



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL REVISION NO E005 OF 2020

GARBE BEKELE ADO & 16 OTHERS.....APPLICANT

VERSUS

RESPONDENT.....REPUBLIC

RULING

1. The application dated 7th October, 2020 is essentially seeking revision of sentence passed against the applicants to serve a jail term of six months without an option of fine. The application is premised upon grounds set out in the application and the affidavit in support sworn by Garbe Bekele Ado. The major arguments presented are:

- a) That the prosecution did not give any previous records of conviction of any of the accused.
- b) That the applicants are first offenders
- c) That the offence has an option of fine
- d) As such, a jail term without an option of fine was harsh. On that basis, the court should revise the sentence and give an option of fine.

2. The prosecution opposed the revision of sentence for the reason that the offence of being illegally in Kenya is quite prevalent in that area. The DPP was of the view that in the circumstances a deterrent sentence was appropriate. According to them, the sentence passed was without an option of fine serves as deterrent. DPP therefore, asked the court to dismiss the application.

ANALYSIS AND DETERMINATION

3. I have perused ISIOLO CMCCRC NO. 570 of 2020, No. 571 of 2020 & 566 of 2020 in order to satisfy myself of the correctness, legality or propriety of the sentence passed by the trial court upon the applicants. The applicants were charged with the offence of being unlawfully present in Kenya contrary to section 53 (1) as read with section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The penalty clause is section 53 (2) which provides as follows:

“(2) Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both;”

4. From the section, a sentence of 6 months is legal. The section also provides for an option of fine; and the trial magistrate noted that fact. But the trial magistrate justified why he did not give them the option of fine; that there were aggravating circumstances in these cases which warrants a deterrent sentence of a jail term without the option of fine. The trial court observed that cases of foreigners being in the country illegally was quite prevalent in that area. He even cited cases where over 35 persons had been charged with this offence. Of proximate value; on the day the applicants were charged, the trial magistrate noted that 12 other foreigners had been charged with being in the country illegally.

5. Further, the trial court noted that the offence is a threat to national security because these individuals are passing through illegal entry points which may be used by terrorists to enter the country.

6. That is not all; the applicants also avoided the legal border entry points, thus, coming in without being tested for COVID-19. This is a great risk and exposure of citizens to the disease.

7. In addition, the trial magistrate noted that the applicants were trying to illegally obtain identity cards in Kenya.

8. Recapitulation of all these matters brings me to the conclusion that, in these circumstances, the trial court rightly formed an opinion that fine may not produce the deterrent effect required in these cases, and correctly imposed a jail of six months without an option of fine. He also ordered repatriation immediately upon completion of sentence.

9. I should state that the Penalty section provides for a jail term, fine or both. In cases where there are aggravating circumstance such as prevalence of the offence etc. deterrence will serve a much higher return in the prevention of crime. A jail term without an option of fine is justified in law in this case. In more severe cases, the court may even impose both a jail term and fine. These cases were perfect for a sentence of a jail term without an option of fine. I do not find anything illegal or improper or harsh with the sentences imposed. Accordingly, I dismiss the application. I however buttress that upon completion of sentence the applicants shall be repatriate back to their home country as earlier ordered by the trial court.

It is so ordered.

Dated, signed and delivered at Narok this 25th day of November 2020

F. GIKONYO

JUDGE