



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 69 OF 2016

(From original conviction and sentence in Criminal Case No. 538 of 2016 of the Chief Magistrate's court at Garissa- M. Wachira - CM)

ALI AHMED SALEH APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the Chief Magistrate's Court at Garissa 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 23rd June 2016 at Hagadera market within Garissa County being a Yemeni National was found to be unlawfully present in Kenya without a valid travel permit.

He was also charged with a second count of failing to report entry to an Immigration Officer Contrary to Section 59 of the Kenya Citizenship and Immigration Act 2011, Regulation 16(1)(a) as read with regulation 16(6) and Regulation 57 of the Kenya Citizenship and Immigration Regulations 2012. The particulars of the offence were that on the same day and place being a Yemeni National was found to have crossed the Kenya border at Liboi from Somalia without reporting his entry to the nearest Immigration Officer.

He denied both charges. After a full trial he was convicted on both counts. He was sentenced to pay a fine of Kshs 300,000/- in respect of count 1 and in default to serve one year imprisonment. On count 2 he was fined Kshs 30,000/- and in default to serve 6 months imprisonment. It was also ordered by the trial court that the appellant be repatriated to Yemen after serving the sentence.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. The appeal was filed on his behalf by the Refugee Consortium of Kenya as Advocates for the appellant. I am not aware of a firm of Advocates in this Country known as Refugee Consortium of Kenya. However the appellant was present in court and M/s Ng'ang'a an advocate appeared for him. I am thus persuaded in the interest of justice under Article 159 of the Constitution of Kenya 2010 and for the benefit of the appellant that I should take it that he filed a proper appeal.

The grounds of appeal are as follows:-

- 1. The learned magistrate erred in law in issuing a punitive sentence and repatriation orders for the appellant for the offences of unlawful presence contrary to section 53(1)(j) of the Immigration and Citizenship Act 2011 and failure to report entry contrary to the Immigration***

and Citizenship Act 2011.

2. by ordering for him to be repatriated back to a country where he fled due to persecution, an international principle known as refoulement, which is also prohibited in section 18 of the Kenyan Refugee Act.

3. The learned trial Magistrate erred in Law and in fact in not considering the evidence presented in court by the appellant in convicting the appellant, evidence such as a Refugee Certificate and the medical documents from Somalia.

4. The learned trial Magistrate erred in law in considering extraneous matters in convicting and sentencing the appellant, and failed to find that the appellant was a genuine asylum seeker in need of medical and legal assistance from the Kenyan Government.

5. The learned Magistrate erred in Law and in fact in failing to consider the defence of the appellant and in appreciating the proper effect of the evidence in arriving at a decision which is not supported by National or International Law.

6. The learned magistrate erred in law in not according the appellant the required care and protection he so required as an asylum seeker according to International Law and the Kenyan Refugee Act.

7. The learned magistrate erred in law and in fact in making out excessive sentence to the appellant who was a first offender without prosecution applying for imposition of such severe sentence.

8. The learned Magistrate erred in law and in fact in ignoring the appellant's mitigation and in the alternative imposing an excessive sentence.

At the hearing of the appeal, Ng'ang'a for the appellant submitted that the appellant in his defence said clearly that his original home was Yemen where he left due to turmoil and became a refugee in Somalia where he was issued with a Refugee Certificate by UNHCR. Counsel stated that the appellant crossed the border to Kenya to look for medical

attention for his abdominal ailment and ended up at Hagadera where he was arrested when he reported an incident at a Police Station. According to counsel, the sentence imposed on the appellant was harsh and contravened refugee and human rights law as well as section 18 of the Kenya Refugee Act, which prohibited the return of refugee to their country of origin.

Counsel submitted further that a number of court decisions had been made regarding refugees in Kenya. Counsel relied on *Nairobi High Court Constitutional Petition No. 19 of 2013 consolidated with No. 115 of 2013 Kituo Cha Sheria and seven others -vs- the Attorney General*, *Mombasa High Court Criminal Revision No. 27 of 2014 Fatuma Ismael and 30 Others -vs- Director of Immigration and Director of Public Prosecutions*, as well as *Mombasa High Court Criminal Appeal No. 227 of 2012 Yusuf Noor & another -vs- Republic*.

Counsel urged that the appellant be handed over to the Department of Refugee Affairs and be accorded an opportunity to attend to his medical requirements. Counsel submitted that it would be preferable that the appellant be taken to Somalia where he had acquired refugee status, and emphasized that the appellant was not a rich man and was thus not able to pay the huge fine imposed.

Counsel closed by stating that the Refugee Affairs Secretariat and the UNHCR were the institutions best placed to handle the case of the appellant.

The prosecuting counsel Mr. Okemwa, submitted that this was a peculiar case of being unlawfully present in Kenya. Counsel observed that the appellant was found outside Hagadera Refugee Camp and that

though he said that he did not have travel documents, the evidence on record was that he had a travel document but no visa. According to counsel, the prosecution evidence was very scanty. It was also clear that the appellant was a refugee in Somalia and had come to Kenya for treatment though he said that he was a victim of human trafficking broker.

Counsel closed by submitting that he was not able to oppose the appeal for the above reasons, as he believed that the appellant came to Kenya honestly looking for medical attention. Counsel urged that the appellant be taken back to Somalia.

This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify in order to determine their demeanor. See the case of ***Okeno -vs- Republic (1972)EA 32***.

I have re-evaluated the evidence on record. I have considered the submissions of counsel both for the appellant and for the state. I have also considered the case authorities cited to me. I appreciate that the prosecuting counsel Mr. Okemwa has not opposed to the appeal.

