REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 26 OF 2015

LIBAN HUSSEIN ALI *alias*

ABDIRASHID MOHAMED ALASOW……APPELLANT

-VERSUS-

REPUBLIC……..……..……..…PROSECUTOR

(Being an appeal from original conviction and sentence in Criminal Case No. 968 of 2015 at Senior Principal Magistrate's Court at Kajiado – before Hon. S. Mbungi (SPM) on 27/7/2015)

JUDGEMENT

1. The appellant **Liban Hussein Ali** alias **Abdirashid Mohamed Alasow** was charged before the subordinate court at Kajiado with two counts.

2. The first count of being unlawfully present in Kenya Contrary to *Section* 53(1) (I) as read with Section 53(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The second count of presenting a forged document for the purpose of obtaining travel documents namely identity card Contrary to Section 54(1) (a) as read with Section 54(2) of the Kenya Citizenship and Immigration Act 2011.

3. The brief fact on both counts were that on 23rd day of June 2015 at Namanga Immigration Office in Kajiado Sub-County within Kajiado County being a Somalian citizen was found being unlawfully present in Kenya and that on the same day regarding count two at Immigration Office Namanga presented a forged Identity Card No.24354096 for purposes of getting a travel document in contravention of the Citizenship and Immigration Act of 2011.

4. The appellant pleaded guilty to both counts and was convicted and sentenced one year imprisonment on each count. The sentence was to run concurrently.

5. The appellant was dissatisfied and lodged an appeal against both conviction and sentence before this court.

6. The appellant in his petition of appeal filed on 25/9/2015 through Itaya & Co. Advocates raised six grounds namely

a.The honourable magistrate erred in law and fact by failing to consider the charge sheet was defective, since the charge was not supported by particulars.

b. That the entire proceedings, judgement, conviction and sentence was nullity.

c. That the honourable magistrate erred in law and fact by failing to consider the appellant as a first offender.

d. That the honourable magistrate erred in law and fact by failing to consider the principles of sentencing.

e. That the honourable magistrate erred in law and fact by failing to consider the appellant's mitigation.

f. That the honourable magistrate erred in law and fact by imposing a harsh and severe sentence without the option of a fine.

7. The appeal was disposed off by way of written submissions.

8. Mr. Itaya, the learned counsel for the appellant, submitted before us regarding the defects in the charge sheet bearing offences against the appellant. In his submissions Section 53(1) (I) in respect of count one does not deal with the offence of being unlawfully present in Kenya but on conditions imposed on a permit.

9. As regards count two he submitted that Section 54 (1) does not relate to the offence of forgery as the indictment against the appellant states.

10. He further submitted that the sentence by the learned trial magistrate did not take into account mitigation nor gave reasons how he arrived at the decision on sentencing. He referred to the provisions of Section 53(2) and Section 54(2) of the Kenya Citizenship and Immigration Act which provides for an option of a fine.

The case of **FATUMA HASSAN SALO VS. REPUBLIC CR. APPEAL NO. 429 OF 2006** was referred to by counsel to buttress his argument on sentencing where the law provides for an option of a fine.

11. Mr. Akula the learned prosecution counsel submitted and mentioned that the appellant was properly charged, convicted and sentenced on both counts under the Citizenship and Immigration Act 2011 of the Laws of Kenya.

12. Mr. Akula referred this court to the case of **JOSEPH NJUGUNA MWAURA & TWO OTHERS VS REP 2013 KLR** and **DAVID NJUGUNA V REP 2010 KLR**

On the duty and role of the first appellant court.

That duty being to analyse and re-evaluate the evidence which was before the trial court in order for the appellant court to draw its own conclusions on that evidence taking into account the findings of the trial court.

13. On the question of sentencing Mr. Akula submitted that the learned trial magistrate exercised his discretion properly by applying the provisions of Section 53(2) and Section 54(2) of the Kenyan Citizenship and Immigration Act No. 12 of 2011.

According to the provisions referred to they both provide for an option of a fine and an imprisonment

term or both. The result according to the learned prosecution counsel was therefore appellant was properly sentenced to one year imprisonment on each count.

