



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEALS NO. 30 OF 2018 AND 31 OF 2018 (CONSOLIDATED)

HALIMA ADAN HASSAN.....1ST APPELLANT

KHEIRTA IBRAHIM ALI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Mandera

Principal Magistrate Criminal Case No. 225 of 2018

by Hon. P. N. Areri (SRM)

JUDGMENT

1. The appellants were charged in the Magistrate's Court at Mandera with four (4) counts. In count 1, they were charged together with trafficking in person contrary to section 3 (d) (e) and sec. (3) as read with section 3 (5) of the Counter Trafficking in Persons Act No. 8 of 2010. The particulars of the offence were that on diverse dates between 25th May, 2018 and 29th May 2018 in Mandera township Mandera County, jointly received Bishara Hassan Isaack a Somali citizen having conspired with another person for onward transportation to Nairobi by means of deception.

2. In Count 2, Halima Adan Hassan was charged alone with giving false information to a person employed in public service contrary to section 129 (a) of the Penal Code. The particulars of offence were that on 29th May 2018 at Mandera Airstrip within Mandera County, gave information to a police officer No. 66828 Cpl. Newton Mbogo, that B H I was her biological daughter a fact which she knew to be false.

3. In Count 3, Halima Adan Hassan was also charged alone with procuring execution of documents by false pretences contrary to section 355 of Penal Code. The particulars of the offence were that on 29th May 2018 at around 7.40 hrs at Mandera Airstrip within Mandera County by means of false and fraudulently representation birth certificate entry No. 02201124/09 bearing the names Usra Mohamed Abdow Mohamed purporting to belong to B H I to a police officer No. 66828 Cpl. Newton Mbogo a fact she knew to be false.

4. In Count 4, Kheirta Ibrahim Ali was charged alone with facilitating the entry of improperly documented person contrary to section 53 (1) (e) (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence were that on diverse dates between 25th May 2018 and 29th May 2018 at Kenya – Somali border within Mandera township being an agent facilitated entry of Bishara Hassan Isaack an improperly documented person.

5. The two were recorded as having pleaded guilty to all the charges. They were thus convicted. On Count 1, each was sentenced to pay a fine of Kshs.30,000,000/= or in default to serve 30 years imprisonment.

With regard to Count 2, Halima Adan Hassan was sentenced to pay a fine of Kshs.100,000/= and in default to serve one (1) year imprisonment. She was warned and discharged under section 35 (1) of the Penal Code with respect to Count 3 and the magistrate ordered that the two prison sentences against Halima Adan Hassan would run consecutively. With regard to Count 4, Kheirta Ibrahim Ali was also warned and discharged under section 35 (1) of the Penal Code.

6. The appellants have now come to this court on appeal through two appeals No. 30 and 31 of 2018, which were consolidated and heard together. Kimathi Muthuri & Co. Advocates filed an appeal for both appellants in Criminal Appeal No. 30 of 2018. On the other hand, Anyoka & Associates Advocates filed Criminal Appeal No. 31 of 2018 on behalf also of both appellants. The grounds of appeal in the two

appeals can be summarised to five (5) as follows –

- (1) The learned magistrate erred in law and fact in failing to caution the appellants on the severity of the charges facing them before entering a plea of guilty.**
- (2) The learned magistrate erred in law and fact by failing to exercise due care in ensuring that the appellants properly understood the charges as read to them by the interpreter.**
- (3) The learned magistrate erred in law and fact by failing to exercise due care in ensuring that the appellants properly understood the charges as they were unrepresented.**
- (4) The learned magistrate erred in law and fact by failing to consider that the responses given by the appellants to the charges as read by the interpreter indicated that the appellants did not understand the charges read to them.**
- (5) That the learned trial magistrate erred in law and fact by failing to indicate the identity of the Somali English interpreter and whether he was qualified to be an interpreter.**

7. During the hearing of their appeals, Mr. Kimathi appeared for Kheirta Ibrahim Ali while Mr. Anyoka appeared for Halima Adan Hassan. Mr. Kimathi was the first to make oral submissions in respect of Criminal Appeal No. 30 of 2018.

8. Counsel submitted that his client was not warned about the severity of the sentence prior to convict thus seriously prejudicing her in that she pleaded guilty without knowing the consequences. According to counsel, the appellant did not understand the charge as the procedures laid down in the case of **Adan vs Republic [1973] EA 445** for reading a guilty plea were not complied with by the magistrate. Counsel emphasized that the appellant was unrepresented and thus the more reason why the magistrate should have taken great care. In addition, counsel said that the response of his client showed that she did not understand the charges as she merely said that the facts are correct.