At the trial, only one prosecution witness testified. He was police constable Noor Hassan who testified as PW1. On the side of the defence the appellant gave his own defence and did not call any other witness.

Indeed, the evidence of the prosecution was short. The appellant was convicted on that evidence. However in the circumstances of this case I do not see any miscarriage of justice counsel by the fact that only one prosecution witness testified. The witness for the prosecution stated that the appellant was brought to the Dadaab ATPU office from the Hagadera Police Patrol Base and that the appellant did not have a visa. He stated that the appellant entered Kenya through Liboi and went to Hagadera Refugee Camp, and at the time of arrest, he wanted to get to Garissa and went to the bus stop and asked for the amount of fare to get to Garissa.

On the side of the defence, the appellant said that he was from Yemen and had fled the country because of insecurity and obtained refugee status in Somalia, but crossed into Kenya in a bus through Doble and was cleared at a police check point. He stated that he met a human trafficking broker who asked for money and that he went to present his papers to UNHCR.

In both the prosecution and the defence evidence, it was clear that the appellant did not have any official visa to enter into Kenya. He was found in the heart of Kenya at Dadaab (Hagadera). He stated that he was coming to Kenya to seek medical attention, however he did not say that he informed anybody in Kenya that he was coming to seek medical attention. He did not say that he so informed the UNHCR in Somalia, who were his hosts. From his cross examination of PW1, he actually showed PW1 receipts for having attended medical treatment at Doble. However, there is no indication that he asked anybody for medical attention in Kenya before arrest. There is no indication that he made any attempt to approach UNHCR in Kenya or at Dadaab Refugee Camp – though he was already a refugee in Somalia. I find that there was adequate evidence for both the prosecution and the defence for the trial court to make a considered decision on the charges.

The two offences he was charged with were being unlawfully present in Kenya and failing to report entry to an Immigration Officer. My perusal of Section 59 of the Kenya Citizenship and Immigration Act convinces me that it does not create an offence. It does not also give the Minister powers to create an offence and prescribe sentence. It provides as follows:-

“59. The Cabinet Secretary may make Regulations for the better carrying into effect of the Provisions of this Act”.

As such in my view the charge brought under section 59 of the Act does not disclose an offence and is thus defective. I will quash conviction on count 2 and set aside the sentence thereof.

It must be stated here that though the appellant was a refugee in Somalia, he was not a refugee in Kenya and other countries of the world. His refugee status was in Somalia. That was not a permission for him to cross into other countries without complying with the relevant laws. It was an offence for him to come into Kenya without a visa. As such Count 1 was proved. I will uphold the conviction.

With regard to sentence, and repatriation, in the case of Nairobi Constitutional Petition No. 19 as consolidated with 115 of 2013 (above), the provisions of Section 8 of the Kenya Refugees Act 2006 were highlighted with regard to non refoulement principle of International Law which is enacted under the Kenyan law. Section 18 provides as follows:-

18. No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other Country or subjected to any similar measure, if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where -

(a) the person maybe subject to persecution on account of race, religion, nationality, membership of a particular social group of political opinion; or

(b) The person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or horn of that country."

The appellant herein was ordered to be repatriated to Yemen where he claimed in court that he had fled due to insecurity. He also showed through documents that he had acquired Refugee status in Somalia. It was thus wrong for the learned Magistrate to have ordered that he be repatriated to Yemen where his life was under threat. The repatriation order to Yemen in my view violated both international law and Kenyan law.

The appellant has not said that his life is under threat in Somalia. Therefore in my view he can be repatriated to Somalia.

The issue of him being handed over to the Refugee Secretariat or the UNHCR in Kenya, presumes that the appellant had been struggling to become a refugee in Kenya. He has not and there is no evidence or assertion on record to that effect. The case of **Mombasa High Court Criminal Revision No. 27 of 2014 Fatuma Ismael and 30 others -vs- Director of Immigration and another** and the case of **Yusuf Noor -vs- Republic Mombasa H. C. Cr. Appeal No. 227 of 2012** are thus distinguishable and no applicable in the present case. In my view, such handover to the Refugee Secretariat and UNHCR in Kenya would only apply to persons whom, when arrested indicated on the balance of probabilities, that they were seeking refugee status. The court cannot convert criminals to refugees simply because they have crossed into Kenya from another country. I will set aside the deportation order to Yemen and order that the appellant be repatriated to Somalia but will not order that he be handed to the Refugee Secretariate or UNHCR in Kenya.

As for the sentence of fine and imprisonment on count 1, considering the security situation in the area and taking into account that sentencing is discretion of a trial court, in my view the sentence was not generally excessive in the circumstances. However, as the appellant claimed to be a sick man, in my view the court should have seriously considered that element. I will therefore reduce the sentence to a fine of Kshs 100,000/= and in default to serve nine (9) months imprisonment.

To conclude, I quash the conviction and set aside the sentence on count 2 for failing to report entry to an Immigration Officer. I uphold the conviction on Count 1 for being unlawfully present in Kenya. I however set aside the sentence imposed and order that instead the appellant will pay a fine of Kshs 100,000/= and in default serve nine (9) months imprisonment from the date on which he was sentenced by the trial court.

As for the repatriation order, I set aside the order of the trial court and in its place I order that the

appellant be repatriated to Somalia after serving sentence.

Dated and delivered at Garissa this 7th day of December 2016.

GEORGE DULU

JUDGE