



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL REVISION NO. 46 OF 2020

(CORAM: R. E. ABURILI - J.)

SALIM OSMAN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Application for Revision of sentence vide Criminal Case No. 28 of 2020 in the Senior Resident Magistrate's Court, Ukwala dated 4.3.2020 before Hon. C.I. Agutu, SRM)

RULING

1. The convict **Salim Osman** was sentenced to serve six (6) months imprisonment by Hon. C.I. Agutu, SRM, Ukwala on 4/3/2020 for the offence of being in possession of narcotic drugs contrary to **Section 3(1) as read with 3(2)(b) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**.
2. According to the court record, the convict pleaded “guilty” to the charge and facts of the case were “as per the charge sheet.”
3. The language in which the charge was read to the convict is not indicated albeit the court record shows that proceedings were conducted in English/Kiswahili/Dholuo. Therefore, it is not clear in which language the convict herein said, **“it is true”**.
4. Nonetheless, it is important to outline the trial court record as it is.
5. On 27/1/2020, the accused appeared before Hon. C.I. Agutu, SRM, Ukwala , and after the charge was allegedly read to him in undisclosed language, he is said to have said:

“it is true.”

6. The record continues:

State counsel: I pray for a mention in 2 weeks for facts.

Court: Mention on 10th February 2020.

Signed.

27.1.2020”

7. On 10.2.2020, the matter was mentioned before Hon. C.N. Sindani, SRM who rescheduled the mention for 13.2.2020 as the facts could not be read because the report from the Government Analyst had not been availed.

8. On 13.2.2020, the report from the Government Chemist was again not ready so the Hon. C.N. Sindani directed the file to be mentioned before the trial magistrate on 19/2/2020, and on the latter date, the matter was before Hon. C.I. Agutu, SRM and the trial record is as follows:

“19/2/2020

Before: Hon. C.I. Agutu, SRM

SC: Munyolo

C/C: Jacinta

Accused: present State Counsel: Facts as per the charge sheet Government Report: Exhibit one Bhang: Exhibit 2

Court: Area facts rights?

Accused: Facts are correct

Court: Mitigation before sentence

Accused: I have no mitigating factors

Court: Probation Report on 4th March. Meanwhile to be taken to Siaya G.K. Prison.

Signed.”

9. Later on 4/3/2020 the trial court record shows as follows:

“Before: Hon. C.I. Agutu, SRM

SC: Munyolo

C/C: Jecinta

Accused: Present

Court: The Probation Officer has presented the report.

Court: The accused person is sentenced to serve six months imprisonment at Siaya G.K Prison.

Signed.”

10. That is basically the trial court record and the orders which sent the convict to prison for 6 months from 4.3.2020.

11. In the meantime, I observe that the convict herein had been arrested on 26/1/2020, arraigned on 27/1/2020 and remained in custody until 4.3.2020. From 26/1/2020 to date are two months and 4 days.

12. The strange thing about the sentence as imposed on the accuse now prisoner is that:

(1) There was no plea of guilty entered.

(2) There was no conviction of the accused by the trial court.

(3) The language in which the charge was read out to the accused is not indicated.

(4) There were no facts of the case read out to the accused.

13. The Probation Report dated 3/3/2020 showed that the convict was unsuitable for non-custodial sentence because he had on 13/4/2018 been placed on Community Service Order (CSO) for 60 days at Ugunja Probation Office but he absconded the sentence and that efforts to trace him, were futile until a warrant was issued on 7.6.2018 vide ***Cr. Case No. 128/2018.***

14. The Prisoner is also said to have been arrested while smoking bhang in the company of his friends. He is a Muslim, Club DJ and barber and is married.

15. My conclusion is that there was no plea taken and there was no conviction entered against the prisoner herein. He is serving an illegal sentence.

16. Accordingly, I find and hold that the proceedings leading to the conviction and sentence of the prisoner herein Salim Osman for 6 months were irregular. The plea was equivocal by all means.

17. I invoke the provisions of **Section 362, 364 of the Criminal Procedure Code and Article 165(6) and (7) of the Constitution** and quash the proceedings and sentence of six (6) months imprisonment imposed on the prisoner Salim Osman.

18. As the convict has already served 2 months of the six months' imprisonment, inclusive of the time spent in remand prior to his unprocedural sentencing, I hereby order that the convict **Salim Osman** shall forthwith be released from prison, unless otherwise lawfully held.

19. Orders accordingly.

Dated, signed and Delivered at Siaya, this 30th Day of March, 2020.

R.E. ABURILI

JUDGE