



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 1 OF 2017
DAHIR MOHAMED HUSSEIN.....APPLICANT
VS
REPUBLIC.....RESPONDENT

RULING

1. On the 21st September, 2016, Dahir Mohamed Hussein (*“the Applicant”*) was aboard Moyale Liner Bus Company from Moyale headed to Nairobi. On reaching Walda Area, two Immigration Officers on routine inspection of the said bus found the Applicant and one Mohamed Abdurahman Hassan (hereafter “Hassan”). The Applicant and Hassan were found to be without passport or identification cards. The appearance of the two made the said Immigration Officers to suspect them to be foreign nationals.

2. Pursuant thereto, the Applicant and Hassan were arrested and on 22nd September, 2016 arraigned before the Senior Resident Magistrates Court, Moyale with the offence of entering Kenya without valid pass or permit country to section 53 (1) (j) (2) of the Kenya Citizenship and Immigration Act. No 12 of 2011. It was alleged that on the aforesaid 21st September, 2016 at Walda Police barrier in Sololo Sub-county within Marsabit County, being Citizens of the Republic of Somalia, the Applicant and Hassan were found to have entered Kenya without a valid pass or permit. Both admitted the charges and were convicted of their own plea of guilt.

3. In mitigation, Hassan said that he was a Kenyan hailing from Mandera and gave some other particulars as a result of which a plea of not guilty was entered for him. On his part, the Applicant is recorded as stating the following:-

“I accept my mistake. I am indeed a national of Somalia. I was travelling to Kampala. I do not have any passport. I pray for forgiveness and I be allowed to proceed to Kampala”.

On the basis of the foregoing, the Applicant was sentenced to two (2) years imprisonment and after the sentence he is to be repatriated to the Republic of Somalia.

4. On 6th December, 2016, the Applicant took out a Motion on Notice expressed to be under Sections 362 and 384 of the Criminal Procedure Code (“C.P.C”) and sought for the revision of the said sentence. The grounds for the motion as set out on the face of the motion were that; he had pleaded guilty, he was a first offender, that the sentence was excessive and that he was remorseful and repentant. I have carefully considered the motion and the record.

5. Section 362 of the CPC provides:-

“The High Court may call for and examine the record of any criminal proceedings before any

subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”. (Emphasis added)

6. It is clear from the foregoing that the jurisdiction of this court under that provision is restricted to satisfying itself with the legality, correctness or propriety of any finding, sentence or order recorded by the lower court. It also extends to this court, power to examine the regularity of the proceedings undertaken in the lower court. I have examined the lower court record, I note that the plea was taken procedurally in accordance with the law. I have also noted that the Applicant was aware and understood the proceedings. This is why he gave a mitigation that actually clarified who he was and where he was going, that is Kampala. Indeed, the Applicant has not complained of any irregularity on the proceedings, sentence or order of the trial court. He only contends that the sentence was excessive in the circumstances.

7. Section 53 (1) (j) (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011 provides:-

“53 (1) A person who--

(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”;

8. From the foregoing, it is clear that the sentence for the offence committed by the Applicant is a fine of Kshs 500,000/= or a jail term of up to three (3) years or to both. In the present case, the Applicant was only sentenced to a jail term of two (2) years. In addition, there was an order he be repatriated back to his country at the end of the jail term. To my mind, the jail term metted out by the trial court was less than the maximum provided for by the law.

9. As to whether it was excessive, I consider that the Applicant is a foreigner. He is being maintained by the government of Kenya through tax payers money after which he will be repatriated back to his country. Rather than take care of the Applicant for all those two (2) years, I would rather he is in jail for one (1) year after which he should be repatriated back to Somalia.

10. Accordingly the sentence of two (2) years is reduced to one(1) year imprisonment after which the Applicant should be repatriated back to Somalia.

Orders accordingly.

Dated and delivered at Meru this 2nd day of March, 2017.

A. MABEYA

JUDGE