



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 28 OF 2016

BAHARU BERHANU..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 24 of 2016 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. M. Kadima (RM) on 11th January 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Baharu Berhanu, together with Madiso Malesa and Marata Chakebowere tried and convicted by Hon E. M. Kadima, Resident Magistrate for the offences of being unlawfully present in Kenya and for failing to produce travel documents to police contrary to Sections 53(1)(j) and Section 53(1)(i) as read with Section 53(2) of the Kenya Citizenship and Immigration Act No 12 of 2011 respectively. They were each fined Kshs 100,000/= and in default, to serve two (2) years' imprisonment.
2. The particulars of Count I were as follows :-

“On the 10th day of January 2016 at about 03.30 hrs at Total area within Taita Taveta County being Ethiopian Nationals were jointly found being unlawfully present in Kenya.”

COUNT II

“On the 10th day of January 2016 at about 03.00 hrs at Total area within Taita Taveta County being Ethiopian Nationals failed to produce their travel documents to police when they were asked to do so.”

3. Being dissatisfied with the said judgment, on 13th July 2016, the Appellant filed a Notice of Motion application seeking leave to file an Appeal out of time, which application was allowed and the Petition of Appeal deemed as duly filed and served. This court discerned the following to have been the Grounds of Appeal that were placed before it for consideration:-

1. **THAT during his plea he pleaded guilty to the offence of being unlawful in Kenya and failing to produce travelling document to police in CR/24/2016 of which he did not know the document was necessary (sic).**

2. **THAT the Learned Trial Magistrate made errors both in law and facts by forming pillars**

of his conviction in his trial of being in Kenya unlawful(sic)and failing to produce travelling documents to police (sic).

3. THAT he was appearing as a first offender and requesting honourable court to reduce sentence imposed on him and substitute with a lesser sentence (sic).

4. THAT he was wrongfully transported through dublou (sic) ways to Kenya heading to South Africa to secure a job as requested by his agent who totally cheated him for green pastures thus landing to Kenyan soil without knowing (sic).

5. THAT he was requesting the honourable court for leniency as he had pleaded guilty in the court (sic).

6. THAT his people since he was convicted were wondering where he was, they never knew if he was alive because he never communicated with them since because the Kenya Prison rules and regulations don't allow foreigner (sic) to communicate outside (sic).

4. He filed his Written Submissions on 15th November 2016. The State filed its Written Submissions dated 13th December 2016 on 14th December 2016. When this court sought to know from him if he wished to respond to the State's Written Submissions, he indicated that he did not wish to do so.

5. When the matter came up in court on 15th December 2016, both the Appellant and the State asked this court to deliver its Judgment based on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. The Appellant's admission of the two (2) Counts that had been preferred against him was reflective of his guilt. This court's role is limited to looking at the extent and legality of the sentence that he was given only.

7. Indeed, Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) stipulates as follows:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

8. In his Written Submissions, the Appellant contended that the sentence that was meted upon him was harsh and excessive. He submitted that he was not conversant with the Kenyan laws at the time he was arrested. He attributed his being on Kenyan soil to the dubious means that were used by his agent to get him to South Africa where he was travelling to secure a job.

9. He added that he had been persuaded by the police to plead guilty so that his trial could be speeded up and returned to his country. He therefore urged this court to quash his conviction and set aside the sentence that was meted upon him.

10. On its part, the State submitted that the Charges were read to him in Amharic which was the language that he understood and as he had not indicated to the Trial Court that he did not understand what was happening in court, his plea was unequivocal and properly taken.

11. It argued that Section 6 of the Ethiopian Immigration Proclamation No 354/2003 provided that a person departing from Ethiopia was required to have a valid travel document and an entry visa and consequently, he could not purport that he was not aware of this fact and his ignorance of Kenyan Laws was not an excuse.

12. It submitted that the Learned Trial Magistrate was within his discretion when he sentenced him to two

(2) years with an option of a fine as Section 53(1)(j) as read with Section 53(2) of the Kenya Citizenship and Immigration Act provides a penalty of a fine not exceeding Kshs 500,000/= or in default to serve a sentence not exceeding three (3) years or to both fine and imprisonment. It therefore urged this court to dismiss his Appeal as the same was not merited.

13. Section 53(1)(i) and (j) and Section 53(2) of the Kenya Citizenship and Immigration Act (hereinafter referred to as “the Act”) under which the Appellant had been charged stipulates as follows:-

“(1) A person who-

....

(i)refuses or neglects to answer any question, to furnish any information any information, to produce any document, to attend at any place or to submit to medical examination, when required to so under this Act;

(j) unlawfully enters or is unlawfully present in Kenya in contravention of this Act;

...commits an offence.

(2) Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both;

14. Upon the Appellant pleading guilty to the two (2) Counts, the Learned Trial Magistrate acted correctly when he exercised his discretion judiciously and fined him Kshs 100,000/= or in default to serve two (2) years’ imprisonment. The penalty that was imposed upon him was thus proper and legal.

15. Having said so, this court noted that the Appellant was arrested as he was enroute to South Africa to look for employment. He did not appear to have had intentions of residing in Kenya. He also pleaded guilty to the charges. This court also took judicial notice that keeping the Appellant in a Kenyan prison until he completes his two (2) year sentence will only continue to drain and strain the Kenyan tax payer who has to fork out taxes to take care of him.

16. In the premises foregoing, having considered the Appellant’s Petition, his Written Submissions and those of the State, this court found that although he had not persuaded this court to quash his conviction herein, there was merit in reducing his sentence. This isa power the High Court has when hearing appeals even where there is no sufficient ground for interfering with a Trial Court’s finding.

17. Notably, Section 354(3)(b) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

3. The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may(emphasis court)—

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence (emphasis court);

DISPOSITION

18. For the foregoing reasons, the upshot of this court’s decision was that although the Appellant’s Appeal that was lodged on 13th July 2016wasnot successful so as to persuade this court to quash the conviction, it nonetheless allowed his ground of appeal of reduction of the sentence that was meted upon him by the Learned Trial Magistrate in line with the provisions of Section 354(3)(b) of the Criminal Procedure Code.

19. This court therefore hereby directs that the Appellant be and is hereby sentenced to the time already served and that he be repatriated to Ethiopia, which is their country, forthwith.

20. It is so ordered.

DATED and DELIVERED at VOI this 15th day of February 2017

J. KAMAU

JUDGE

In the presence of:-

Baharu Berhanu..... Appellant

Miss Anyumbafor State

Josephat Mavu– Court Clerk