REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 102 OF 2015

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 297 OF 2015 OF THE PM MAGISTRATE'S COURT AT WAJIR – B. ROGOCHO R.M).

MOHAMED NOOR GODANA ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

J U D G M E N T

The appellant was charged in the magistrate's court at Wajir with two counts. Count 1 was for escape from lawful custody contrary to Section 123 as read with Section 36 of the Penal code. The particulars of the offence were that on the 9th July 2015 at Buna Township within Buna Sub County in Wajir County being in lawful custody of No. 88978 PC Hassan Bonaya escaped from the said custody. Count 2 was for being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the offence were that on the same day and place being an Ethiopian citizen was found unlawfully present in Kenya without legal documents.

Initially when he appeared before court, he was recorded as having pleaded not guilty to the charges. However, on the 18th of September 2015 when the matter came for mention, he was recorded as having pleaded guilty. He was thus convicted and sentenced to serve 1 year imprisonment in count 1, and 5 years imprisonment in count 2, the sentences to run concurrently and thereafter to be repatriated to Ethiopia.

He has now come to this court on appeal against both conviction and sentence, on the following grounds:-

1. That he did not plead guilty to the charge.
2. That he is a Borana Kenyan who hails from Moyale Sub county.
3. That he lost his national identity card when he suffered bouts of mental illness a few years ago.
4. The sentence of 5 years imprisonment is harsh and excessive.

At the hearing of the appeal, the appellant submitted that he came from Wajir to Garissa and alighted to take tea before proceeding to Moyale. He was then arrested, taken to Wajir and charged and sentenced to serve 6 years imprisonment.

He stated that he was not arrested in possession of anything. He contended that his only mistake was that he had lost his identity card on his way from Moyale.

Learned Prosecuting Counsel Mr. Okemwa, opposed the appeal. Counsel emphasized that the matter was

mentioned 4 times before the trial court, and thereafter, appellant stated that he wanted to change his plea. Charges were then read to him and he agreed to both the charge and the facts. As such counsel contended the conviction was proper.

With regard to sentence, counsel submitted that Section 123 of the Penal Code should be read together with Section 36 as no specific sentence was provided for count 1. According to counsel, the sentence of 1 year imprisonment for count 1 was proper. As for count 2, counsel submitted that the maximum sentence provided by law was Kshs 500,000/= or imprisonment for 3 years. Counsel urged this court to revisit the of sentence and on count 2, but retain the repatriation orders imposed by the trial court.

In response to the Prosecuting Counsel's submissions, the appellant maintained that he did not admit the offences and stated that he was a Kenyan not Ethiopian. He asked for leniency.

This being a first appeal, I am required to scrutinize the record and come to my conclusions, as the appellant was recorded as having pleaded guilty to the charges and was convicted and sentenced. I have to scrutinize critically the record to be satisfied whether the plea of guilty was unequivocal, and also whether the sentence imposed was lawful and not excessive in the circumstances.

From the record, the appellant was initially brought to court on 13th July 2015 and was recorded as pleaded not guilty to both charges. On that day the interpretation was recorded as being from English to Kiswahili. Thereafter 30th of July 2015 the matter was mentioned in the presence of the appellant and the interpretation was recorded to be from English to Borana. On 27th August 2015, 10th September 2015 and 17th September 2015 the matter was again mentioned in the presence of the appellant. The language of the court and the language of the proceedings were not recorded by the trial court.

On 18th September 2015 the matter was again mentioned, when the appellant was recorded as having said that he wished to change his plea. The language of the court and the language of the proceedings was not recorded by the court on this date. It was recorded however,

that the charge was read over and explained to the appellant in a language which he understood and he said that it was true to both counts. The prosecutor Mr. Andai then said that the facts were as per charge sheet and the appellant said that the facts were true. He was then convicted by the court and sentenced.

The proper steps to be followed by a court in taking a plea of guilty were clearly set down in the case of ***Adan -vs- Republic (1973) EA 445***. In our present case the language was not indicated. The prosecutor also adopted a short cut procedure of saying that the facts were as per charge sheet.

In my view mistakes were committed by the trial court in not specifically indicating the language used in the court on a number of occasions, including the day on which the appellant pleaded guilty. However from the record, it is clear that the appellant understood both Kiswahili and Kiborana. His mitigation is quite clear and does not show any confusion on his part or any limitation with regard to his understanding of language in court. He said that it was true that this was not the first time that he had appeared in that same court. In my view no prejudice was caused to him by the failure of the court to indicate the language used on the date he pleaded guilty as it is clear from the record that the appellant understood both Kiswahili and Kiborana. In the particular circumstances of proceedings herein the error of the magistrate in not specifically recording the language of the proceedings on the day plea was taken while previously having recorded that Kiswahili and Kiborana was used, is in my view curable under section 386 of the Criminal Procedure Code.

The prosecutor also took a short cut in merely informing the court that the facts were as per the charge sheet. In my view the prosecutor should have given his own summary of facts instead of relying on the charge sheet. However with the charges that the appellant faced, I am of the view that this failure of the prosecutor to summarize the actual facts of the case did not prejudice the appellant, as the facts were not technical as in the case of ***Kivisi –vs- Republic (1995)KLR 125***. I will thus uphold the conviction on both counts as in my view the appellant's plea of guilty to both counts was unequivocal.

With regard to sentence, the sentence for count 1 was lawful. However the sentence imposed on count 2 was unlawful as the maximum sentence for the offence under section 53(2) of the Kenya Citizenship and Immigration Act was a fine of Kshs 500,000/= or 3 years imprisonment. Therefore in my view the learned magistrate was wrong in imposing a sentence of imprisonment of 5 years which was beyond that allowed by law. The learned magistrate should also in my view have handed down the option of a fine because the sentence for the offence is firstly described as a fine and then subsequently described as imprisonment. Therefore in my view Parliament intended that the sentence of a fine should have been given priority over that of imprisonment.

The appellant stated that he had appeared before the same court before, but did not state that he had been convicted and sentenced. Appearing in court before is not the same thing as a conviction. It is thus not clear to me whether the appellant was previously convicted before the date of sentencing and for what crime. The learned magistrate was thus not entitled to treat him as a person with a previous conviction.

For the above reasons, I uphold the conviction on both counts.

I uphold the sentence of 1 year imprisonment for count 1. I set aside the illegal sentence of 5 years imprisonment for count 2. In its place, I impose a sentence of a fine of Kshs 300,000/= and in default to serve imprisonment for 3 years on count 2, from the date on which he was sentenced by the trial court.

The prison sentences will run concurrently from the date the appellant was the sentenced by the magistrate. The repatriation orders imposed by the trial court are hereby upheld. It is so ordered.

Dated and delivered at Garissa this 5th day of July 2016.

GEORGE DULU

JUDGE