REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL REVISION NO.106 OF 2018

(From original sentence in Criminal Case No. 173 of 2016 in Senior Resident Magistrate's Court at Winam passed by Hon. C.N.Njalale(RM) on 15.8.18).

SIMON OMOLLO AIRO.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. This revision was brought by way of the applicant's application dated 27.8.18 in which he seeks review of the custodial sentence for the offence of trespass.

2. The powers of the High court in revision cases are contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). Section 362 specifically provides as follows:-

> **"362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court".**

3. What the High Court can do under its revision jurisdiction is stated under section 364 of the Criminal Procedure Code Cap 75, which states as follows:-

> **"364.(1) in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may -**
>
> **(a) ……**
>
> **(b) in the case of any other order than an order of acquittal, alter or reverse the order.**

5. I have perused the record of the Lower court for the purpose of satisfying myself as to the legality, correctness or propriety of the same. The applicant was charged under the penalty act.

6. Section 11 of the Trespass Act under which the applicant was charged and convicted does not disclose an offence since it only prescribes a penalty for a conviction in case a charge of trespass is established and the charge sheet ought to have been rejected.

7. Consequently, the conviction of the applicant is quashed and the sentence set aside and I substitute it with an order that the charge sheet is rejected and dismissed under section 89(5) of the Criminal Procedure Code Cap 75 Laws of Kenya. The applicant has been in custody since he was convicted and sentenced on a defective charge 15.8.18. It is hereby ordered that he be released and set free forthwith, unless he is lawfully held..

DATED AND DELIVERED THIS *27th* **DAY OF** *September***,2018**

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Applicant - Present

For the Applicant - Mr. Mwesigwa

For the State - Ms. Barasa