



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL REVISION CASE NO. 9 OF 2016**

**M H A.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. By a letter dated **30<sup>th</sup> September, 2016**, **C. K. Nzili & Co. Advocates** seek revision of the sentence meted out by the **Mwingi Senior Principal Magistrate's Court** in **Criminal Case No. 296 of 2016**.
2. The application is made on grounds that **MHA** (Applicant) was a minor but was erroneously described in the charge sheet as an adult aged **26 years** a fact that came to the notice of the Court after sentencing.
3. The brief facts of the case are that the Applicant was arrested alongside others and charged with the offence of **Being Unlawfully Present in Kenya** contrary to **Section 53(1)(j)** as read with **Section 53(2)** of the **Kenya Citizenship and Immigration Act No. 12 of 2011**. Particulars of the offence being that on the **25<sup>th</sup> day of September, 2016** at [particulars withheld], **Ukasi Location**, in **Mwingi East Sub-county** within **Kitui County** being **Somalia Nationals** were found being unlawfully present in Kenya in contravention of the **Kenya Citizenship and Immigration Act** having no valid pass nor permit authorizing them to be in Kenya.
4. The Applicant admitted the charge. **Ms. Nzili Advocate** addressed the Court in mitigation whereafter the Court sentenced all the Accused.
5. I have perused the record in an endeavor to satisfy myself of the legality of the sentence passed as required by **Section 362** of the **Criminal Procedure Code**.
6. The charge sheet drawn by the State represented by the Office of the Director of Public Prosecution has a list of Accused persons attached. The age of each Accused is stated. In the case of the Applicant age is indicated as **26<sup>th</sup> Years**. Three of the Accused were indicated as minors and their respective age given.
7. The Applicant and other Accused instructed Counsel who was on record at the point of submitting to enable the Court inform itself of the proper sentence to mete out. This is what he told the Court:

***"I have instruction to come on record on behalf of the accused persons and to mitigate on their behalf. My instructions are that the accused persons are first offenders. Secondly the accused persons are aliens from Somali seeking refuge in Kenya. We urge court to take judicial notice of the situation in Somali and the recent efforts by the international community to normalize the situation in Somali. The United nations assembly confirmed in its sitting this week that the***

*situation in Somalia is still fluid. Thirdly and more importantly the accused persons have been in custody since they were ordered to be further remanded pending investigations. Fourthly the accused persons were involved in a road traffic accident with the 1<sup>st</sup> and 4<sup>th</sup> accused persons sustaining serious injuries. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused persons are minors aged 15 years and 13 years respectively who are covered under section 190 and 191 of the Children's Act, who are children in conflict with the law. Fifthly accused persons are remorseful and were misled by a driver who caused the accident. Sixthly we pray for a non-custodial sentence. Accused persons were not found in possession of anything threatening the security of our country and have hitherto co-operated with the investigating officers and urge for leniency of the court. We urge court to invoke section 190 and 191 of the Children's Act and to discharge the minor children unconditionally. We also urge court to be escorted (sic) back to [particulars withheld] Refugee Camp to regularize their refugee status. Lastly it is unfortunate that accused persons were frenzied by members of the public and their personal belongings taken away from them."*

8. Following his submission the learned trial Magistrate discharged the minors and ordered them to be escorted to **[particulars withheld] Refugee Camp**. Each adult was fined **Kshs. 100,000/=** and in default of raising the fine they were to serve **twelve Months imprisonment**.

9. I have re-considered the entire Lower Court record. There is no indication of the Court having been notified of the allegation of the Applicant's age. There is nothing to suggest that the Applicant is a minor.

10. Other than the allegation in the letter that the Applicant is a minor who was erroneously described in the charge sheet as aged **26 years** instead of **16 years** there is absolutely nothing to support the allegation.

11. He who alleges must prove the fact. The Applicant herein should have adduced evidence of her age to move the Court to grant the order sought. The Lower Court having had the opportunity of seeing the Applicant and having acted after receiving the required submissions cannot be faulted to have misdirected him itself.

12. In the result, I find the application lacking merit and is hereby dismissed.

13. It is so ordered.

**Dated, Signed and Delivered at Kitui this 20<sup>th</sup> day of April, 2017.**

**L. N. MUTENDE**

**JUDGE**