THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

CRIMINAL APPEAL NO 8 OF 2009

YAKUBU BUKENYA ………………………………… APPELLANT

VERSUS

UGANDA ………………………………. RESPONDENT

BEFORE: HON. LADY JUSTICE FAITH MWONDHA

JUDGEMENT

This appeal was brought before me by counsel for the appellant Ms Bakiza and Co. Advocates; the appellant was appealing against the judgment and decision of the Chief Magistrate His Worship Deo Nzeimana dated 17th of November 2008. The appellant was convicted of the offence of unlawful return of a deported person contrary to S. 66 (3) of the Uganda Citizenship and Immigration Control Act and was sentenced to two years imprisonment. The grounds of appeal as embodied in the memorandum of Appeal were as follows;

1. The learned trial magistrate erred in law and fact when he decided that the deportation of the appellant from Uganda to Cameroon when there was in existence an interim order of the High Court at Nakawa to stay such deportation was valid.

2. The learned trial magistrate erred in law and fact when he concluded that the interim order of the High Court at Nakawa had been overtaken by the order of the Minister of Internal Affairs to deport the appellant and to remain out of Uganda indefinitely.

3. The learned trial magistrate erred in law and fact when he failed o evaluate the evidence on record and erroneously concluded that the appellant having been deported contrary to

the interim order of the High Court, his return to Uganda under another passport with a valid entry visa was unlawful.

4. The learned trial magistrate erred in law and fact when he imposed a harsh and excessive custodial sentence without taking into consideration the circumstances that the appellant is a first offender and is married to a Ugandan citizen with children.

As counsel for the appellant correctly submitted, the duty of the first appellate court is to evaluate and scrutinize the evidence on record afresh to facilitate it to come up with its own independent decision.

I am in agreement with the decision in the cases cited by counsel for the appellant on this issue. This was a criminal case which the state had a burden of proof throughout the trial beyond reasonable doubt and the burden of criminal cases does not shift. It is always on the prosecution. S. 101 of the Evidence Act Cap 6, provides that;

1. Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of the facts which she or he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

From decided cases by superior courts, they have held that the prosecution has to bring the guilt of the accused person home beyond reasonable doubt, see **Sekitoleko Vs Uganda (1967) EA 531**. The conviction is only based on the strength of the prosecution case but not on the weakness in the defence case, see **Ntura Vs. Uganda (1973) HCB 103**. The prosecution in this case had to prove beyond reasonable doubt the following ingredients that;

1. The accused/ appellant was deported.
2. He returned to Uganda while was prohibited.
3. The return was without the permission of the Minister.

Exercising the duty of the first appellate court of evaluating and scrutinizing the lower court record I observed that the charge sheet was defective on the face of it. The drafting of the same, both the statement of offence and the particulars of the offence fell short of what was required as S. 88 provides of the CMA which is in respect of Rules for framing of charges. The appellant was deported under S.52(c) of the Uganda Citizenship and Immigration Control Act Cap 66. It was not stated in the charge sheet to fulfill the ingredient 2 of a prohibited immigrant which required that he obtains permission to return or be in Uganda. But even if one was to argue that the charge sheet was proper which was not the case in the instant case, I find the following;-

1. That on ingredient 1 and 2 as above stated there was evidence on record to prove that the appellant was deported and he returned to Uganda and this was proved beyond reasonable doubt.

For ingredient number two, there was no evidence on record apart from the deportation order to prove that he was prohibited. That is why even at Katuna he was given a 3 months' visa while in the country.