14. I have considered the record and proceedings of the lower court constituting plea taking, facts presentation, decision on conviction and sentencing. The rival submissions by learned counsels for the appellant and respondent. The applicable law and principles on matters of this nature has also been taken into account.

15. From the record and before dealing with grounds of appeal one critical issue emerged relating to plea taking.

The celebrated case of **ADAN VS. REPUBLIC 1973 EA 443** sets out the procedure of plea taking as follows;

a. The charge sheet and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

b. The accused's own words should be recorded and if they are an admission a plea of guilty should be recorded.

c. The prosecution should then state the facts and the accused should be given an opportunity to dispute or explain or to add any relevant facts.

d. If the accused does not agree with the facts or raise any question of his guilty, his reply must be recorded and change of plea entered.

e. It there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused reply should be recorded.

16. Article 50 of the Constitution provides **safeguards of an accused person right to a fair hearing** of relevant to this case is a right to have the assistance of an interpreter under Article 50 (2) (M). The assistance of an interpreter is to enable an accused person to be explained in sufficient details elements of the offence and particulars thereof before he answers to the charge.

The procedure on plea taking is also underlined under Section 207(1) (2) of the Criminal Procedure Code. The gist of the section is that the substance of the charge facing the accused persons shall be read to the accused persons. The nature and details of the trial court recording is clearly set out.

17. The trial court record has been examined in its entirety and reveals the following;

i. The language of the accused preference in conduct of the proceedings is not known.

ii. The trial magistrate did not inquire from the accused which language he understands clearly in particular to right to be explained the charges facing him.

18. There is evidence of an interpreter in court as an interpreter but which language he was interpreting is not indicated.

The coram section of the record has details of interpreter English/Swahili but for whose benefit the language was aimed at not clear from the record at plea taking.

19. The constitutional rights of an accused person under Article 49 (1) and rights to a fair hearing under Article 50 of the Constitution 2010 has the threshold to be complied with by courts in administration of criminal justice. One of the fundamental rights for accused person is in respect of language and being availed an interpreter during trial of a case.

20. The perusal of the trial court record on plea reads as follows:

"Charge read over to the accused in English language which he responds and says:

Count I – It is true

Count II – It is true

A plea of guilty entered."

There is no evidence that accused person had been asked preferred language for purposes of the proceedings. I am of the conceded view that the plea taking before the learned trial magistrate was not unequivocal.

21. The second ground in this appeal related to the defective charge sheet.

The appellant was charged in court with the offence of being unlawfully present in Kenya contrary to Section 53(1) (I) as read with Section 53(2) of the Kenyan Citizenship and Immigration Act No. 12 of the Laws of Kenya.

I have perused the Act and Section 53(1) (I) does not exist to create an offence of being unlawfully present in Kenya.

Section 53(1) (2) provides for general offences under the Act with a prescribed punishment under Section 53(2). The penalty spelt out upon conviction of an offender on any of the offences being Ksh.500,000 or to imprisonment for a term not exceeding three years or both.

22. As regards count 2 accused was charged of presenting a forged documents for the purposes of obtaining travel documents namely identify card Contrary to Section 54(1) (a).

The offence under Section 54 (1) (a) is described as:

"Makes, whether within or outside Kenya, a false declaration or statement, which he knows or has reasonable cause to believe to be false or misleading, for the purposes of obtaining or assisting another person to obtain a passport, travel document, citizen registration, visa, work permit, residence permit pass, written authority, consent or approval under this Act."

23. From the record it is quite clear that exist variance between the charge under Section 54(1) (a) and facts adduced by the prosecution in support of the charge. It is clear from the reading of Section 53(1) and Section 54(1)(a) of the Kenya Citizenship and Immigration Act No. 12 of 2011 did not refer to the specific section which creates the offences of which accused was charged of. My view is that there was no offence and proper charge against the appellant to plead. The charges as framed and read were defective.

24. This can be demonstrated by the brief facts which the learned magistrate relied upon to convict the

appellant.

"On 23rd June 2015, the accused at Namanga Immigration Office presented ID No. 24354096 purporting to be ABDIRASHID MOHAMMED ALOSOW to Immigration officer – Wilson Mutunga.

