REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NOS.175 & 176 OF 2019

(An Application arising out of the sentence of Hon. B. Ochoi- SPM

delivered on 10th June 2019 in Nairobi (Milimani) CM. CR. Case No.2032 of 2018)

LUBEGA SHARIF alias

TOSKIN OCHIENG OJENDE.....1ST APPLICANT

PAUL OJENGE DEDE.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants, Paul Ojenge Dede and Lubega Sharif *alias* Toskin Ochieng Ojende are father and son. They were charged with the offences under the **Kenya Citizenship and Immigration Act**. The 1st Applicant was convicted of **making a false declaration** contrary to **Section 54(1)(a)** as read with **Section 54(2**) of the **Act**. He was sentenced to pay a fine of Kshs.2,000,000/- or in default he was to serve three (3) years imprisonment. The 2nd Applicant was convicted of **giving misleading information to an immigration officer** contrary to **Section 53(1)(a)** as read with **Section 53(2**) of the **Act.** He was sentenced to pay a fine of Kshs.400,000/- or in default serve twelve (12) months imprisonment. Both Applicants are not challenging their conviction. They have, however, made an application to this court for review of their sentences.

The 1st Applicant stated that he was very remorseful. He was a first offender. He was the sole breadwinner of his family. He stated that he suffered from severe spinal cord dislocation which made his stay in prison difficult due to lack of appropriate medication. He pleaded with the court to consider his circumstances and reduce the custodial sentence that was imposed upon him. On his part, the 2nd Applicant stated that he was remorseful. He was a first offender. He was the sole breadwinner of his family who depended on him both financially and psychologically. He pleaded with the court to consider his age when determining the appropriate sentence that should be meted on him. Prior to considering this application, this court ordered for a probation report to be prepared in respect of the Applicants. This court has read the probation report and will be guided by it in reaching its determination.

When the trial magistrate sentenced the Applicant to serve the custodial sentences, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another – vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

> ***"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated thus:***
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> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist."***

In the present application, it was clear to the court that the trial court properly exercised its discretion when it sentenced the Applicants to serve the custodial sentence that was imposed upon them. The sentence was legal. However, this court is of the view that taking into consideration the circumstances in which the offence was committed the same was harsh and excessive. The mitigating circumstances of the Applicants, especially the 2nd Applicant, were not taken into account. That being the case, this court is of the view that the Applicants made a case for this court to revise their sentences.

In the premises therefore, the default custodial sentence of three (3) years imprisonment that was imposed on the 1st Applicant is hereby set aside and substituted by a sentence of one (1) year imprisonment. The sentence shall take effect from 10th June 2019 when the 1st Applicant was convicted. In respect of the 2nd Applicant, the court has taken into account his age and the mitigating circumstances that appear in the probation report. This court formed the view that the 2nd Applicant has sufficiently been punished in the period that he has been in prison. In the premises therefore, the default custodial sentence that was imposed upon him is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2019

L. KIMARU

JUDGE