As far as the third ingredient is concerned, the evidence surrounding it was as follows bearing in mind that the accused/appellant had pleaded not guilty. PW1 testified among others that around May 2007, the appellant had an immigration issue and was arrested. That when the matter was investigated, it was found that his visa had expired and therefore was staying in Uganda illegally. That deportation papers were signed to deport him back to Cameroon being a Cameroonian. That he was deported in October 2007. That they learned that he sneaked in the country. That he was traced and arrested was detained. That when the deportation order was made, he was assigned the duty to escort him to Yaounde and he photocopied his passport issued on 27th of November 2006, passport number 01121484. He again stated that he was deported on 15th of September 2007 and he came back on 27th of October 2007 with another Cameroonian passport. I noted that he was inconsistent on the time the appellant was deported. That he entered Uganda through Katuna Entry point. The court received passport No. 01183916 issued on 18/09/2007 and it was exhibited and admitted as EXP 3.

In cross examination he stated that when he arrested him in April 2007 he was taken to the immigration office for interrogation and he was later detained at Jinja Police station. That by the time he was arrested he had the passport and that he did not remember the accused/appellant telling him that he lost his passport. That the accused did not give him the police report reference number reporting the loss of his passport. That at first the accused was taken to the airport in July 2007 but he did not board the plane and that he did not know why he was not put on the flight (one wonders why this witness says that and yet there was a deportation order). He appears to be not truthful as he is concealing information. He said that the deportation order was signed in May 2007 and he claimed to be seeing the interim court order staying the deportation at that time in court. He stated that when the first attempt failed, the accused/appellant went to the immigration office wanting to see the Minister but he did not see him. That he re-arrested him and was put in further custody. He denied having seen the court order.

The accused/appellant in his defence stated that he one time went to the immigration office to see the Minister of Internal Affairs. That he met an immigration officer who arrested him and was taken to JATT where he was detained for a week and then was escorted to the airport and handed over to the immigration officer in Yaounde. That while in Cameroon he contacted his relatives in Uganda who told him that his wife was about to deliver. That he secured another passport and came back to Uganda where he was granted three months visa at the Katuna Entry point. He went to his family and a few days later he was arrested by immigration officers who took him to Jinja Road Police Station and later was taken to Court. He told court that his first passport got lost and he had reported at police and he did not report back to any police station when he came back in the country.

From the above foregoing it is apparent that it was the immigration officers who mismanaged the whole process. PW1 stated that the accused/appellant came back after the failed deportation in July 2007 after the deportation order had been issued in May 2007, and he was denied the opportunity to see the Minister so that he can be heard on his predicament. Indeed the appellant also affirms this. There is no explanation by PW1 why he did not facilitate the appellant to be heard by the Minister. He even went ahead to lie to court that he did not know why the appellant was not put on flight in July 2007. He was obviously aware of the interim order issued by High

Court Nakawa in June 2007 staying the deportation until the main application was disposed. He denied the appellant the opportunity to be heard and this was in bad faith on part of PW1. The reason for deportation was that his visa had expired. When he came back he had a valid passport with a visa through the Uganda official entry points.

I also find that the prosecution left a lot of gaps in its case in that they could not perforate the defence of the accused/ appellant. There was no evidence to the effect that the Minister denied him the permission. If the appellant went to see the Minister and the Minister insisted that the deportation should ensue and gave orders that he should return by his permission this would have gone a long way to prove the prosecution case beyond reasonable doubt as far as the third ingredient was concerned as per S. 66 (3) of that Act. PW1 was not the Minister and there was no evidence that when he refused the accused/appellant to see the Minister, he was working on the instructions of the Minister that the appellant should be deported and should not come back except with the Minister's permission. In his testimony, the accused/appellant had stated that the passport had got lost and he even made a report to the police. He stated that it was recovered outside in front of his house. And this was not unusual.

