



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 3 OF 2018.

BETWEEN

ISSA ABDIKADIR OSMAN.....APPLICANT.

AND

REPUBLIC.....RESPONDENT.

RULING

1. Issa Abdikadir Osman, the Applicant herein filed the instant application seeking revision of the sentence under Article 50(2) of the Constitution and Section 362 and 364 of the Criminal Procedure Code. He asked for an affordable amount of fine or a non-custodial sentence.

2. The Applicant was charged with three counts contrary to Section 54(1) of the Kenya Citizenship and Immigration Act, 2011. The sentencing provision is Section 54(2) of the Act which provides for a fine not exceeding Kshs. 5,000,000/- or imprisonment not exceeding five years. The Applicant was found guilty on all the counts and sentenced to pay a fine of Kshs. 200,000/- in each count in default serve six months imprisonment respectively. The sentences were to run consecutively. The Applicant is serving the default custodial sentences which by law must run consecutively.

3. He averred that both the imprisonment period and the fine were punitive and excessive. He swore that while the matter had two witnesses only one testified, the investigating officer. That he was the father to two children whose future was halted due to his incarceration and his jobless wife was finding it hard to take care of the family. He added that his mother was suffering from blood pressure and he was the only one who used to take care of her health but since his conviction her health had deteriorated.

4. The application was canvassed before me on 11th April, 2018. The Applicant reiterated the content of his supporting affidavit. He added that he had been in remand custody for more than 8 months and that he had now served 6 months of his sentence. Learned State Counsel, Ms. Sigei for the Respondent opposed the application. She submitted that the time the Applicant had spent in remand was taken into account as it was part of his mitigation. Further, that the trial court had been very lenient on account of the penalties provided by the law. She submitted that the Applicant was only sentenced in November, 2017 and was therefore yet to learn his lesson.

DETERMINATION.

5. The circumstances of the case, as gleaned from the judgment of the court were that the Applicant induced one Hany R.A.H. Matar to believe that he could procure a work permit on his behalf but instead, and after being paid for the services gained a counterfeit work permit and got a false endorsement made to the complainant's passport. After the ruse was discovered he was lured to a meeting with a potential client where he was arrested. He charged the proposed customer Kshs. 150,000/- and later USD 500.

6. It is apparent that the Applicant spent eight months in remand which period he urges the court to consider as part of the sentence. In sentencing, the court took into account the Applicant's mitigation. It is therefore clear that the trial court was cognizant of the remand period when it meted out the sentence. Further, sentencing is a discretionary power to be exercised by the trial court and this court is always wary when interfering with the exercise of this discretion. It will not interfere with the discretion unless it was applied contrary to the interests of justice or circumstances of the case or the law.

7. In this case, the sentence passed falls squarely within the confines of the law even when the court considers the period spent in remand. I say so having regard to the seriousness of the offences and effect the Applicant's action had and will continue to have on the complainant. They are offences deserving deterrent measures. The Applicant's contention that the sentence was punitive and excessive is therefore untenable.

8. The Sentencing Policy Guidelines grants the discretion to the trial court of determining whether sentences should run concurrently or consecutively. The Policy Guidelines also state that where the counts emanate from multiple transactions then the court is guided to order that the sentences be served consecutively whereas when arising from a single transaction then the sentence should be concurrent. The instant offences arise from the same transaction as they were contingent offences of the first count. That said, the fact that the sentences were ordered to run *consecutively* is not counter the proviso to Section 28(1)(c)(i) of the Penal Code which provides that sentences resultant from a failure to pay a fine shall be considered in addition to any other imprisonment. In my considered view, where a default of payment of a fine occurs, it cannot be deemed to be common to all the counts as the sentences are independent. Therefore, a default imposes a sentence in each of the counts and those sentences accord with Section 28(1)(c)(i) so that they are served independently; which is consecutive in nature.

9. The final issue is the Applicant's submission that his incarceration has caused his family continued distress. While sympathetic to his family's plight I find that this would not amount to a ground for revision of a properly and legally meted sentence pursuant to a proper conviction.

10. In sum, the application is hereby dismissed.

DATED and DELIVERED this 23rd day of May, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person present.
2. Mr. Momanyi for the Respondent.