



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 40 OF 2016**

**S A A ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**(From the conviction and sentence in Wajir SRM Criminal Case No. 393 of 2014 – B. Rogoncho RM)**

**JUDGMENT**

The appellant was charged in the subordinate court Wajir with being unlawfully present in Kenya contrary to section 53 (1) (j) as read with section 53 (2) of the Kenya Citizenship and Immigration Act of 2011. He was charged together with another. The particulars of the offence were that on 17th October 2014 in Buna District within Wajir County being Ethiopian citizen was found unlawfully present in Kenya without a valid entry permit.

When the charge was read over to him, he admitted the offence. A plea of guilty was entered. The prosecutor then said that the facts were as per charge sheet. The accused said that the facts were true. He was thus convicted. His co accused who was a minor was discharged because of age and ordered to be repatriated to Ethiopia immediately. The appellant was however fined to pay Kshs. 100,000/= and in default to serve 3 years imprisonment. Thereafter he was to be repatriated back to Ethiopia.

Aggrieved by the decision of the trial court, the appellant came to this court on 16th December 2014 with an application for leave to appeal out of time. The application for leave to appeal out of time was however brought to this court on 13th June 2016 and leave was granted for the appeal to be filed out of time.

The appeal is on sentence. The appellant stated in the grounds of appeal that he was in Kenya on his way to South Africa when he was arrested. That he wanted to get employment in South Africa. He also stated that he was sick and that the sentence imposed is harsh and excessive.

During the hearing of the appeal, the appellant submitted that his interest was reduction of the 3 years imprisonment sentence. He stated that he appealed in 2013 and the matter had delayed and that he only had 3 months imprisonment to serve as at the time of hearing of this appeal. He also stated that his co accused was treated differently and released.

Learned Prosecuting Counsel Mr. Okemwa opposed the appeal. Counsel submitted that the maximum sentence for the offence was a fine of Kshs. 500,000/=. Counsel submitted that the factors surrounding the offence were considered by the trial court as the appellant was not found in Moyale or Mandera but was found in Wajir in the hinterland of Kenya. Counsel submitted that the co accused was

treated differently because he was a minor. Counsel also stated that the delay in having the appeal heard was because the file from Wajir court might have taken long to be transmitted to this court.

I have considered the appeal. I have considered the submissions of the appellant as well as submissions of learned prosecuting counsel. I have perused the record.

It is clear to me that the appellant pleaded guilty to the charge. He is not complaining about his plea of guilty. He has come to this court to challenge the sentence. It is also on record that his co-accused informed the court that he was aged 15 years and was thus treated differently. Therefore in my view the appellant cannot compare himself with the treatment given by the court to his co-accused who was a minor.

The maximum sentence for the offence of being unlawfully present in Kenya is a fine of Kshs. 500,000/= and in default 3 years imprisonment. The appellant was sentenced to a fine of Kshs. 100,000/= and in default to serve 3 years imprisonment and thereafter to be repatriated back to Ethiopia. The default sentence was the maximum of 3 years imprisonment. The fine of Kshs.100,000/= was 1/5 of the maximum sentence or fine. In my view the default sentence was harsh, though it was lawful.

As the magistrate decided to fine the appellant Kshs. 100,000/=, I find no justification for sentencing him to a default sentence of 3 years imprisonment which was the maximum default sentence without any explanation. I will thus interfere with the default prison sentence and reduce it to 2 years imprisonment.

I thus uphold the sentence of fine of Kshs. 100,000/=. I set aside the 3 years imprisonment default sentence and order that the appellant will serve imprisonment for a term of 2 years in default of paying the fine, with effect from the date that he was sentenced by the trial court. The appellant will still be repatriated back to Ethiopia after either paying the fine or serving the prison sentence.

It is so ordered.

**Dated and delivered at Garissa this 2<sup>nd</sup> day of September 2016**

**GEORGE DULU**

**JUDGE`**