



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL APPEAL NO. 12 OF 2016

(From original conviction and sentence in criminal case No. 35 of 2016

of the SRM Magistrate's court at Mandera – P.N. Areri - srm)

ABDIKADIR SHARIF ABDINOR.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Abdikadir Sharif Abdinor was charged in the Magistrate's court at Mandera with two counts. Count 1 was for knowingly having in his possession a visa which could not be reasonably accounted for contrary to Section 54 (1) (d) as read with 54 (2) of the Kenya Citizenship and Immigration Act 2011. The particulars of the offence were that on the 1st February 2016 at Mandera Township in Mandera East Sub County within Mandera County had in his possession a Kenyan travel visa which he could not reasonably give a proper account of. 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. The particulars of the offence were that on the same day and place while being a Somali national was found unlawfully present in Kenya without a valid permit authorizing him to stay in Kenya.

On being read the two charges, he was recorded as having pleaded guilty to both. He was thus convicted. He was sentenced to pay a fine of Kshs 5 million and in default to serve 5 years imprisonment on count 1. With regard to count 2, he was sentenced to pay a fine of Kshs 500,000/- and in default to serve 5 years imprisonment. The sentences were ordered to run consecutively. The court further ordered that the document be destroyed and that upon completion of sentence he be repatriated to Somalia.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. From the grounds of appeal filed, the appellant is appealing on sentence. He also filed written submissions to the appeal and relied on the same at the hearing of the appeal.

Learned Prosecuting counsel Mr. Okemwa submitted that the appellant was a first offender. Counsel felt that because the appellant was a first offender and pleaded guilty to the charges, the sentence handed down by the magistrate was harsh and excessive but left the matter for the court to decide. Counsel pointed to the court that, in other appeal No. 11 of 2016 and 13 of 2016 this court had ordered that only the page of the passport which contained the unlawful visa to Kenya be destroyed.

In response to the prosecuting counsel's submissions, the appellant stated that he was misled by someone

who he did not know well to commit the offence.

This is an appeal against sentence. However the appellant was not represented during the trial. I am thus obliged to consider whether or not the conviction was proper.

Having perused the record, I am of the view that the learned magistrate complied with the requirements of taking a plea of guilty stated in the case of *Adan -vs- republic (1973) EA 445*. The appellant has also not appealed against conviction. I find that the conviction was proper.

With regard to sentence on which the appellant has appealed, section 54 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011 prescribes the sentence for possession of a visa which cannot be reasonably accounted for. The section states as follows:-

“54(2) any person convicted for an offence under this section shall be liable to a fine not exceeding Kshs 5 million or to imprisonment for a term not exceeding 5 years or both.”

The above is the maximum sentence for count 1 herein.

With regard to the offence of being unlawfully present in Kenya Section 53(2) on the same Act provides as follows:-

“53(2) any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding Kshs 500,000/= or imprisonment for a term not exceeding 3 years or both.”

The above is the maximum sentence for an offence under count 2 of being unlawfully present in Kenya.

From the record herein, the learned trial magistrate handed down the maximum sentence of fine for both counts, and the maximum default prison sentence for Count 1 and an illegal default prison sentence for count 2 of 5 years imprisonment since the maximum default sentence for count 2 was 3 years imprisonment. The appellant pleaded guilty to the offences and did not waste court's time. The prosecution also treated the appellant as a 1st offender. Both these factors were a mitigation in favour of the appellant.

I appreciate that both offences are serious and are quite common in this Mandera region of Kenya. In addition, several incidents of killing of innocent citizens have occurred in the same area in the recent past. One cannot know whether the people who are coming to Kenya illegally are part of those who have been killing innocent Kenyans.

Be that as it may, in my view because the appellant pleaded guilty and was treated as a first offender, the magistrate should have exercised discretion and handed down a sentence that was lower than the maximum sentence. I find that the sentence handed down by the trial court was based on wrong principle as the appellant pleaded guilty and should have been shown mercy.

I will thus interfere with the sentence and order that the appellant will instead pay a fine of Kshs 3 million for the offence of possessing a Kenyan visa which he could not account for and in default serve 3 years imprisonment. As for the offence of being in Kenya illegally, I will order that he pays a fine of Kshs 300,000/= and in default serve 2 years imprisonment. The prison sentences will run consecutively.

As for the order of destroying document, I find no basis for that order as the passport was not alleged to be forged nor was it said to be a Kenyan passport. I thus order that the page on which the appellants Somali passport has a Kenyan visa be destroyed and the rest of the passport be returned to him. This is because that passport might be the only document of identification that the appellant can rely on. The repatriation orders are upheld and will be implemented as ordered by the trial court.

It is so ordered.

Dated and delivered at Garissa this 10th day of November 2016.

GEORGE DULU

JUDGE