He also presented 3 photographs for purposes of applying for pass permit to travel to Tanzania. The Immigration officer suspected the images of that person together with the ID and 3 photographs (passports).

The accused was then not talking, and he interrogated the accused. The accused could not speak Swahili fluently. The accused has Somali passport that was recovered from him. The passport was in the names of the accused. A Somali ID Card be also recovered from the accused. The accused was then charged as present. I produce the ID cards and passport as exhibits."

25. The above recapitulation of the facts of this case and the law raises the following pertinent questions;-

(i) Whether the prosecution proved the ingredient of the two counts beyond reasonable doubt.

(ii) Whether the facts as presented before the trial court met the test of unequivocal plea of guilty.

This principle was elucidated in the case of **BUKENYA VS. UGANDA EA 341** on **pg 343 Sir. Udo Odoma C.J** stated:

"In REPUBLIC VS. YONASAMI EGALU AND OTHERS 1945 9EACA 65, it was laid down as a matter of law that, in any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take plea of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution). It is most desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every constituent of the offence, and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and plead thereto unequivocally."

26. It was the duty of the learned trial magistrate to assess properly the link between a plea of guilty and the facts laid before him by the prosecution. I am of the holding that trial court should endeavour to avoid omnibus facts to ensure clarity and prove of each ingredient of the charge by the facts presented at the time of plea.

27. In the instant case the appellant was found in possession of Somalian passport and identity card bearing his names. The trial court was not told what difficulty appellant faced by the appellant in using the passport bearing his name nor his identity card.

28. The prosecution did not adduce evidence that the passport and identity card in the names of appellant were not genuine to be used as travel documents.

29. This is a case where the record is clear that appellant had language barrier to communicate with the Immigration officer at Namanga.

30. It is also clear from proceedings of the trial court that no efforts were made by the Immigration officer to avail an interpreter at the time of arrest and interrogation.

31. I consider this to be a violation of Article 49(1) (a) of the Constitution 2010 which provides:

"An accused person has the right to be informed promptly, in language that the person understands, of the reason for the arrest……."

32. I am of the finding that the appellant in this case was prejudiced in the manner and reasons advanced by this court.

33. The part of Adan's case referred to above echoes the general concern of the courts on convicting an accused person without ascertaining that he understands the charge. It was held interalia;

"The courts have always been concerned that an accused person should not be convicted on his own plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education and does not speak the language of the court."

34. The appellant was convicted to one year imprisonment on each count.

Section 53(2) prescribes the penalty of various offences upon conviction or fine Ksh.500,000 or to imprisonment of three years or both.

In respect of count 2, Section 54(2) provides for a penalty of Ksh.5,000,000 or imprisonment of 5 years or both.

35. On sentencing each case must be considered by trial court taking into account peculiar circumstances. In this case the appellant submitted that the sentence of one year imprisonment was harsh. The learned senior state counsel argued that the sentence of one year imprisonment was appropriate.

36. In examining the record the appellant was a first offender. The appellant readily admitted the offence. This court takes cognizance that sentencing is a matter of discretion by the trial court. However in exercising that discretion one has to act judiciously and be guided by sentencing principles.

37. In my considered view where an act of Parliament provides for options in respect to sentences to be imposed, then the court must be guided accordingly.

38. I have in mind where sentences to be imposed is a fine or a term of imprisonment or both; as it is the case in the Kenyan Citizenship and Immigration Act. It is appropriate for the sentencing court to consider the option of a fine at the first instance unless there are compelling reasons to be recorded in opting for a term of imprisonment. That being the case, this court could have varied the sentence to that of an option of fine against the appellant.

39. The upshot in view of the findings I have alluded to come to the conclusion that conviction against the appellant be quashed and sentence set aside.

Accused is at liberty unless lawfully held.

Dated and delivered at Kajiado this 23th November, 2015.

R. NYAKUNDI

JUDGE

In the presence of

Mr. Itaya for appellant

Mr. Akula – Senior State Counsel

Appellant

Mateli Court Assistant