9. Counsel said also that the essential element of the charge of trafficking in human persons included exploitation which was not in the charge

sheet, and asked this court to quash the conviction and set aside the sentence. Counsel felt however that a retrial should not be ordered as the charges were defective. In counsel's view, if retrial was ordered, it would amount to an injustice to his client.

10. Mr. Anyoka for Halima Adan Hassan on his part submitted that this court should reconsider the entire record and determine whether the plea of guilty was unequivocal, and relied on the case of **Simon Gitau Kinene vs Republic [2016] eKLR** as well as the case of **Adan vs Republic (Supra)** and said that the words used by the appellants were not recorded verbatim by the magistrate which was a deviation from the set requirements for taking a plea of guilty.

11. Counsel also submitted that the charge sheet was defective as there was no offence created under section 3 (d) of the Act.

12. In counsel's view, only trafficking for purposes of exploitation was provided for under section 3 (5) of the Act, while the particulars of the offence herein did not include exploitation or description. As such, the trial court convicted on an unknown and non-existent charge and the plea was thus not unequivocal.

13. Counsel also submitted that his client should have been warned of the seriousness of the offence before conviction and relied on the case of **Simon Gitau Kinene vs Republic (Supra)**.

14. Further, counsel argued that the appellant who was unrepresented did not understand the charges and as such the plea was not unequivocal, and relied on the case of **Julieta Ruvasia vs Republic [2017] eKLR**.

15. Counsel lastly submitted that the identity of the Somali interpreter was not indicated by the trial court and as such the plea of guilty cannot be said to be unequivocal.

16. With regard to a retrial, counsel submitted that such should not be ordered as it would be a violation of the rights of a fair trial of his client under Article 50 of the Constitution, as section 198 of the Criminal Procedure Code (Cap. 75) was not complied with by the trial court.

17. In response, Mr. Okemwa the Principal Prosecuting Counsel submitted that indeed there were irregularities in plea taking. However, counsel maintained that the language used in the trial court was clearly Somali language. Counsel stated that the irregularities were minor and curable and as such, the conviction and sentence should be upheld.

18. Counsel however argued that if the conviction was quashed, then a retrial should be ordered as the appellants had served a very short term of the sentence in this case of great public importance whose sentence was thirty (30) years imprisonment and relied in the case of **Degow Dagane Munow vs Republic [2007] eKLR** which was relied upon by the counsel for the appellants.

19. This is a first appeal and as a first appellate court, I am required to re-examine the whole record carefully as the appellants are said to have pleaded guilty to the charges, in order to determine whether indeed the plea of guilty was unequivocal.

20. There are several decisions from the courts on the procedure to be adopted in recording a plea of guilty. The most commonly referred to case is the case of **Adan vs Republic [1973] EA 445** in which **Spry VP** at **page 446** stated as follows –

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true might raise a question as to his guilt, the magistrate should record a change of plea to not guilty and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused reply must of course be recorded.”

21. It has been argued by counsels for the appellants herein that the language used in the trial court was not clear and that the identity and qualification of the Somali interpreter was not indicated by the court.

22. Having perused the record, in my view, that is not true. Both appellants said that they understood Somali language. The magistrate also recorded that the interpretation was English/Somali. The court clerk was named as Muhidin, and the responses of the appellants were recorded by the magistrate to be in Kisomali translated into English.

23. In my view, therefore, it cannot be said that there was no Somali interpreter as Muhidin the court clerk was the interpreter. There is also no legal requirement that the qualification of an interpreter be recorded by the magistrate. In my view, the language used was Kisomali, the interpreter was Muhidin, and the appellants understood the language used in court and responded to the charges.

24. The only serious mistake of the magistrate was the failure to warn the appellants about the seriousness of the offences. The courts have held that it is important for trial courts to warn unrepresented accused persons on the seriousness of the offence before convicting them on a plea of guilty in cases of serious offences. See **Simon Gitau Kinene vs Republic [2016] eKLR**. In my view, had the magistrate warned the two appellants about the seriousness of the offence before convicting them, they would most probably have changed their minds and pleaded not guilty. On that score alone, I will allow the appeal.

25. It has been argued that a retrial should not be ordered as the charge is defective. In my view, the offence herein being a very serious offence in Count 1 and the appellants having merely served a few months in prison, an order for retrial is justified in the interests of justice. The issue of an alleged defective charge will be determined by the trial court and should thus be raised in the trial court which has powers to determine that issue.

26. Consequently, I allow the appeal, quash the conviction and set aside the sentences imposed. I however order that a retrial be held on the same charges before the same court. In this regard, both appellants will remain in custody and taken to the Mandera Principal Magistrate’s Court for retrial on the same charges preferred against them. The case will be mentioned in Mandera Court for progress on a date I will hereafter fix.

27. It is so ordered.

Dated, Signed and Delivered in open court at Garissa this 12th July, 2018.

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George Dulu

JUDGE