



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.E092 OF 2021

EZZAT SALEM ABDELFAATTAN.....APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J. O Magori in Makindu Senior Principal Magistrate's Court PMCR Case No.E875 of 2021 pronounced on 20th September, 2021).

JUDGMENT

1. The appellant herein was charged in the magistrates' court with counterfeiting an immigration stamp contrary to section 54(1) (h) as read with section 54(2) of the Kenya Citizenship and Immigration Act 2011. The particulars of the offence were that on 4th June 2021 at unknown place within the Republic of Kenya jointly with others not before court, with intent to deceive and without lawful authority or excuse forged a Kenyan immigration stamp No. 0461 for Malaba Immigration Officer purporting it to be a genuine immigration stamp issued by Malaba Immigration Officer endorsed on his Egyptian Passport No. A2xxxxxxx on page 10.

2. He was also charged with a second count of being unlawfully present in Kenya contrary to section 53(i) (j) as read with section 53(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011, the particulars of which were that on 13th September 2021 at Makindu Township of Makueni County being an Egyptian citizen was found being unlawfully present in Kenya without a valid permit or passport to remain in Kenya in contravention of the said Act.

3. He was recorded as having pleaded guilty to both charges, and was thus convicted and sentenced to pay a fine of Ksh.5,000,000/= and in default to serve imprisonment for 5 years for counterfeiting an immigration stamp; and fined Kshs.100,000/= and in default to serve imprisonment for one (1) year for being unlawfully present in Kenya.

4. He has now come to this court on appeal through counsel M/s Thomas Onyancha and company advocates on the following grounds –

1. That the learned magistrate erred in law and fact by considering the appellant having understood the language of the court which was not correct since the appellant who is not fluent in English language was unable to follow the proceedings which were conducted in English language, hence making the entire proceedings and the judgment passed thereon be a nullity.

2. That the learned magistrate erred in law and in fact by passing a sentence that was too harsh, high and excessive in the circumstances and failed to consider the appellant's mitigation or status which were compelling in nature having regard to the circumstances surrounding the commission of the offences herein.

3. That the learned magistrate erred and grossly misdirected himself in his holding by adopting the facts as read to the appellant by not considering that according to the investigations done there was no evidence connecting the appellant to terrorism activities in the country and therefore he was not a threat to the Kenyan National Security.

4. That by reasons of the misdirection pointed out herein the learned magistrate proceeded on the wrong premises as a consequence whereof he arrived at a wrong decision to the prejudice of the appellant.

5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the written submissions of the counsel for the appellant and those of the Director of Public Prosecutions.

6. I note that, though the appellant was recorded by the trial court as having been convicted and sentenced on his own plea of guilty to the

charges, the appeal herein is against both the conviction and sentence.

7. With regard to conviction, the main complaint of the appellant is based on the ground that he did not understand the English language which in court.

8. Article 50(1) of the Constitution of Kenya 2010 confers on all persons the right to a fair hearing, and Article 50(3) thereof requires that information against a person be given to that person in a language that he or she understands.

9. Indeed proceedings herein before the magistrate were conducted in English language and the appellant is said to be Egyptian. I note however that at no point in the proceedings did the appellant complain of inability to understand the proceedings or the language in the proceedings. Infact, in mitigation the appellant is recorded as having said that – *“I am sorry. I don’t know the Kenyan system. I pray for leniency”*.

10. Thus the appellant having talked in English, and in clear terms and bearing in mind what the appellant said in mitigation above, it cannot be said that he did not understand the English language. I dismiss that ground, and find that he understood the English language, which language was used in court. I uphold the conviction.

11. With regard to sentence, I note that the learned Assistant Director of Public Prosecutions has submitted on appeal that the trial court imposed the maximum sentence for a first offender which was manifestly excessive. I note also that the maximum sentence for count 1 under section 54(2) of the Act is a fine of Kshs.5,000,000/= and in default five (5) years imprisonment or both while the maximum sentence for count 2 under section 53(2) of the Act is a fine of Kshs.500,000/= and in default 3 years imprisonment or both.

12. The trial court imposed a sentence of fine of Kshs.5,000,000/= and in default imprisonment for 5 years for count 1, which was the maximum sentence. For count 2 the trial court imposed a fine of Kshs.100,000/= and in default imprisonment for 1 year, which was not the maximum sentence.

13. Since I see no aggravating circumstances in the matter, I am of the view that the maximum sentence imposed by the trial court in count 1 was not justified, as the prosecution did not indicate any aggravating facts. The findings of the magistrates’ court on terrorism were neither backed by evidence or contained in submissions of the Director of Public Prosecutions. I will therefore review the sentence for count 1 downwards. As for the sentence for count 2, I find it to be justified and within the discretion of the trial court. I will thus uphold the same.

14. Consequently, and for the above reasons, I dismiss the appeal against conviction. I uphold the conviction of the trial court. With regard to sentence, I set aside the sentence of a fine of Kshs.5,000,000/= and in default 5 years imprisonment for count 1. Instead, I order that the appellant will pay a fine of Kshs.2,000,000/= and in default serve 2 years imprisonment for count 1 from the date he was sentenced by the trial court. I uphold the sentence of fine of Kshs.100,000/= and in default 1 year imprisonment imposed by trial court for count 2.

It is so ordered.

DELIVERED, SIGNED & DATED THIS 1ST DAY OF FEBRUARY, 2022, IN OPEN COURT AT MAKUENI.

.....

GEORGE DULU

JUDGE