

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION. NO. 804 OF 2018

EVALINE LUSICHI KHALUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant by an application filed in court on 3/9/2018 seeks revision of the sentence. She was sentenced on 11/9/2017 to serve a three year jail term. She was charged with two offences. In count I, she was charged with child stealing contrary to **Section 174(1)(a) of the Penal Code**. In Count II, she was charged with making a document without authority contrary to Section 357 of the Penal Code. The document in question in the latter charge was a birth notification certificate purporting it to be a certificate issued by Huruma Nursing Home.

2. From the body of the judgment, it is clear that the learned trial magistrate found that both charges had been proved beyond a reasonable doubt.

3. In an interesting twist, he only convicted the Applicant in respect of count I, for which she was sentenced. The duty of this court in an application of this nature is to call for the original record of trial of the subordinate court so that the court can satisfy itself as the correctness, propriety, regularity or legality of the order or sentence passed.

4. In the present case, under Section 354 of the Criminal Procedure Code, the court has powers to impose the correct sentence. In the present case, the recourse lies with remitting the file back to the trial magistrate so that he can pass the sentence in respect of count II.

5. In respect of Count I, **Section 174(1)(a) of the Penal Code** provides for a penalty of up to seven years imprisonment . In the view of this court, the Applicant's action, by depriving another woman of her right to own and bring up her child, she can only feel the weight of her irresponsible action if she is kept away from her children for some time. That way, she will feel the pain of not being close to her children. Her mitigation that she deserves a release from jail so that she can go to take care of her children cannot bail her out.

6. The totality of my observation is that the application fails. I dismiss it with no orders of costs. I further order that the Applicant be escorted to Makadara Law Courts before the trial magistrate, Hon. A. Kithinji, SPM so that he can pass the sentence in respect of Count II. He shall additionally order how the sentence in that count shall run with the sentence in Count I. In his absence, the Applicant shall be presented before the Chief Magistrate of the court. Production order shall issue for the Applicant to appear before Makadara Law Courts on 2/12/2018 for this purpose. The original trial court record shall forthwith be remitted back for that purpose.

DATED and DELIVERED this 22nd day of November, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Applicant present in person*

2. *M/s Atina for the Respondent.*