



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 6 OF 2016

(From original conviction and sentence in Criminal Case No. 7 of 2016 of the Senior Principal Magistrate's Court at Wajir B. ROGOCHO - RM).

DHAMBALA JILLO.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

The appellant was charged in the Magistrate's Court at Wajir together with six others for being unlawfully present in Kenya contrary to Section 13 (2)(c) of the Immigration Act Cap 172. The charges three of the accused persons were later withdrawn. Two of the three were said to be Refugees seekers while one was said to be a minor.

The appellant pleaded guilty to the charge and was convicted and sentenced to pay a fine of Kshs 100,000/= and in default to serve 3 years imprisonment and thereafter to be repatriated.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal on sentence. His grounds of appeal are as follows:-

1. That he is remorseful.
2. That the sentence imposed was too harsh and excessive.
3. That because the fine was too high he could not raise the money.
4. That he was a Kenyan citizen without an identification card and could not understand the language of the court.

The appellant also filed written submissions, which I have perused. Though the appellant emphasized the severity of the sentence in his appeal, when he said in the grounds of appeal that he was a Kenyan, that means that he was appealing against conviction also.

The Learned Prosecuting counsel Mr. Okemwa submitted that Section 13 (2) of the Immigration Act had, by the time of charge, been repealed and replaced by Section 53(1) of the Kenya Citizenship and Immigration Act. Counsel therefore submitted that the charge was defective. Counsel added that in mitigation the appellant brought in new issues that he was a Kenyan and a plea of not guilty should have been entered. Counsel concluded by stating that he did not oppose the appeal.

I have perused the record and, indeed the appellant in mitigation stated that he was a Kenyan but had not taken an identity card.

In my view, though that fact was disclosed by the appellant to the court after conviction had been entered, since the criminal proceedings had not come to a conclusion, and since a plea of guilty had to be unequivocal as stated in the case of *Adan -vs- Republic (1973)EA 445*, in my view a plea of not guilty should have been entered by the trial court, because the appellant during mitigation had changed his mind and was denying the offence before the criminal proceedings were concluded. I agree with the submissions of the prosecution counsel on this issue.

Learned prosecuting counsel, has also submitted correctly that Section 13(2) of the Immigration Act had by the time of the charge in the trial court, been repealed and replaced by Section 53(1) of the Kenya Citizenship and Immigration Act. The appellant was thus charged with committing an offence under an Act of Parliament which had been repealed. It was impossible thus for him to defend himself. His sentence would also follow the provisions of the same Act which had been repealed. In my view therefore, the charge was fatally defective. It is not curable under Section 382 of the Criminal Procedure Code (cap.75). On that account also the conviction is not sustainable.

The above defects, are of a technical nature, as such in my view, it is preferable to order a retrial under the proper existing law. This court takes note that the appellant was alleged to be an illegal immigrant which fact was denied by him during mitigation. He has served prison sentence of 9 months only as he was sentenced in January this year. In my view, a retrial will be in the best interests of the justice as it will protect both the interests of the appellant as well as the interest of the State at this time when insecurity is a serious issue in the country. The sentence already served can be considered on retrial.

I thus allow the appeal and quash the conviction and set aside the sentence of the trial court. I however order that a retrial be conducted at Wajir magistrate's court. The appellant will therefore be taken to Wajir court and charged with the offence under the appropriate Section of the Kenya Citizenship and Immigration Act. In the meantime he will remain in custody until he is taken to Wajir by the police and charged before the magistrate's court there for a retrial. It is so ordered.

Dated and delivered at Garissa this 4th day of October 2016.

GEORGE DULU

JUDGE