REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 76 OF 2016

HANETH AHMED ALI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 607 of 2016 – M. Wachira CM).

JUDGMENT

The appellant Haneth Ahmed Ali was charged with others in the Chief Magistrate's Court at Garissa with 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. He was recorded as having pleaded guilty to the charge. He was convicted and sentenced to pay a fine of Kshs. 500,000/= and in default to serve 2 years imprisonment. During mitigation it was recorded that accused 7 to 12 were minors. The appellant was accused No 8. In sentencing the appellant and others, the trial court observed that the issue of age had been abused in the past with a view to evading justice and that none of them appeared to be underage.

Initially, the appellant came to this court through the criminal review procedure. That request for review was rejected by this court and the appellant then filed this appeal. In both the request for review and this appeal, the appellant was represented or has been represented by Counsel Mr. Onono. The grounds of appeal herein are as follows:-

> ***1. The chief magistrate erred by sending the appellant to a jail term contrary to the letter and spirit of the Constitution of Kenya 2010.***
>
> ***2. The learned chief magistrate erred by sending the appellant to jail contrary to the provisions of the Children's Act 2001 Act No. 8 of 2001.***
>
> ***3. Learned chief magistrate erred by ignoring without reason and without making an inquiry in respect thereof, information placed before the court before sentencing the appellant who was a minor.***
>
> ***4. The sentence meted out was unjustifiable and unreasonable having regard to the age and apparent means to the appellant, who being a minor was eminently incapable of paying the fine imposed.***
>
> ***5. That after convicting the appellant and being informed that the appellant was a minor the learned chief magistrate erred by failing, neglecting or refusing to give such final order as would have catered for his best interest as a minor.***

Mr. Onono for the appellant made long and exhaustive submissions on each of the grounds of appeal. He emphasized especially the fact that the appellant was a minor during the trial in the Chief Magistrate court and that, according to the Kenya Constitution 2010 and the Children Act, he should have been given special treatment as the law requires to be given to all minors. He stated that the magistrate should not have ignored the information given to her that the appellant and others were minors. According to counsel the magistrate should have made an enquiry to determine age of the appellant and the others before sentencing them.

Counsel also submitted that the sentence imposed was harsh and excessive considering the age of the appellant.

Mr. Okemwa for the respondent stated that in this matter there was a first request for review made to this court and a second review both of which were dismissed. The court however allowed the appellant to challenge the decision of the trial court through an appeal. Counsel submitted that there was no fault or dispute regarding the conviction as counsel for the appellant had not challenged the same. Counsel contended that the conviction was proper.

Counsel submitted that though the issue of age was emphasized by counsel for the appellant, no proof of age had been provided to this court. According to counsel it was not the work of the court to make an enquiry. Counsel stated that if minority age was established in the trial court then the appellant would have been accorded treatment under Article 53 of the Constitution and Section 189 and 190 of the Children's Act. However since minority age was not established, the appellant could not benefit from those legal provisions.

Counsel stated also that on sentence, the offences had become prevalent and there existed aggravating circumstances herein where the appellant and others were arrested in a group of 12 hiding in a thicket at Hola junction and their intention must have been to avoid the Kenyan authorities. According to counsel that was the reason why the sentence was harsh.

In response, Mr. Onono for the appellant submitted that the remarks by the trial court regarding the sentence were subjective and dismissive of what the appellant and the co-accused had said. According to counsel, such act by the trial court displayed prejudice as the magistrate should have ordered an inquiry regarding the age of the alleged minors. Counsel also stated that this court had ordered an age assessment of the appellant and has not expressed any doubt on the report given and should thus go by that assessment. In any case this court can even at this stage order fresh age assessment for clarification purposes.

I have considered the appeal and the arguments on both sides. I have also perused the trial court record. All the accused persons before the trial court pleaded guilty to the charge. They were thus convicted. They were sentenced on 25th July 2016.

Mr. Onono for the appellant has argued very strongly that in accordance with a provisions of the Constitution and the Children's Act, the trial court should have made an enquiry to determine whether or not the appellant and the others who were said to be minors were actually minors. In my view though such action would be preferred, it cannot be mandatory for a court in every case to order determination of age of convicts. The court can form its opinion as to whether a person appears to be an adult or a minor. In the circumstances of this case in my view and having seen the appellant myself in court, it is a case where the magistrate cannot be faulted in deciding that the appellant and the others were adults. There is nothing so obvious that could show that the appellant was a minor.

Having said the above, I am aware that the maximum sentence for the offence is Kshs. 500,000/= fine and in default imprisonment for 3 years. The appellant was awarded the maximum sentence of a fine. He was a first offender who had pleaded guilty to the charge and did not waste the courts time. In my view, the magistrate should have considered that the plea of guilty was a mitigating factor and given a slightly lesser sentence.

The appellant has tried a number of times to get a review of the judgment and sentence. Two previously request for review were rejected. He has now come to this court on appeal. As a court of justice I am of the view that the sentence imposed was excessive especially the limb of the fine. I will thus reduce both the fine and the default prison sentence. Consequently I will reduce the sentence of the fine to a fine of Kshs. 100,000/= and in default the appellant will serve the sentence which he has already served in custody which means he will be released forthwith since he was imprisoned in July of last year.

To conclude, I uphold the conviction of the trial court. I however set aside the sentence imposed and order that instead the appellant will pay a fine of Kshs.100,000/= and in default will serve the sentence which he has already served in prison since July 2016 which means he will be released from prison forthwith unless otherwise lawfully held. I uphold the order of the trial court that the appellant be repatriated to Somalia after serving the sentence. It is so ordered.

Dated and delivered at Garissa this 13th day of January 2017

GEORGE DULU

JUDGE