



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 67 OF 2015

HEMED ABDALLA KINJEKELAAPPELLANT

VS

REPUBLIC.....RESPONDENT

**(From the conviction and sentence in Garissa Chief Magistrates Criminal Court No. 399 of 2015 -
M Wachira (CM)**

JUDGEMENT

The appellant was charged in Chief magistrate's court at Garissa with two counts. Count 1 was for giving force information to a person employed in the Public Service contrary to section 129 (a) of Penal Code. The particulars of the offence were that on 14th April 2015 at Lungalunga Border Point Immigration Offices within Lungalunga township in Kwale County informed Mrs. Caroline Okungu a person employed in the Public Service as an Immigration Officer that he was traveling to Mombasa to seek medical attention, information he knew to be false intending thereby to cause the said Immigration Officer to issue him with a two weeks medical visa allowing him to enter Kenya, an act she ought not to have done if the true facts respecting which such information was given had been known to her.

Count 2 was attempting to depart from Kenya through a place that has not been specified as a point of exit contrary to section 59 of Kenya Citizenship and Immigration Act 2011 Regulation 15(2) (a) as read with Regulation 57 of the Kenya Citizenship and Immigration Regulations 2012.

He was recorded as having pleaded guilty to both counts. He was thus convicted, sentenced to serve 2½ years imprisonment in count 1 and 2 years imprisonment in count 2, the sentence to run concurrently.

He has now come to this court on appeal. He filed his appeal in person under the following grounds;

1. The sentence imposed on both counts was harsh and excessive.
2. The sentence is stressing and causing depression and was thus asking that it be made concurrent.
3. He is remorseful and begs for mercy
4. He asks to be considered for reasonable affordable fine.
5. That he pleaded guilty meaning that he recognized his mistake and was repentant.
6. That he is a young man of prime age and his life was in danger of total destruction if not pardoned.

Before the appeal was heard, written submissions were filed on his behalf by Chacha Mwita advocate, describing himself as Probono Advocate.

Though the grounds of appeal were not amended, the written submissions were on both conviction and sentence. It was stated that the plea was not unequivocal for each of the two counts. Counsel argued that the facts did not agree with the charges leveled against the appellant. Secondly, the document relied upon for the two weeks medical visa was not clear. Thirdly, that Liboi was recognized as a border point for exit and entry into Kenya.

Counsel also submitted that the sentence was excessive in circumstances.

With regard to the plea, counsel relied on the case of PETER MURURI & ANOTHOR VS REPUBLIC (2014) eKLR, to emphasize the point that the plea of guilty herein was not unequivocal.

During the hearing of the appeal, Mr. Chacha advocate did not appear. However the appellant elected to proceed and relied on the written submissions filed by counsel.

Mr. Okemwa Learned Principal Prosecuting Counsel submitted that initially the appellant pleaded not guilty to count 1 but pleaded guilty to count 2. He however disputed the facts given by the prosecutor and a plea of not guilty was entered on count 2.

Counsel submitted that on the 8th June 2015 however, the appellant asked that the charges to be read afresh and he pleaded guilty on both counts. Facts were read the next day 9th June 2015 and they captured first ream of count one that the offence was committed at Lungalunga. Though the appellant told the immigration officer at Lunga Lunga border post that he wanted to seek medical attention in Mombasa, he was found at Dagahaley Refugee Camp in Garissa two days thereafter. Counsel submitted thus that the guilty plea of guilty on both counts was proper.

With regard to sentence, counsel submitted that the sentence imposed was proper and not excessive.

In response to the Principal Prosecuting Counsel's submission, the appellant stated that he was arrested at Dagahaley not Liboi.

This is a first appeal. As a first appellate court, I am duty bound to reconsider and reevaluate the evidence on record and reach my own conclusions and inferences. See the case of OKENO VS REPUBLIC (1972) EA32, and the earlier case of PANDYA VS R (1957) EA336.

I have to take note at this early stage that the appellant was convicted on his own plea of guilty. I am thus duty bound to scrutinize the trial court record to establish whether or not the plea was unequivocal.

The provisions relating to taking a plea are contained under Section 281 of the Criminal Procedure Code (Cap 75), which provides that an accused person may plead not guilty, or guilty, or guilty, subject to plea agreement. The section however does not set out the precise steps to be taken by the court when taking a plea. As such courts have set out elaborate steps on the taking of a plea. Several cases have dealt with the issue. In my view, it will suffice to cite the case of ADAN VS REPUBLIC (1973) EA445 where in the Court of Appeal for East Africa, set out the detailed steps to be taken by a court in recording a plea.

The Court of Appeal further explained the reason for the statement of facts to be given by the prosecutor, which is to enable the trial court satisfy itself that the plea is really unequivocal. The statement of facts assists the court to confirm if the accused really understood the position when he pleaded guilty.

In the present case, on 20th April 2015 when the charges were initially read to the appellant, he denied count 1. With regard to count 2 he stated that it was true. The facts were then given by the prosecutor on 17th April 2015. The facts were that the appellant was arrested at Dagahaley in Dadaab while exiting Kenya to Somalia through Liboi which is not a designated entry point. In response the appellant stated

that the facts are not correct and a plea of not guilty was also entered in count 2.

