



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL 129 OF 2017

BETWEEN

EDWARD KABIU NJAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Nairobi Cr. Case No. 1021 of 2013 delivered by Honorable T.N .Sinkiyian, RM on the 6th September, 2017).

Background

1. The Appellant was convicted for unlawfully permitting a prohibited immigrant entry to Kenya contrary to **Section 56 (1)(a)(3) of the Kenya Citizenship and Immigration Act, 2011**. It was alleged that on the 9th day of July, 2013 between 3.45 and 4.30 pm at Namanga border point within Kajiado County, willfully and unlawfully permitted into the country a prohibited immigrant by the name Naeke Chimezie, a Nigerian citizen holder of passport No. A02743350 in contravention of the Act. He was sentenced to serve seven (7) months imprisonment. Dissatisfied with the decision, he filed the present appeal. His Petition of Appeal was filed by learned counsel, M/s Omwoyo, Momanyi, Gichuki & Co. Advocates on 26th September, 2017. Six grounds of appeal were framed which I summarize as under:

- a. That the trial magistrate sentenced him to a more severe sentence contrary to Article 50(2)(p) of the Constitution of Kenya as read with the Sentencing policy guidelines;*
- b. That the trial magistrate convicted him despite glaring evidence that the offence was by honest mistake;*
- c. That the trial magistrate failed to fully comply with Section 200(3) of the Criminal Procedure Code;*
- d. That the trial magistrate failed to consider the circumstances that surrounded the case including the power and system failure, non-compliance with the requirements and regulations when dealing with prohibited immigrants vis-à-vis how the Appellant executed duties on the material day; and*

e. That the trial magistrate convicted the Appellant without evidence.

Evidence

2. I am minded that this is a first appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu & Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

3. **PW1, Paul Kamau Macharia** a civil servant with the immigration Department at Nyayo House then stationed at Namanga Border Point on 10th July, 2013 at about 10.00 am testified that he received a phone call from the Appellant who informed him that he had cleared a prohibited immigrant, Anaeke Chimezie a day before. The PISCES system did indicate that the immigrant was clearly prohibited from entry into Kenya.

4. **PW2, Raphael Mwandolo** was an immigration officer then in charge of Namanga border point. He did not work in the office on 9th July, 2013 as he was another meeting. Later at around 5.00 pm he passed by the office to check if there was anything requiring his attention. That is when he was informed that the PISCES system had jammed. On the following day he learnt through the Appellant and one Macharia that the Appellant had cleared an illegal immigrant.

5. PW2 further testified that the Appellant had indicated in the OB book that there was system failure. Therefore, the decision to revert to manual clearing from PISCES was well informed.

6. **PW3, Robert Kipkirui Bett**, also an immigration officer testified that on the 9th of July, 2013 he was on duty manning the East Africa desk from 8.00 am. He was working alongside Peter Kioko, Cate Njoroge and the Appellant who was at the time manning the foreign nationals' desk. There was a power failure that briefly interfered with the PISCES system. It took barely a minute and therefore he did not need to resort to the manual system. There was nothing unusual reported by his colleagues. It was his testimony that each computer was password protected and therefore no one could access another's.

7. PW3 further testified that, in the event of system failure, it was proper practice to switch to manual clearing. It was his view that he was not aware whether Mr. Anaeke was on the stop list. Further, that in the absence of a physical copy of the stop list they resort to looking at the travel documents that a person is in possession of.

8. **PW4, Catherine Njeri Njoroge**, as well an immigration officer at Namanga Border was on the material day working alongside Peter Kioko who was at visa control and Robert Bett at the East African Nationalities while the Appellant worked on the other nationalities counter together with her. It was her testimony that nothing peculiar happened. It was her view that the manual clearing is allowed when the system fails.

9. **PW5, CPL Allan Ratemo** attached to the Anti-Narcotic Unit at CID Nairobi was on the 11th July, 2013 at 2.30 pm informed that a prohibited immigrant had been cleared to reenter Kenya. He proceeded to Namanga Border. After meeting the In-charge of Immigration, Mr. Macharia they were briefed and thereafter referred to Nyayo House where they went the following morning. They were given statements made by the Appellant. As well, they were handed the declaration form, Exhibit 2, that the Appellant used to clear Mr. Anaeke. There was a space at the back of the declaration form for a stamp, reference number and signature of the immigration officer. However, the Appellant being the officer who handled Mr. Anaeke did not stamp the document.

10. It was his testimony that evidence yielded information that no one else experienced the system failure. Further, the work protocol was that when one person experienced clearing hitches on the system they ought to transfer persons needing clearance to the next counter. It was also his evidence that the Appellant only reported the mishap 17 hours later.

11. **PW6, David Nyongesa Wambliyanga**, Assistant Director Immigration Services testified of the existence of a border management system that keeps a travel history of all persons leaving or entering Kenya. A print out made by **PW6** of the travel history for 9th July, 2013 indicated that Mr. Anaeke was cleared to enter Kenya.

12. After the close of the prosecution case, the court ruled that the Appellant had a case to answer. He gave a sworn statement of defence and called no witnesses in support of his defence. It was his defence that he was on duty on the material date when there was a power failure. This interrupted the working of the computer system that he relied on to process cases. It was then that he entered the issue in the occurrence book. Thereafter, he resorted to manually clearing cases. This went on from 1.00 to 4.00 pm. Later, the system was operational and he began to key in information that he had since collected. It was then that he realized that among those that he cleared was a prohibited immigrant. He attempted to alert his superiors Mr. Mwandolo and Mr. Macharia both who were away at the time. He however met Mr. Mwandolo the next day and informed him what had transpired.

