



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 24 OF 2018

ZAKARIA MOHAMED WARSAME alias ZAKARIA

MOHAMED JAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From conviction and sentence in Garissa Chief Magistrate

Criminal Case No. 209 of 2018 by Hon. Cosmas Maundu (CM)

JUDGMENT

1. The appellant pleaded guilty before the trial court and was convicted of three counts. Count one was for making a document without authority contrary to section 357 (a) of the Penal Code, the particulars of offence being that on or before 20th March, 2018 at Tana River Bridge jointly with others not before court with intent to deceive without lawful authority or excuse made a certain document namely a Kenyan National Identification Card Number 26878432 purporting it to be a genuine Kenya National Identification Card issued by National Registration Bureau, Garissa.
2. Count 2 was for uttering a document with intent to deceive contrary to section 357 (b) of the Penal Code; the particulars of which were that on the same day and place with intent to deceive knowingly uttered a forged Kenya National Identity Card Number 26878432 to No. 235184 IP Peter Ndirangu purporting it to be a genuine Kenya National Identification Card issued by National Registration Bureau, Garissa County.
3. Count 3 was for residing outside designated area without permission from the authority contrary to section 25 (f) of the Refugee Act 2006, the particulars of offence being that on the same day and place being a Somali Refugee at Hagadera Refugee Camp was found residing outside designated area without permission from the authority.
4. He pleaded guilty and was convicted of the three offences and sentenced to a fine of Kshs.200,000/= and in default to serve one (1) year imprisonment on each of Count 1 and 2. With regard to Count 3, he was sentenced to a fine of Kshs.20,000/= and in default to serve three (3) months imprisonment, and upon completion of sentence to be escorted back to Hagadera Refugee Camp.
5. He has now come to this court on appeal on sentence claiming that the consecutive prison sentences were excessive as he was misled by an uncle residing in Nairobi who assisted him to commit the offence. He has asked that at least the prison sentences be made to run concurrently, as he is not able to pay the fines imposed. At the hearing of the appeal he filed and relied on written submissions, which I have perused. He elected not to make oral submissions.
6. The learned Principal Prosecuting Counsel Mr. Okemwa left the issue of sentence to the discretion of this court. Counsel however submitted that there was a duplication of Count 1 and 2 in that the prosecution should have chosen to charge the appellant only with one of the two charges not both.
7. I have perused the trial court record. The initial charges were read and explained to the appellant. He pleaded guilty to Count 1 and 2, but said with regard to Count 3, which was initially for being unlawfully present in Kenya, he said that he was a registered refugee, and the charge was later amended to residing outside designated area without permission. In all the three counts, the prosecutor gave the facts and the appellant agreed with the same.
8. In my view, both the offence of making a document without authority and uttering a false document can be brought against an accused

person in the same charge sheet. However, both cannot be based on the same incident and facts. The incident and facts relating to an offence of making a false document and that relating to the offence of uttering a false document have to be separate and distinct. I agree with Mr. Okemwa that in the circumstances of this case Count 1 and Count 2 was a duplication.

9. The facts given by the prosecutor clearly demonstrated the act of uttering the false document and not the act of making or manufacturing a false document. Certainly the document was not made at the Tana River Bridge, as what occurred at the bridge on 20th March 2018 was merely the uttering of the false document. It was thus wrong for the prosecution to charge the appellant with making the false document on the alleged date without providing facts to establish the same. I thus agree with the Principal Prosecuting Counsel that prosecution should have made a choice between Count 1 and Count 2. In my view, from the facts given by the prosecutor the court should not have convicted the appellant for Count 1 for making a document without authority. The court should have acquitted the appellant on that count. I will quash the conviction and sentence on that count.

10. With regard to the request of the appellant that the sentences should have been made to run concurrently, I find no basis for that contention. The law under section 37 of the Penal Code says that, where a fine is imposed, default prison sentences should not be made to run concurrently.

11. With regard to the severity of fine and default prison sentence imposed, in Count 2, my view is that the learned trial magistrate exercised his discretion in accordance with the law, taking into account the fact that the offence is quite prevalent in this Garissa area. I find no fault on the part of the magistrate.

12. I thus allow the appeal on Count 1, and quash the conviction for making a document without authority and set aside the sentence imposed herein. I however dismiss the appeal on Count 2 and 3 and uphold the conviction on those two counts and the sentences and other orders imposed by the trial court. He will be escorted back to the refugee camp on completion of prison sentence.

Dated and delivered at Garissa this 18th day of September, 2018.

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George Dulu

JUDGE