To prove the prosecution case beyond reasonable doubt to warrant conviction, the police must have made its case water tight to disprove the accused/appellant defence so as not to be sustained. If PW1 had not denied the accused/appellant to access the Minister bearing in mind that there was a valid interim order which was granted by court in the presence of representative of the state, these immigration issues would have been sorted out either way. The accused/appellant had so many other favourable circumstances which existed, the fact that he was born at Mulago hospital in Uganda on the 1st of February 1978. That his father was Peter Bukenya of Bugerere. This was on the birth certificate issued by the Registrar General of Births and Deaths. He had a family and was married to a Ugandan wife. The fact that he was holding a Cameroonian passport in the absence of any evidence to show that he renounced his birthright in Uganda, it would be inhuman to say the least and discrimination of the first orders. Article 21 of the Constitution is clear on this. Article 10 of the Constitution provides for persons who shall be citizens of Uganda by birth and it is also clear. In order for the prosecution to prove their case beyond reasonable doubt, it had to adduce evidence that the appellant was not a Ugandan by birth which it did not attempt to do at all. How can a country close out its own?

Additionally, PW1 could not have expected the accused/appellant to get permission of the Minister to return by proxy considering our level of development. If the appellant just sneaked in this country secretly in non official entry and without a valid traveling document, this would have been a big immigration issue as to what his intentions were in Uganda. PW1 testified that he accessed entry through Katuna Entry Point and he was given a three months' visa. Katuna Entry Point is an official Entry Point. He was arrested on his alleged illegal return, there was no resistance, he endured the suffering when the charge sheet was defective.

It is amazing that the trial court found his return illegal when in the first place his deportation was not justified at all in light of the interim order issued by the superior court to the trial magistrate's court. It is worth noting that the accused/appellant was arrested in July 2007 and he was in detention until September 2007 when he was accompanied by PW1 to Yaounde. The interim order was issued in June 2007 and the interim order, much as it was signed in May 2007, the first attempt to deport him was in July 2007 and in fact it could not be effected because the officers at the airport learned of the interim order. So the persistent deportation was in actual contempt of court and there is no way the trial Magistrate could have overlooked the hearing down of the integrity respect independence of courts of law. The issue of the deportation order overtaking the interim court order could not arise. This was a lawful and legal order which ought to have been adhered to by everyone concerned in the matter until it was varied. This is the only way the rule of law can be upheld.

From the evidence on record it is also clear as summarised above that the trial Magistrate failed miserably to evaluate the evidence on record, as a result, he came to wrong decisions and conclusions. The prosecution failed to prove the third ingredient beyond reasonable doubt. There was no request put to the Minister and he refused. The court was speculating absence of permission that is why there was an application before court. The passport which PW1 photocopied never showed that he had been deported and therefore was a prohibited immigrant as per S. 52 (c) of the Uganda Citizenship and Immigration Control Act. The deportation order perse in my view was not conclusive evidence that he is prohibited.

DRAFT

The learned State Attorney submitted on ground four that the appellate court will only interfere with the discretion of sentencing by a Magistrate if the sentence is illegal or if the sentence imposed is manifestly excessive to amount to an injustice see **Kyalimpa Edward Vs. Uganda SCCA N0.10/95.**

From what I have observed from the record as stated it is apparent to me that the sentence was manifestly excessive. I have already given the reasons above. If the players (PW1) not manifestly biased and concealed the truth by not disclosing to the Minister that, there was an interim order from the high court staying the deportation. PW1 closed the appellant's opportunity to explain his position in July 2007 to the Minister of Internal Affairs among others. Utmost the trial Magistrate should have sentenced him to pay a fine since the law provides for it and it would have been appropriate in the circumstances if the charge sheet was proper. As I said earlier the charge sheet was defective. From the above foregoing, the appellant succeeds on all four grounds. It is unfortunate that the appellant was subjected to abuse of his human rights unjustifiably after having been denied all avenues to be given a right hearing before the Minister.

Accordingly, this court finds it appropriate to set aside the lower court judgment and quash the sentence imposed of two years' imprisonment. He is acquitted and set free. The accused/appellant applies for bail pending appeal which was granted by this court. It is ordered that the security money deposited with government be refunded to him accordingly.

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FAITH MWONDHA

Judge

17/06/10

DRAFT