When the case came up in court on the 8th June 2015, the accused requested that the charges be read afresh and he responded as follows:-

Count 1: true

Count 2: true.

The prosecutor then asked that the case be mentioned the next day 9th June 2015 to give the facts which was allowed by the court.

On the 9th June 2015, the prosecutor gave the following facts:

“Accused person is a Tanzanian National. He entered Kenya through Lungalunga on 14th April, 2015. He did not have a passport. He acquired temporarily travel document from Tanzania Immigration Office. While in immigration office in HolHol of Kenya Tanzania border, he informed Caroline immigration officer that purpose of visit was to visit Mombasa for treatment. He was allowed two weeks and same was endorsed in his travel document. On 17th April, 2015 accused was arrested at Dagahaley refugee camp where upon interrogation he said he was preparing to leave for Somalia. His telephone was confiscated and upon exploitation it was found he had telephone communication with one Bakari Hussein Naikeyaya based in Somalia who has had saved as “Boss”. Accused admitted he was to travel and was in Somalia. Accused was taken to police station and charged as per charge sheet. This is travel document I produced it as P exhibit 1.”

In the grounds of appeal, the appellant has not appeal against conviction. The submissions of Mr.Chacha Mwita advocate however raise the issue of the conviction.

I am aware that a party in litigation is generally bound by his/her pleadings. However, this being a criminal case, and the fact that the appellant filed his appeal in person as a layman, and also the spirit of Article 159 (2) (d) of the Constitution of Kenya 2010 wherein courts are called upon to administer substantive justice without being unduly tied to technicalities, I will consider the issue of conviction.

The appellant is recorded having pleaded guilty to both counts. With regard to count 1, giving false information to a person employed in the Public Service it was alleged in the charge that he gave the information to Mrs. Caroline Okungu and that he was granted two weeks visa to enter Kenya for medical purposes. The document relied upon by the prosecution as Exhibit 1 is an Immigration document headed The United Republic of Tanzania. It was an entry pass stamped by The Kenya Immigration Office at Lungalunga on 14th April, 2015. It shows that the appellant was proceeding to Kenya for a short visit and it stated specifically as follows:-

“The above named person is a Tanzania citizen who is proceeding to Kenya for short visit. This letter is issued in lien of a travel document and is valid for single journey and return. Any assistance granted to him is highly appreciated. Thanks for your cooperation.”

The document was stamped by the Immigration Officer in Kenya under stamp No 1156, which means the appellant was allowed entry into Kenya. There is no indication whatsoever that it was for a duration of two weeks as alleged in the charge. There was no indication that it was a medical visa as alleged in the charge. It only says that it was valid for a single journey and for return, and that it was for a short visit. There is no indication of what the appellant told Caroline Okungu at the border post.

It cannot thus be said that, relying on that document, the appellant entered Kenya on a medical visa and for two weeks. He was arrested at Dadaab Refugee Camp on 17th April 2015 which was three days after entry into Kenya. The document did not restrict the appellant not to go to Dadaab. Therefore it cannot be said that he committed the offence alleged. In short the facts provided by the prosecution did not support

the charge in count 1, and therefore the plea of guilty of the appellant was not unequivocal. I will quash the conviction and set aside the sentence on count 1.

With regard to count 2, the appellant was alleged to have attempted to depart from Kenya through Liboi a border point that has not been specified as a point of exit. Counsel for the appellant has provided the Kenya Citizenship and Immigration Regulations 2012 containing the schedule of points and times of entry into and exit from Kenya. One of those points, for people traveling by road, is Liboi Immigration Control between the hours of 6.00 am and 6.00 pm.

It follows that Liboi border point is an authorized point of entry and exit from Kenya between 8.00 am and 6.00 pm. The appellant was arrested far away from Liboi at Dagahaley Refugee Camp. He was merely alleged to have stated that he wanted to cross into Somalia through Liboi. That statement in itself was not an offence under the section for which he was charged, as Liboi was an entry and exit point for Kenya Immigration purposes.

The fact that he was not authorized to cross to another county by his short time visa into Kenya, did not create the offence charged. May be it could be another offence, which I cannot define currently. As for the offence in count 2 for which he pleaded guilty, it was not an offence known in law, and as such his plea, of guilty was not unequivocal. He thus deserves an acquittal on that account, and I will quash the conviction and set aside the sentence.

The appellant has served much of his sentence already before the appeal was heard as the two sentences were ordered to run concurrently. It is a regrettable event and this court takes note of the delay in processing this appeal. There is need to find ways of speeding up processing and hearing of appeals.

Lastly, the appellant was allowed to come to Kenya for a short visit whose period was not given in the document relied upon by the prosecution. Though I will quash the convictions and set aside the sentence, I will order that the Cabinet Secretary currently in charge of Immigration removes him and takes him back to Tanzania his country of origin, as the appellant is a foreign national who has no reason to remain in Kenya.

In conclusion, I allow the appeal quash to conviction on both counts. I set aside the prison sentences imposed. I however order that the Cabinet Secretary in charge of Immigration do remove the appellant, who is a foreign national back to his country of origin of Tanzania under the Kenya Citizenship and Immigration Act No.12 of 2011 and Regulations thereunder. The appellant will remain in custody and handed over to the Immigration Department.

Dated and delivered at Garissa on 18th July, 2017.

GEORGE DULU

JUDGE