



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 380 OF 2018**

**HAJI HAMADI HAJI & 4 OTHERS.....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Revision of the decision of Hon. D.W. Nyambu, Chief Magistrate, delivered on 12<sup>th</sup> October, 2018 in Kwale Chief Magistrate's Court Criminal Case No. 874 of 2018)**

**RULING**

1. The applicants filed a joint application for revision on 18th October, 2018 against the decision of Hon. Nyambu, Chief Magistrate's decision made on 12th October, 2018. This was after they were arraigned in Kwale Chief Magistrate's Court on 11<sup>th</sup> October, 2018 and charged with the following offences:-

**Count I**

The applicants were charged with the offence of being unlawfully present in Kenya contrary to Section 34(1) as read with Section 53(1)(j)(2) of the Kenya Citizenship and Immigration Act No. 2 of 2011. The particulars of the charge were that on the 10<sup>th</sup> day of October, 2018 at Majoreni Bazo area at 0330hrs in Majoreni sub-location in Lungalunga sub-county within Kwale County, being Tanzanian citizens, jointly were found being unlawfully present in Kenya, without valid passports or travel documents, in contravention of the said act.

**Count II**

The applicants were charged with the offence of failure to report departure to an Immigration Officer contrary to regulation 17(1)(A) and 17(4) as read with regulation 57 of the Citizenship and Immigration Regulations, 2012. The particulars of the charge were that on the 10th day of October, 2018 at Majoreni Bazo area at 0330hrs in Majoreni sub-location in Lunga Lunga sub-county within Kwale County, being Tanzanian citizens, failed to report to Immigration Officer in contravention of the said Act.

**Count III**

The applicants were also charged with the offence of exiting the country through an ungazetted border contrary to regulation 5(2)(a) as read with regulation 57 of the Citizenship and Immigration regulations, 2012. The particulars of the charge were that on the 10th October, 2018 at Majoreni Bazo area at 0330hrs in Majoreni sub-location in Lungalunga sub-county within Kwale County, being Tanzanian citizens, exited the country through an ungazetted border point in contravention of the said Act.

**Count IV**

The applicants were charged with the charge of facilitating the entry of improperly documented persons to Kenyan territory contrary to Section 53(1) (e) as read with 53(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The particulars of the charge were that on the 10<sup>th</sup> day of October, 2018 at Majoreni Bazo area in Lunga Lunga sub-county within Kwale County, being the sailors of a boat by the name "cheko si pigo" facilitated the entry of improperly documented persons.

2. The charges in the 4 counts were read out to the applicants in Kiswahili language to which each one of them responded that the charges were true. A plea of guilty was entered. The facts were read out to the applicants who responded individually that the facts were correct. Each applicant was convicted on his own plea of guilty.

3. Although the applicants allege that the offences they were charged with and the facts were read out to them in English language, the court record shows that the interpretation was from English to Kiswahili. There was a Court Clerk by the name Mweru who was present in court. The court record shows that the applicants responded in Kiswahili.
4. Ms Ogwen, Learned Prosecution Counsel opposed the application for revision on the grounds that the applicants pleaded guilty to the charges and the plea was clear and unequivocal. She also stated that they admitted that the facts were correct. She left the issue of sentencing to the court.
5. In paragraph (c) and (d) of the application for revision, the applicants have challenged their conviction on the basis that the Prosecution failed to connect them to the commission of the offence in Count IV as the facts disclosed that 56 Ethiopians were found in the boat that was intercepted by Kenya Navy personnel in Kenyan waters at Majoreni area, Kwale County.
6. Under the provisions of Section 348 of the Criminal Procedure Code, the applicants cannot challenge their conviction since they were convicted on their own plea of guilty. They can however challenge the sentence that was imposed against them.
7. The applicants are Tanzanian Nationals who understood Kiswahili language. If they felt that the facts were incorrect, they would have indicated the same to the lower court. They however went ahead to admit that the facts were correct. It is apparent that the reasoning by the applicants is flawed as the particulars of Count IV indicate that they were the sailors of a boat named "cheko si pigo" and that they facilitated the entry of improperly documented persons into Kenyan territory. The Hon. Magistrate did not have to be a Rocket Scientist to decipher that such a large group of persons who were not properly documented were being trafficked. It was obvious to her. This court therefore finds no error in the reasoning of the Hon. Magistrate that the 56 persons aboard the said boat were being trafficked.
8. The Hon. Magistrate in Count I imposed a fine of Kshs. 20,000/= and in default 2 months imprisonment. The sentence provided for in Count 1 under the Kenya Citizenship and Immigration Act is a fine not exceeding Five Hundred Thousand Shillings or to imprisonment for a term not exceeding 3 years or to both.
9. In Count 2, the Hon. Magistrate imposed a fine of Kshs. 30,000/= and in default 3 months imprisonment. The sentence provided for in Count 2 is a fine not exceeding Two Hundred Thousand Shillings or to imprisonment for a term not exceeding one year or to both. In Count 3 she imposed a fine of Kshs. 30,000/-= and in default 3 months imprisonment. The sentence for Count II is similar to that of Count III.
10. In Count 4, the Hon. Magistrate imposed a fine of Kshs. 100,000/= and in default a sentence of 9 months imprisonment. The sentence provided for in Count IV is a fine not exceeding Five Hundred Thousand Shillings or to imprisonment for a term not exceeding three years or to both.
11. The Hon. Magistrate also ordered that the applicants be repatriated to Tanzania after the fines were paid or after they had completed serving the sentence imposed.
12. During the hearing of the revision application, the applicants informed this court that they were not in a position to pay the fines imposed. This court will therefore consider the sentence meted out. Cumulatively, each applicant was sentenced to serve 17 months imprisonment. They were sentenced on 12th October, 2018. They have therefore served 2 months and 10 days imprisonment. The Hon. Magistrate had the discretion to impose the sentences she did. This court notes that Count Nos. 1 and 4 are serious offences and that the entry of undocumented persons into Kenya unlawfully can have a serious negative impact on the security of Kenya.
13. In exercise of my discretion, I reduce the sentence imposed cumulatively to 10 months imprisonment for each applicant. The applicants will be repatriated to Tanzania which is their country of origin, after completion of the said sentence.

**DELIVERED, DATED and SIGNED at MOMBASA on this 20<sup>th</sup> day of December, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Applicants present in person

Ms Ogwen prosecution Counsel

Beja - Court Assistant