REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 447 of 2007
MOHAMED AYUB SHEIKH alias

MOHAMED AYUB HAJI MOHAMED SHAFFI ……. APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(*Appeal from the Judgment of the High Court of Kenya at Mombasa* (Maraga, J) dated 18th December, 2007

In

H.C. Cr. A. No. 160 of 2007)

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JUDGMENT OF THE COURT

This is a second appeal. The appellant Mohamed Ayub Sheikh alias Mohamed Ayub Haji Mohamed Shaffi, faced five charges before the Chief Magistrate's Court at Mombasa which were:-

"***Count 1,***

Unlawfully engaging in business contrary to section 13 (2) (f) of the Immigration Act Cap 172 Laws of Kenya.

Particulars:

Mohammed Ayub Sheikh alias Mohamed Ayub Haji Mohamed Shaffi: On the 26th day of March, 2007 at Al Noor Motors along Moi Avenue within Mombasa District of Coast province being a Pakistani national engaged in the business of Al Noor Motors without a valid permit or pass authorizing him to do so.

Count II

Unlawfully present in Kenya contrary to section 13 (2) of the Immigration Act Cap 172 Laws of Kenya.

Particulars:

Mohammed Ayub Sheikh alias Mohamed Ayub Haji Mohamed Shaffi: On the 26th day of March, 2007

at Al Noor Motors along Moi Avenue within Mombasa district of Coast Province being a Pakistani national was found unlawfully present in Kenya in that his visitor's pass had expired.

Count III:

Failure to register as an alien contrary to regulation 4 (1) of the Aliens Registration Order as read with section 3 (3) of the Alien Registration Act Cap 173 Laws of Kenya.

Particulars

Mohammed Ayub Sheikh alias Mohamed Ayub Haji Mohamed Shaffi: On the 26th day of March 2007 at Al Noor Motors along Moi Avenue within Mombasa District of Coast province being a Pakistani national was found to have failed to register as an alien as required by the Aliens Registration Act.

Count IV

Having been removed from Kenya in consequence of an order made under section 8 was found in Kenya while that order is still in force contrary to section 13 (1) (g) of the Immigration Act Cap 172 Laws of Kenya.

Particulars

Mohammed Ayub Sheik alias Mohamed Ayub Haji Mohamed Shaffi: On the 26th day of March 2007 at Al Noor Motors along Moi Avenue within Mombasa District of Coast Province being a Pakistani national was found in Kenya after a removal order had been made and while the same order is still in force."

On the charges having been read to the appellant by the Chief Magistrate (B. N. Olao) on 27th March 2007 the record shows that the appellant who was on that date represented by an advocate, Mr. Nyabena could not understand English or Swahili languages and an interpreter Pranjiran Jesang Denji was in Court to interpret for the appellant from English to Ulgu (sic). On that day he pleaded not guilty to all the four charges and a plea of not guilty was entered for him by the court and the case set down for hearing on 24th April , 2007, in court 13. In the meantime, the appellant acquired the services of Mr. Khatib, learned counsel who apparently replaced Mr. Nyabena. On 24th April, 2007, the appellant was absent and the hearing could not proceed. On 27th April, 2007, for reasons not recorded, the appellant and his counsel were in court and the record shows that although there was no Ulgu interpreter, and interpretation was English/Swahili, the charges were read over and explained to the appellant, who this time said in respect of each charge – "it is true" and a plea of guilty was entered against the appellant in respect of each count. Facts were read to the appellant. They are:-

"***On material day the accused who is a Pakistani national was arrested while walking (sic) at Al Noor Motors without a permit or pass. Also he was unlawfully present in Kenya and had not registered as an alien. Also he had returned to Kenya having been removed from the country. He had been declared a prohibited immigrant by the Minister in charge and removed but he came back while the order still stood. The order cannot be revoked by the Minister. The Minister had not revoked the order. That is the order."***

The appellant admitted the facts as read, and the court found the appellant guilty on plea and convicted him on all the counts. In mitigation the appellant's counsel stated inter alia:-

"***We have since applied to regularize the accused's status and this process will take three (3) months. I therefore pray for time so he can wind of (sic) his business and travel back to Pakistan. I apply for 3 months."***

In response to that plea in mitigation, the prosecutor stated :-

"***Since the order still stands, if he wants to regularize his status, he will make the application from his country then he can be given a pass to re-enter. He should therefore be removed."***

After considering the mitigation and the case, the learned Chief Magistrate in his sentence ordered a fine of Kshs.10,000/- on each of the first, second and fourth counts with a default sentence of two months imprisonment on each of the counts. He also ordered a fine of Ksh.5,000/- in default one month imprisonment in respect of the third count default sentences to run concurrently. He then stated:-

"***Accused is a prohibited person and an order removing the status stands. He must therefore be removed from Kenya. The application to be given time to regularize is registered (sic)." (***We think it should read "rejected").

