REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 1 OF 2015

DAHIR HUSSEIN……..……...……APPELLANT

-VERSUS-

REPUBLIC…….……...…
RESPONDENT

(Being an appeal from original conviction and sentence in Criminal Case No. 1277 of 2015 at Senior Principal Magistrate's Court at Kajiado – before Hon. S. Mbungi S.P.M. delivered on 28/7/2015)

JUDGEMENT

1. **Dahir Hussein**, the appellant was charged with the offence of being unlawfully present in Kenya Contrary to **Section 53(1) (J)** of the Kenya Citizenship and Immigration Act No. 12 of 2011.
2. The particulars of the charge stated that on 27th July 2015 at Covec area along Kajiado -Namanga road in Kajiado Sub-County within Kajiado County being a Somalian national was found being unlawfully present in Kenya without a valid entry permit in violation of the said Act.
3. The appellant was arraigned before the Senior Principal Magistrate Court and on his own plea of guilty to charge was convicted and sentenced to one year imprisonment.
4. From the record of the trial court dated 28th July 2015 the substance and elements of the offence was read to the appellant and upon being asked to reply confirmed the offence to be true.
5. The prosecution presented the facts of the charge facing the appellant and indeed he responded that ***"I do not have any papers allowing me to be in Kenya."***
6. The learned trial magistrate proceeded and entered an order of conviction against the appellant on his own plea of guilty and sentenced him accordingly.
7. Being dissatisfied with the sentence of the learned trial magistrate, the appellant has appealed to this court against severity of sentence.
8. In his appeal filed on his behalf by Counsel Mr. Itaya appellant relied on the written submissions dated 16/10/2015.
9. In the submissions appellant confirmed that he had pleaded guilty to the charge and was sentenced to one year imprisonment. However in his appeal he argued that the learned trial magistrate did not take into account that he was a first offender and mitigation offered to be treated with leniency.
10. In support of appellant case of **FATUMA HASSAN SALO VS. REPUBLIC CR. APPEAL 429 OF 2006**, the court stated interalia:

    "In sentencing mitigation is critical for it enables the court to arrive at an appropriate and suitable sentence."

11. In his submissions Mr. Akula, Senior Prosecution Counsel opposed the appeal and contended that the appeal lacks merit on grounds that the sentence was regular and lawful. He further submitted

that the appellant had pleaded guilty to the offence and had been convicted where the learned trial magistrate considered all factors and sentenced him accordingly.

12. In his objection Senior Prosecution Counsel asked the court to refer to the case of ***Joseph* NJUGUNA MWAURA AND 2 OTHERS VS. REPUBLIC 2013 EKLR, DAVID NJUGUNA WARUI VS. REPUBLIC 2010 EKLR** where the court stated that the role of the 1st appellate court was not to re-evaluate the evidence but to consider the evidence on the bases of law and the evidence to satisfy itself on the correctness of the decision.
13. The provisions of **Section 348** of the Criminal Procedure Code, regarding an appeal where an accused person who has pleaded guilty and convicted no appeal shall tie court on extent or legality of the sentence. He added that the Kenyan Citizenship and Immigration Act No. 12 of 2011 **Section 53(2)** prescribes the penalty for the offence of being unlawfully present in Kenya to be a fine not exceeding 500,000 or to imprisonment of three years or both.
14. The issue before me is on severity of sentence. What is the applicable law in the case of **OGOLA SIO OWUORA VS. REGINA 1954 EACA 290.** The appellate court dealt with the issue and sets out the guiding principles to deal with matters of this nature.

The court stated:

> ***"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by trial judge unless it is evident that the judge acted upon wrong principles or under-looked some material factor. To this we would add a third criteria, namely that the sentence is manifestly excessive in view of the circumstances of the case."***

15. In **GRIFFIN V REPUBLIC 1981 KLR (2)** the court of appeal held that an appellate court can only interfere with the exercise of discretion by the trial court when such discretion exercised the sentence imposed is either manifestly harsh or extremely lenient. The appellate court is also enjoined by law to interfere with discretion of the trial court where facts establish that trial courts are insulated from interference by appellate courts save in exercising their discretion in sentencing unless the statute sets a minimum sentence. That exercise of discretion is normally arrived at by a trial court taking into account several principles like; proportionality, equality and uniformity.
16. These principles guide the court in meeting the objectives of sentencing which consist of deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.
17. The above principles and objectives underpines the critical importance of sentencing decision in the criminal justice process. In exercising discretion to impose a sentence on an accused person, trial courts should be guided by above principles and objectives.

In the case of **AMBANI VS. REPUBLIC 1990 KLR** the court observed as follows:

> ***"Further, the law is that sentence imposed on an accused person must be commensurate to the moral blame worthiness of the offender and that it is thus not proper exercise of discretion in sentencing for the court to fail to look at the facts and circumstances of the case in their entirety before sentencing for any given sentence."***

18. I find support from this proposition stated in this case on the issue before me. It is clear to this court that the learned trial magistrate took into account that may be appellant was planning evil activities against Kenya hinged on terrorism to impose a custodial sentence. I have examined the record and facts presented by the prosecution and find no evidence to link accused to any plan or threat to terrorism in Kenya.
19. In the instant case the record shows that appellant pleaded guilty to the charge. He had no previous conviction. The appellant was therefore a first offender. He cooperated with the police and saved the court's time of subjecting it to lengthy trials. In his mitigation appellant pleaded for

leniency from the trial court and requested for a repatriation order.

20. In my view the learned trial magistrate did not give effect to the principles of and objectives of sentencing outlined above in this judgement to impose a custodial sentence. The appellant was charged with the offence of being unlawfully present in Kenya contrary to **Section 53(1) (J)** of the Kenya Citizen and Immigration Act.
21. The penalty prescribed under **Section 53(2)** is on conviction accused shall be liable to a fine not exceeding (500,000) five hundred thousand shillings or imprisonment not exceeding three years or both.
22. On consideration and taking into account all that has been discussed regarding sentencing. Therefore vary the order by the trial court in the following terms. Sentence against the appellant varied by imposing a fine of Ksh.50,000 in default one year imprisonment. On payment of fine the appellant be repatriated back to Somalia by the Immigration Department.

Dated and delivered at Kajiado this 2nd day of December, 2015.

R. NYAKUNDI

JUDGE

Read and delivered in presence of

Appellant

Mr. Itaya

Senior Prosecution Counsel

Mr. Mateli – Court Assistant