



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL REVISION NO. 2 OF 2016

1. OSMAN HAPI MOHAMED
2. HUSSEIN MOHAMED ALI
3. ABDULLAHI JELLE MAALIM
4. HARET ALI ABDILE
5. MOHAMED NOR BULUALE
6. IBRAHIM MOHAMED ALI
7. BAREN SELLE MAALIM

8. BARREH HALEY ALI.....APPLICANTS

V E R S U S

REPUBLIC.....RESPONDENT

From original conviction and sentence in Criminal Case No. 2 of 2016 of the PM Magistrate's Court at Mandera (Elwak) – P.N. Ileri (SRM).

RULING

These proceedings were commenced before this court through a Notice of Motion dated 15th January 2016 which was filed on 20th January 2016. The matter was brought under certificate of urgency and the court certified it as urgent, thus dealing with prayer 1, and ordered that it be served on the Director of Public Prosecution's office Garissa forthwith for hearing on 21st January 2016.

In the application, the following orders were sought –

1. (spent).
2. That the Honourable Court do revise the sentence issued and fine imposed by the Senior Resident Magistrate P. N. Ileri on the 8th January 2016 at the mobile court at Elwak.
3. That the court issues orders for an inquiry as to the death of the 4th accused Haret Ali abdile, as well as health status of the remaining 7 accused's who were rejected by the prison department in Wajir due to their health condition.
4. That the court issues an order for the deceased Haret Ali Abdile's body to be transferred from Wajir to Garissa Provincial General Hospital for preservation and to undergo a postmortem

- examination, so as to establish the cause of death.
5. That the Honourable Court be pleased to make any other orders or relief as it may deem, just and fair for the ends of justice to be met.
 6. That costs of this application be borne by the respondent.

The application was served and heard interparties on 22nd January 2014.

During submissions, the prayers, other than that relating to sentence, were not argued and I took it that they had been abandoned. In any case, the said prayers are not related to the request for revision of the magistrate's orders.

The counsel for the applicants Mr. Hassan submitted that the applicants were charged in the subordinate court under Section 53(1)(j) of the Kenya Citizenship and Migration Act of 2011. They had been convicted and sentenced and had now applied for a review of the orders of the trial court. In counsel's view the sentence imposed by the trial court was illegal and as such needed to be reviewed by this court. Counsel submitted that there were ample case authorities relating to similar situations, where the court had commuted the sentences of the trial court.

Counsel submitted that the convicts/applicants had pleaded guilty to being in Kenya illegally and thus expected lenient treatment. He stated that the Kenya - Somalia border was porous and the applicants being pastoralists whose way of life would require that they take animals for grazing from place to place, accidentally entered Kenya while searching for greener pastures.

Counsel emphasized that the clans of people living in Somalia and those living in Kenya around the border were the same and there was also a lot of intermarriage. Counsel submitted that the appellants did not waste the court's time by pleading guilty to the offences. However

the court went out of its way to sentence them to serve 5 years imprisonment, while the maximum sentence for the offence was merely three years imprisonment. The sentence was thus illegal, as section 66(1) of the Interpretation and General Provisions Act (cap.2) of the Laws of Kenya, provided that where a written law stipulated a penalty then unless specifically stated, that penalty would be maximum penalty. As such counsel argued, the learned magistrate was wrong in sentencing the convicts to 5 years imprisonment while the maximum sentence for the offence was 3 years imprisonment.

Counsel submitted also that one of the convicts age 80 years had already passed away while another who was in custody was over 60 years of age. According to counsel the convicts were currently not aware of where their livestock's were.

Counsel submitted further that the convicts/applicants did not mind being returned to their Country of origin Somalia, and urged this court to review the sentence and, in the alternative, since the applicants had served 1 month in custody, they be granted mercy and be released.

Learned Prosecuting Counsel Mr. Wanyonyi submitted that the conviction was proper but the sentence imposed by the trial court was problematic. Counsel submitted that the applicants pleaded guilty and expected a lighter sentence. They also mitigated and there was no previous record. However the court pronounced an illegal sentence. The sentence of 5 years was not provided for in law.

In counsel's view therefore, the magistrate considered extraneous matters or misconstrued the provisions of the written law in arriving at the harsh and illegal sentence. Counsel submitted that the State did not support the sentence which was harsh, excessive and illegal. Counsel urged this court to exercise its powers in revision to correct the mistake. Counsel relied on a case of ***Daniel Kyalo Mwema -vs- Republic Criminal Appeal No. 479 of 2007 Nairobi.***

I have considered the application, documents filed and the submissions on both sides.

I do not have the original court file from the magistrate's court. However I have a certified copy of the

trial court record wherein 8 persons ie, Osman Hapi Mohammed, Hussein Mohamed Ali, Abdullahi Jelle Maalim, Haret Ali Abdile, Mohammed Nor Buluale, Ibrahim Mohamed Ali, Baren Selle Maalim, and Barreh Haley Ali were charged in the subordinate court at Elwak with entering Kenya without a passport or permit Contrary to Section 34(1) as read with Section 53(1) of the Kenya Citizenship and Immigration Act of 2011. Each of them said that the charge was true. Therefore, a plea of guilty was entered against for each of them.

The facts were then given by the prosecutor and each of the 8 admitted the facts. They were thus convicted.

The facts were that there was a report that some Somali nationals had crossed into Kenya and were a security threat to the local community within Falama location of Mandera Central Sub County. The 8 applicants were then arrested while others managed to escape. There was no mention of livestock or the herding of livestock.

Each of the applicants made his own plea in mitigation. None of them talked of herding livestock in Kenya. Only the 2nd applicant together with the 7th applicant mentioned livestock. None of them however talked about grazing livestock in Kenya. What they said was that they had left their livestock behind with their wives and children when they came to Kenya.

It is thus not the position from the record, that any of the applicants was caught grazing livestock or stated to the police or even to court, that he was herding livestock when he was arrested. The submissions from counsel therefore that the applicants were pastoralists herding animals is not supported by the record.

The State does not object to the review of the sentence. The sentence is obviously illegal sentence since the learned magistrate ordered each of them to serve 5 years imprisonment in default of paying a fine of Kshs 400,000/-. There is no default prison sentence of 5 years under the Act. The maximum sentence under Section 53(2) was a fine of Kshs 500,000/- or a prison term of 3 years.

This court has powers under Section 362 of the Criminal Procedure Code (cap.75) to review the proceedings or orders or sentence made by any subordinate court. Since I am persuaded that the 5 years imprisonment term is illegal, I will interfere with the sentence and reduce it to a sentence that is within the parameters that are within the law.

The offence is however a serious one in that Mandera area. As counsel for the applicant says, the border is porous. I add that the incidence of insecurity is high. It is also not clear from the facts and what the applicants said, what the applicants were up to when they crossed into Kenya from Somalia. In my view therefore a deterrent sentence is called for.

Having considered all the facts and evidence placed before the magistrate and the seriousness of the offence, and in exercise of this court's powers on review, I set aside the fine and default prison sentence handed down by the trial court. Instead I order that each of the appellants will pay a fine of Kshs 200,000/= and in default will serve one year imprisonment. The repatriation orders are hereby upheld, and will be enforced as ordered by the trial court.

Dated and Delivered at Garissa this 4th day of February 2016.

GEORGE DULU

JUDGE