13. It was his further defence that there was an error with the travel documents. Despite the assertions that Mr. Anaeke was deported there was no endorsement either on the passport or the work permit. It was therefore his assertion that he was not to blame for clearing the prohibited immigrant. He as well felt no need to run the credentials on the colleague's computers.

Analysis and determination

14. I have carefully considered the evidence and the respective submissions made. I have deduced that the issues arising for determination are whether **Section 200(3) of the Criminal Procedure Code** was violated and whether the Appellant acted under honest mistake in clearing the prohibited immigrant.

Whether there was non-compliance with Section 200 (3) of Criminal Procedure Code

15. The Appellant raised the ground that there was non-compliance with **Section 200 (3) of Criminal Procedure Code**. The evidence on record was recorded by two magistrates, that is Hon. D.N. Mulekyo and Hon. T.N. Sinkiyian. The third magistrate who handled the file, Hon. Agande, RM did not record evidence. **Section 200(3)** only binds succeeding magistrates who recorded evidence to inform an accused person if he wishes to proceed with evidence on record or have the witnesses who had testified recalled either for fresh testimony or further cross examination or have the case heard *de novo*. Hon. Sinkiyian substantively took over the conduct of the trial on 9th November, 2019 and she duly did ask the Appellant on the direction the trial should take pursuant to Section 200(3). The Appellant in his own words stated that he wanted the case to proceed from where it had reached. I therefore find that the provision was not breached and this ground of appeal lacks merit.

Whether the Appellant acted under honest mistake.

16. It is not contested that the Appellant cleared the prohibited immigrant. His defense was that he operated under honest mistake. Section 10 (1) of the Penal Code absolves acts or omissions of criminal nature provided they were done under honest belief by mistake.

The same reads:

“A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real things had such as he believed to exist.”

17. Subsection (2) is an exception to the rule which is however inapplicable here. It provides that **“The operation of this section may be excluded by the express or implied provisions of the law relating to the subject.”** In establishing this I am bound to interrogate the circumstances of this offence.

18. It is very easy to conclude that this was not a case of honest make for several reasons. The Appellant

was an immigration officer of ten (10) years standing with two (2) years spent in Namanga Border. He was manning the foreign nationals counter. He was not working alone since Catherine Njeri, **PW4**, was on duty alongside him. It was his defense that in the course of his work there was a system failure occasioned by a power outage. He thereafter switched to clearing travelers using manual method. The method entailed cross-referencing a person's information with a stop list and perusing their travel documents as well as an entry declaration form. It is not clear at what point the switch happened, but he ended up allowing a prohibited immigrant to enter Kenya. This fact he attributed to an honest mistake that was occasioned by a failed system, physical stop list that had not yet been updated and absence of any endorsements on the subject's passport.

19. It is an uncontested fact that the most recent manual stop list had not been received until a day after the prohibited immigrant was cleared. Further, the Appellant claimed that the PISCES system had failed. It was this reason that he resorted to manually clearing people.

20. Another issue that comes to the fore is the fact of the power outage which is corroborated but the time it lasted is not. The immigration officers on duty in the same shift with the Appellant each stated that it lasted less than a minute. As well, none of the immigration officers complained of system failure or interruption. This would easily lead to a conclusion that there was no problem with the PISCES system.

21. It is however noteworthy that PW2 did clearly testify that in the event of power failure, it was in order to result to manual system. Therefore, there was nothing wrong that the Appellant did in resulting to manual system after the disruption of the PISCES system. PW3 who was a more senior immigration officer corroborated this evidence.

22. There is also no doubt that as at the time the Appellant was clearing the illegal immigrant, there was no stop list in the PISCES in which event the Appellant was required to physically examine the travel documents of the illegal immigrant. This is attested by the evidence of PW1 who categorically stated that the system did show the stop list.

23. According to his defence which was unchallenged, the immigrant's travel documents were not highlighted that he was not required to re-enter Kenya, reasons wherefore he cleared him. Further, he only realized much later after the system was re-uploaded that he had cleared an illegal immigrant; this time the stop list was already on the system. He did the needful, both to enter the error on the Occurrence Book and report to his superiors.

24. I would also not find it plausible the argument that since other officers did not experience problems then the Appellant merely found an excuse in the power outage. It suffices to state that, none of the witnesses ever testified that they were confronted with a case similar to what the Appellant was handling and therefore, blame could not be apportioned to him because by coincidence he handled the prohibited immigrant.

25. In my view, it is not much an issue that he did not book the error in the OB immediately which can be explained probably by shock of what had happened. The fact is that he wrote the mistake in the OB and informed his seniors within reasonable time.

26. The above are reasons which clearly cast doubt in my mind that although a mistake was done, the same was honest in the circumstances of the facts prevailing at the time. It is trite law in criminal proceedings that where a court entertains the slightest doubt, the same must be resolved in favour of the accused. The rationale to it is that proof of a case is beyond all reasonable doubt. No single doubt ought to be entertained before arriving at a conclusion of the culpability of an accused person. It is for this reason that I conclude that sufficient evidence was not adduced in proof of the case. The prosecution failed to discharge the burden of proof.

27. I accordingly find the appeal with merit. I quash the conviction, set aside the sentence imposed and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so held.

DATED and DELIVERED this 2nd day of **March, 2020**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Mr. Nyamberi for the Appellant.*
2. *Mr. Momanyi for the Respondent*