



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL APPEAL NO. 93 ,95 ,94 ,96 ,89 AND 87 OF 2015 (CONSOLIDATED)

(From original conviction and sentence in Criminal Case No. 354 of 2015

of the PM Magistrate Court at Wajir- B. ROGOCHO – RM).

1. ABDI ABDULLAHI ABDOW

2. MOHAMED ALI HASSAN

3. MUSA ABDULLAHI ADAN 94

4. ALI GAMACHO ABDOW

5. MUSTAFA ABDULLAHI ALI

6. HANA TANTU SIMON.....APPELLANTS

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The six appellants ABDI ABDULLAHI ABDOW, MOHAMED ALI HASSAN, MUSA ABDULLAHI ADAN, ALI GAMACHO ABDOW, MUSTAFA ABDULLAHI ALI, and HANA TANTU SIMON were charged in subordinate court at Wajir with being unlawfully present in Kenya contrary to Section 53(1)(j) as read with Section 53(2) of the Kenyan Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence were that on 24th August 2015 at Barwaqo Location in Wajir Subcounty within Wajir County being Ethiopian citizen were found being in Kenya unlawfully and without any valid permit.

On the first day they appeared in court, which was 25/8/2015, four pleaded not guilty. However Mustafa Abdullahi Ali and Hana Tantu Simon pleaded guilty.

The prosecutor then gave a summary the facts in respect of the two and they agreed to the facts. They were thus convicted. They were sentenced to a fine of Kshs 300,000/- each and in default to serve 36 months imprisonment. They were also ordered to be repatriated to their home country Ethiopia.

On 14/9/2015 the, other four appellants ABDI ABDULLAHI ABDOW, MOHAMED ALI HASSAN,

MUSA ABDULLAHI ADAN, and ALI GAMACHO ABDOW, changed their plea to guilty. The facts were then given by the Prosecuting Counsel. They agreed to the facts and were convicted. They were sentenced to pay a fine of Kshs 300,000/= and in default, to serve 36 months imprisonment.

Aggrieved by the decision of the trial court all the six(6) appellants have come to this court on appeal.

The appeals are on sentence, but Mustafa Abdullahi Ali has raised the issue that he was a Kenyan, but had merely not applied for an identity card. He said he came from Burji in Moyale, which is a challenge to the conviction. He filed written submissions, as did. Hana Tanju Simon.

At the hearing of the appeals, Abdi Abdullahi Abdow stated that he pleaded guilty, and that the sentence of fine was too high for him to raise. He said that he was cheated by a man at Wajir who promised him a job for Kshs 6,000/= per month.

Ahmed Ali Hassan said that he was also lured to Wajir for a job, and pleaded guilty. He asked for leniency.

Musa Abdullahi Adan said that he was brought to Wajir for a job and was Ethiopian. He said that he lost his father and that the fine of Kshs 300,000/= was too harsh.

Ali Gamacho Abdow said that he was Ethiopian and had come to Kenya because of hunger. He got a job at Wajir. He said the fine was too harsh.

Mustafa Abdullahi Ali relied on written submissions. He added that he was a Kenyan from Marsabit. He stated that he was to be taken by his father to the Chief for an identity card, but was arrested before then. He said that he was from the Burji tribe.

Hana Tantu Simon relied on her written submissions, and emphasized that she pleaded guilty to the charge.

Learned Prosecuting Counsel. Mr. Okemwa submitted that except for one appellant, the rest were appealing against sentence. Counsel submitted that the maximum prison sentence was 3 years imprisonment. Counsel emphasized that the repatriation order should be maintained.

With respect to Mustafa Abdullahi, counsel submitted that he was trying to change course on appeal using Kiswahili – and saying that he was a Kenyan, which he did not say at the trial. Counsel observed that the said appellant had even initially tried to assist. Hana in Amharic language here in court, but later changed and started using Kiswahili. According to counsel, this appellant was a liar.

This being a first appellate court, I am duty bound to reconsider all the record of the trial court, as the appellants were convicted on their pleas of guilty. I have to satisfy myself that the pleas of guilty were equivocal.

I have considered submissions, both written and oral on both sides.

I will deal with the 1st, 2nd, 3rd, 4th and 6th appellants first. The record of the trial court is very clear that they pleaded guilty to the charge, and agreed to the facts. In my view, their pleas were unequivocal. Their conviction on a plea of guilty was proper.

With regard to Mustafa Abdullahi, he pleaded guilty to charge. He agreed to the facts. He was thus convicted. In mitigation, he stated as follows:-

“I have first visited Wajir – I work at Leheley. I have applied for an identity card and I have not been supplied”.

On appeal, he has raised the same issue that he was to obtain an identity card.

In my view, the plea of guilty with regard to this appellant was not unequivocal, since he raised the issue of obtaining Kenyan Identity Card. A plea of not guilty should have been entered and he should have been tried through tendering evidence.

I will thus quash his conviction, set aside the sentence.

As for the other appellants, the maximum sentence for the offence is Kshs 500,000/= and in default imprisonment for 3 years.

Sentencing is a discretion of the trial court, taking into account the peculiar or special circumstances of each case. In the circumstances of this case where the appellants were in a group, I do not find the sentence of Kshs 300,000/= to be excessive. However, the maximum default prison sentence was not justified. They were first offenders. I will substitute it with a prison sentence with a default sentence of 1 year imprisonment.

To conclude, I uphold the conviction of the 1st, 2nd, 3rd, 4th and 6th appellants. I uphold the sentence of fine imposed on them. I however, set aside the default prison sentence and order that each will in default of paying the fine serve one (1) year imprisonment from the date on which each was sentenced by the trial court. The repatriation orders are upheld.

With regard to the 5th appellant Mustafa Abdullahi Ali, I find that his plea of guilty was not unequivocal. I quash the conviction and set aside the sentence imposed. I however order a retrial, as it is not known whether he is a Kenyan. He will thus be taken by the police to the Wajir Magistrate's court where he will be retried for the same offence.

Dated and Delivered at Garissa this 2nd June 2016.

GEORGE DULU

JUDGE