



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 21 OF 2018**

**OSMAN ALI HASSAN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the sentence in Garissa Chief Magistrate Criminal Case No. 194 of 2018**

**by Hon. J. J. Masiga (SRM)**

**JUDGEMENT**

1. The appellant was charged in the Magistrate's Court at Garissa with two (2) counts. Count 1 was for making a document without authority contrary to section 357 (a) of the Penal Code. The particulars of the offence were that on 6<sup>th</sup> March 2018 at unknown place within the Republic of Kenya with intent to deceive without lawful authority or excuse made a certain document namely Refugee Movement Pass Ref. No. RFG/KAK/KDM/05D18/1548 purporting it to be a genuine movement pass issued by Refugee Affairs Secretariat/Ras Kakuma.
2. Count 2 was residing outside designated area without permission from the authority contrary to section 25 (f) of the Refugee Act 2006. The particulars of the offence were that on 13<sup>th</sup> March 2018 at Madogo area within Tana River County being a Somali Refugee at Kakuma Refugee Camp was found residing outside designated area namely Kakuma Refugee Camp without permission from the authority.
3. He pleaded guilty to both counts and was convicted. He was sentenced to one (1) year imprisonment on Count 1 and three (3) months imprisonment on Count 2 and the sentences were ordered to run concurrently, which meant a total prison sentence for a duration of one (1) year.
4. He has now come to this court on appeal on sentence alone. He filed an initial memorandum of appeal, and later an amended petition of appeal which he called mitigation grounds which included written submissions. I have perused the same.
5. At the hearing of the appeal, the appellant stated that he was in a Refugee Camp for about thirteen (13) years and learnt that his mother had died and that was the reason why he came out of the Refugee Camp. He asked this court to impose a sentence of a fine instead of imprisonment.
6. The Principal Prosecuting Counsel Mr. Okemwa submitted that the appellant was sentenced to a prison term without an option of a fine. He stated that since there was no minimum sentence for the offence, section 28 of the Penal Code allowed the trial court to impose a prison sentence or a fine. Counsel left it to the discretion of this court to consider the matter.
7. This is a first appeal. As a first appellate court, though the appellant has appealed on sentence only, I am required to consider all the record of the trial court to ascertain whether the conviction on a plea of guilty was proper. This is more so as the appellant is a lay person and is not represented by a lawyer.
8. I have perused the record of the trial court. The charge was read to the appellant and he admitted both counts. Facts were given by the prosecutor and the same were admitted by the appellant. The facts disclose the offences charged. I find that the plea of guilty and conviction were properly recorded in line with the principles in the case of **Adan vs Republic [1973] EA 445**.
9. With regard to sentence, the appellant said in mitigation that he was a refugee and came out of the refugee camp because his mother was unwell. He asked for forgiveness. The trial court stated that though the appellant had given such mitigation, the offence was serious.
10. Sentencing is the discretion of a trial court. Indeed the trial court herein was entitled to impose a fine but did not. In the circumstances of

this case and taking into account the prevalence and seriousness of the offence, I find that the concurrent prison sentences imposed by the trial court without option of a fine were proper. I will thus not disturb the prison sentence imposed.

11. The appellant was charged with residing outside the refugee camp. There is no evidence or suggestion from him that he had become a person authorized to reside outside the refugee camp. Therefore in my view, the magistrate erred in not considering what action should be taken after the appellant serving his prison term. In my view, the magistrate should have ordered that the appellant be taken back to Kakuma Refugee Camp to be dealt appropriate by the Refugee Affairs Secretariat.

12. I thus dismiss the appellant's appeal and uphold the prison sentence imposed by the trial court. I also order that the appellant be escorted back to the Refugee Affairs Secretariat at Kakuma Refugee Camp for appropriate action by them after the completion of the prison term.

13. Orders accordingly.

**Dated, Signed and Delivered at Garissa this 19<sup>th</sup> day of September, 2018.**

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**George Dulu**

**JUDGE**