



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 13 OF 2018

ABDALLA HASSAN HAMISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Mandera Senior Principal Magistrate Criminal Case No. 486 of 2017 by Hon. P. N. Areri (SRM))

JUDGEMENT

1. The appellant was charged in the Magistrate's Court at Mandera with two counts. Count 1 was being unlawfully present in Kenya contrary to section 53 (1)(j) as read with section 53(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence were that on 23rd May 2017 at 14.30hrs at border point 4 within Mandera County of the Republic of Kenya, being a Tanzanian national was found unlawfully present in Kenya without valid passport or permit authorizing him to stay in Kenya.
2. Count 2 was attempting to depart from Kenya through a place that has not been specified as a point of exit contrary to section 15(2) (a) as read with section 57 of the Kenya Citizenship Act and Immigration Regulations 2012. The particulars of the offence were that on the same day at BP 4 in Mandera Township within Mandera County of the Republic of Kenya attempted to depart from Kenya to Somali through Mandera border point 4 a point which has not been specified as a point of exit or entry.
3. He was recorded as having pleaded guilty to both counts. He was then convicted on his own plea of guilty. He was sentenced to a fine of Kshs.300,000/= on Count 1 for being unlawfully present in Kenya and in default to serve 4 years imprisonment. With respect to Count 1 of attempting to depart from Kenya through a place which has not been specified as a place of exit, he was sentenced to a fine of Kshs.150,000/= and in default to serve 2 years imprisonment. The sentenced were ordered to run consecutively.
4. The appellant has now come to court appealing against sentence. He claims that the prison terms were too severe as he was trying to travel in order to look for a job. He also filed written submissions which he relied upon without making any oral submissions in court.
5. The learned Principal Prosecuting Counsel Mr. Okemwa supported the conviction on Count 1. He stated however that though the offence was serious, the default prison sentence of 4 years was unlawful as the maximum default sentence was 3 years imprisonment.
6. With regard to Count 2, counsel stated that section 57 of the Act did not exist. He also stated that section 15(2) related to stateless persons and that nothing to do with an attempt to depart from Kenya. Counsel felt that the appellant however committed an offence and urged this court to consider that sentiment.
7. The appellant was convicted on his own plea of guilty. He has come on appeal against sentence. This being a first appellate court, I am required to peruse and consider all the record and come to my own conclusions regarding both the conviction and the sentence.
8. The learned Prosecuting Counsel has made his submissions orally. The appellant made his submissions in writing.
9. With regard to Count 1, I agree with the learned Prosecuting Counsel that the conviction was proper as after the appellant admitted the offence, the facts was summarized to him and he agreed to the same. He was thus properly convicted. I also agree with the Principal Prosecuting Counsel that the default prison sentence was unlawful, as the maximum sentence under section 53(2) is a fine of Kshs.500,000/= and in default 3 years imprisonment. The magistrate was therefore wrong in sentencing the appellant to a default prison sentence of 4 years imprisonment. Because the magistrate sentenced the appellant to a fine of Kshs.300,000/=, in my view, the default prison sentence should not have been even 3 years imprisonment. I thus uphold the sentence of fine of Kshs.300,000/=, but set aside the prison sentence and order that instead the appellant in default of paying the above fine he will be prisoned for two years.
10. With regard to Count 2 for attempting to depart Kenya through a place that has not been specified as an exit point, I do not agree with the Prosecuting Counsel that section 57 does not exist. The Act has 65 sections.

11. The learned Principal Prosecuting Counsel has however said that an offence was committed by the appellant. This court cannot however assume that such an offence was committed if it is not clearly defined in a written law in line with the provisions of Article 50(n) of the Constitution of Kenya which provides as follows:-

“(n) not to be convicted for an act or omission that at the time it was committed or omitted was not –

(i) an offence in Kenya, or

(ii) a crime under international law.”

12. It is also true to say that all crimes are prescribed in writing and the punishment thereto also prescribed. Therefore, a person cannot be convicted of non-existent crime. The existing crime is either created either by statute or subsidiary legislation where it is permitted, and in both cases it has to be gazetted in the official gazette as notice to the public so that the maxim that ignorance of the law is no defence applies.

13. I agree with the Prosecuting Counsel however that the sections quoted in the charge sheet do not relate to an attempt to exit Kenya through a point which is not designated. I am sure that there are designated exit points in this country. The description given of the Immigration Regulations 2012 does not help as either. The prosecution is advised to specify the specific regulation or regulations and the legal notice number of those regulations. In the present case, they have given an advantage with the appellant and because of that the conviction for Count 2 and the sentence imposed therein are not sustainable.

14. Consequently, the appeal is allowed in part. I quash the conviction of the trial court for the offence of attempting to depart from Kenya through a place that has not been specified as a point of exit and set aside a sentence of fine of Kshs.150,000/= in default sentence of 2 years imprisonment.

15. I however uphold the conviction on Count 1 for being unlawfully present in Kenya. I vary the sentence imposed by ordering that the appellant will pay a fine of Kshs.300,000/= and in default will serve 2 years imprisonment. He will be deported to his home country Tanzania on release from custody.

Dated and delivered at Garissa this 13th day of November, 2018.

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George Dulu

JUDGE