence of being unlawfully present in Kenya Contrary to Section 53(1)(j) as read with Section 53 (2) of the Kenyan Citizenship and Immigration Act Section 53(2) of the *Kenya citizenship and Immigration Act* No.12 of 2011. Particulars were that on the 25th October 2020 at around 0245 hours at soko miraa market in Mandera township within Mandera County being a somali national was found unlawfully present in Kenya without a valid passport or permit authorizing him to stay in Kenya.
3. Count III, he was charged with entering Kenya through a place not designated as a place of entry contrary to Section 15(2)(a) of the Kenya Citizenship and Immigration regulations, 2012 as read with Section 60 of the *Kenya citizenship and Immigration Act* No 12 of 2011. Particulars were that on



unknown dates in the month of October 2020 at soko miraa market Mandera East Sub-County within Mandera County being a somali national was found having entered Kenya from Bulla-Hawa-somalia through boarder point III a place that has not been designated as a point of entry into Kenya.

4. Count IV, he was charged with contravening curfew order contrary to Section 8(6) of the *Public Order Act* cap 56 laws of Kenya. Particulars were that on the 25th day of October 2020 at Mandera Township within Mandera County, knowing that there was a curfew order issued by the President of the republic of Kenya was found loitering in the streets within restricted hours that is from 2300hrs to 0400hrs.
5. Count V, he was charged with being in possession of another person's document contrary to Section 53(1)(d) of the *Kenya Citizenship and Immigration Act* No.12 of 2011. Particulars were that on the 25th day of October, 2020, at Mandera county he was found in possession of an identity card No.xxxx bearing the names Abdirahman Hajir Maalim which he presented as his fact he knew to be false.
6. Having returned a plea of not guilty, the matter proceeded to full trial. At the close of the trial, the appellatant was convicted of counts I, II, III and IV. He was however acquitted of count V. Consequently, he was sentenced to serve 5years imprisonment for count I, 1year imprisonment for count II, 1year imprisonment for count III and 3years imprisonment for count IV. Sentences were to run concurrently.
7. Aggrieved with the conviction and sentence, the appellatant filed his undated grounds of appeal on 7th September 2021 citing the following grounds; he had come to Kenya from Somalia to seek medication; he was arrested in possession of a blank used cartridge which he collected along the border while going back to his country; the trial magistrate considered extraneous matters when making his determination; the trial court failed to consider his mitigation before meting out excessive sentence; the trial court failed to do justice.
8. When the matter came up for hearing, the appellatant opted to argue his appeal against sentence effectively abandoning the appeal against conviction. He urged the court to consider the fact that he has children and that he was remorseful.
9. In response, the state relied on its submissions filed on 25th April 2023 thus reciting the lower court proceedings. Counsel asserted that the sentence imposed was lawful and appropriate in the circumstances.
10. The appellatant having abandoned his appeal on conviction, my task is made simple. The question is whether the court did consider the appellatant's mitigation and whether the sentence is excessive. It is trite law that sentencing is a matter of discretion of the trial court and that an appellate court will only interfere if the same is excessive; the trial court applied wrong legal principles or took into consideration irrelevant factors. See *Shadrack Kipkoech Kogo - vs - R.* Eldoret Criminal Appeal No.253 of 2003 where the Court of Appeal stated thus;

“ sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka - vs- R.* (1989 KLR 306)”
11. On the question of mitigation, the appellatant simply sought forgiveness. On its part, the court said it had considered mitigation before passing sentence. Accordingly, it is my finding that the court did consider the mitigation on record. Regarding sentence, count I for the offence of being found in possession of an ammunition without a lincense the penalty is life imprisonment. To have been given 5 years, one



should not be heard to complain that it was excessive. In-fact, the penalties meted out in respect of each count are lenient hence I do not find them excessive at all.

12. However, although not pleaded for consideration, the court did not consider the period the appellant spent in remand custody pursuant to section 333(2) of the *CPC*. The court has a duty to enforce the appellant's rights where there is obvious omission on the part of the trial court. The appellant was charged on 6th November 2020 and remained in custody till 3rd March 2021 when he was sentenced. This period does translate to four months and 10days. Accordingly, the period spent in remand custody shall be taken into account when computing sentence.
13. To that extent the appeal on sentence partially fails and partially succeeds.

Right of appeal 14 days

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 3RD DAY OF JULY 2023

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J.N.ONYIEGO

JUDGE