The appellant was not satisfied with that decision. He lodged an appeal in the superior court – criminal Appeal No. 160 of 2007. That appeal came before Maraga, J for hearing on 11th December, 2007. The learned Senior State Counsel (Mr. Monda) appeared for the State whereas Mr. Magolo represented the appellant. Mr. Monda conceded the appeal on grounds that on 27th April , 2007, when the appellant was charged there was no interpreter and so the plea could not have been unequivocal. In his view, the appellant's rights under the Constitution had been violated. In the light of the same and as Mr. Magolo concurred with Mr. Monda, the superior court, allowed the appeal, quashed the conviction and set aside the sentence. He ordered the fine paid by the appellant to be refunded forthwith. At the end of that judgment, the learned Judge stated:-

"***The appellant being a foreigner the trial magistrate's order of deportation stands."***

This is the part of the superior court's judgment that has prompted this appeal before us. The appellant was not amused by the above remarks by the learned Judge. He filed notice of appeal against that part of the judgment. In his Memorandum of Appeal filed on his behalf by Mr. Magolo, the appellant raised the following two grounds;-

"***1. That the learned Judge of the superior court erred in law in confirming the Chief Magistrate's order after finding that the plea recorded was a nullity yet the order aforesaid resulted from the said plea.***

2. ***That the learned Judge of the superior court erred in law in making an order which clearly discriminated the appellant an (sic) account of his origin and or race."***

Mr. Magolo addressed us at length on the first ground of appeal alone. He did not touch the second ground and we need not delve into that ground. Mr. Monda opposed the appeal, arguing that it was clear from the record that the appellant was a prohibited immigrant and his stay in Kenya was thus unlawful. The learned Magistrate was, in Mr. Monda's view, right in ordering his removal.

We have set out at length the facts that were before the subordinate court and the superior court as we believe that they are necessary for the full understanding of the appeal before us and particularly for the appreciation of the part of the superior court's judgment that the appellant finds offending.

It is not in dispute, that as at the date the appellant was arrested and taken to court on 27th March, 2007, he had been declared a prohibited immigrant by the relevant Minister pursuant to **section 8** of the Immigration Act **Chapter 172** Laws of Kenya. The prosecution in setting out the facts of the case stated as we have reproduced hereinabove that the appellant was unlawfully present in Kenya. He had returned to Kenya after he had been removed from the country. The appellant was represented in the court by an advocate who understood that allegation, but even if one were to assume that he did not understand that allegation because of lack of interpretation, the appellant himself stated in his mitigation, which he must have discussed with his advocate, that he had since applied to regularize his status in the country and that would take three months. He therefore prayed for time so as to wind up his business and travel back to Pakistan. Our understanding of this, is that an order declaring him a prohibited immigrant had been issued prior to his being taken to the court and that is why he was charged in count 4 with the offence of

having been removed from Kenya in consequence of an order made under **section 8** and he was still found in Kenya while that order was still in force contrary to **section 13 (1) (g)** of the Immigration Act **Chapter 172** Laws of Kenya, **section 8 (1)** and **(2)** of the Immigration Act Chapter 172 Laws of Kenya states:-

"***8 (1) The Minister may, by order in writing, direct that any person whose presence in Kenya was immediately before the making of that order, unlawful under this Act, or in respect of whom a recommendation has been made to him, under section 26A of the Penal Code, shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.***

(2) A person to whom an order made under this section relates shall –

(a) be removed to the place from where he came, or with the approval of the Minister, to a place in the country to which he belongs, or to any place to which he consents to be removed if the Government of that place consents to receive him.

(b) If the Minister so directs, be kept in prison or in police custody until his departure from Kenya, and while so kept shall be deemed to be in lawful custody."

In our view, the fact accepted by the appellant, that by the date of his arrest and charge in court he was already a prohibited immigrant was not a matter for the subordinate court to decide upon. The Immigration Act pursuant to which the relevant Minister made that order does not provide for appeal against such an order and we were not shown the provisions for an appeal under the Minister's order. That, in effect, means that all the appellant could have done was to challenge that order by way of Judicial Review. He did not do so. The subordinate court therefore had no jurisdiction to interfere with that order even at the level of passing the sentence. It did the only reasonable thing and that was to recognize that with that order already issued against the appellant, the appellant was a prohibited immigrant whose stay in Kenya or returning to Kenya without the Minister revoking the order under **section 8 (4)** of the Act was illegal and had to be dealt with as required under **section 8 (7)** of the Act. That section provides:-

"***8 (7) An order made or deemed to have been made under this section shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly; but nothing in this subsection shall prevent the prosecution for an offence under this Act or any other within law of any person who returns to Kenya in contravention of such an order."*** (underlining supplied).

If and when such a person is prosecuted for any other offence as the appellant was in this case prosecuted, it would not, in our view, be proper to hide under that other prosecution to seek to avail himself the remedies against the Minister's order which he never challenged.

The learned Judge of the superior court, likewise, could not have ordered stay of the appellant in the country as in any case there was no such application properly made under the law for such an order. He had dealt with the charges that were before the court and quashed the convictions entered against the appellant pursuant to those charges but clearly the fact that not withstanding, his allowing the appeal on those charges, the Minister's order against the appellant declaring him prohibited immigrant still remained and could not be ignored; he could not remain in Kenya despite that order by the Minister. In our view the learned Judge took the right action on the matter. The appellant's only plea to the Magistrate was for him to regularize his status. He could do that even if he was outside the country.

The above being our view of the matter, we do not see enough reason to disturb the decision appealed from. It will stand. The appeal is dismissed.

Dated and delivered at Mombasa this 23rd day of January, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.