



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION CASE NO. 5 OF 2016**

**ABDULLAHI ABDISALAM MOHAMED ALIAS MOHAMUD**

**ABDULLAHI SANEY.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. By a letter dated **26<sup>th</sup> May, 2016**, **Mulinga Mbaluka & Co. Advocates** asked me to invoke **Section 362** of the **Criminal Procedure Code** and call for the record of the Lower Court, examine it for purposes of satisfying myself as to the order passed and regularity of the proceedings in a matter where **Abdullahi Abdisalam** (Applicant) was charged, convicted and sentenced to pay a fine of **Kshs. 300,000/=** or serve **three (3) years imprisonment** in default.

2. The basis of the prayer sought is that:

(i) The plea was not unequivocal as

(a) The alleged interpreter was not qualified as her name appears as **Rebecca** therefore she is not a Somali.

(b) The Applicant is of Somali origin and the interpretation at the first instance was not done in Somali language.

(ii) The procedure on the conduct of proceedings was erroneous.

(iii) The sentence imposed was erroneous. He prayed for the sentence to be set aside and the Applicant to stand acquitted.

3. I have re-examined the court record to come up with my own conclusions.

4. The applicant herein was charged with two (2) counts;

**(1) 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 **5<sup>th</sup> day of December, 2015**, at **Tyaa Police Road Block** in **Mwingi Central Sub-county** within **Kitui County**, being a **Somali National** he attempted to board a motor vehicle registration No. **KCE 870J G-Coach** heading to **Nairobi**, being unlawfully present in Kenya in contravention

of the Immigration Act in that he had no valid pass or permit authorizing him to be in Kenya.

**(2) Unlawful Possession of Another Person's National Identity Card** contrary to **Section 14(1)(f)** of the **Registration of Persons Act Cap 107 Laws of Kenya**. Particulars of the offence being that on the 5<sup>th</sup> day of **December, 2015**, at **Mwingi Police Station in Mwingi Central Sub-county of Kitui County** was found in possession of a National Card No. **13117640** belonging to **Mohamud Abdullahi Saney** knowing it to be containing false entries.

5. When he was arraigned before court for plea taking, the coram recorded indicates that the court interpreter was **Rebecca**. The language is indicated as **Somali/English**. The record shows that the Prosecutor made an application to have file placed aside to enable the Prosecution amend the charges, an application that was allowed.

6. Later on, at **2.50 p.m.** the Applicant was arraigned before court, the court interpreter was one **Halima** a Somali Interpreter. The amended charges were read to the Accused in Somali Language and he pleaded as required. The Applicant pleaded guilty to the 1<sup>st</sup> count but denied the 2<sup>nd</sup> count.

7. A plea of guilty was entered/recorded. Facts of the case were presented and the Applicant was given an opportunity of responding. He admitted the facts as being true. The court proceeded to convict him. He was given an opportunity of submitting in mitigation, prior to being sentenced.

8. The procedure of plea taking was set out in the case of **Adan vs. Republic (1973) EA 445**. The case was followed in **Kariuki vs. Republic (1984) KLR 809** where it was held that:

***"The manner in which a plea of guilty should be recorded is;***

***(a) The trial Magistrate or Judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;***

***(b) He should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;***

***(c) The Prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;***

***(d) If the accused does not agree to the facts or raises any questions of his guilt his reply must be recorded and or change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan vs. Republic (1973) EA 445."***

9. In the instant case the charge and all essential ingredients as spelled out on the charge sheet were explained to the Applicant in Somali, a language that he understood and he replied thereto. Facts presented in support of the charge were that:

***"On the 5<sup>th</sup> day of December, 2015 at around 9.30 a.m. P C Kilasi from Mwingi CID Offices had been given a tip off that a motor vehicle Registration No. KCE 870J G-Coach, Bus Company was headed towards Nairobi from Garissa and had been suspected that the bus was carrying an alien. He then headed towards Garissa stage where he spotted the G-Coach bus and found passengers alighting for a short call. P C Kilasi pretended to be a passenger and proceeded to the seat where the suspected alien was said to be travelling in and sat. After fifteen minutes all the passengers who had disembarked entered the bus. Surprisingly the suspect did not board the bus and on reaching the road block at Tia bridge the bus was stopped by officer manning the roadblock and it was the two suspects of alien origin arrived riding on a boda boda motor cycle. The two male persons got into the bus and headed directly to where P C Kilasi was seated and claimed the seat as they had paid the fares. P C Kilasi upon realizing that one of the two suspects was an alien arrested the two suspects and escorted them to Mwingi police station where***

*upon interrogation one of them was established to be a Somali who was in possession of a national identity card belonging to a Kenyan. The one suspect was found to be a Kenyan and the accused in the dock was consequently charged with the two counts, being unlawfully present in Kenya as he did not have any documents allowing him to be in Kenya.”*

The Applicant admitted the fact that he was unlawfully present in Kenya and circumstances that were explained in details by the Prosecution. Having admitted the truthfulness of the charge he was convicted. The procedure adopted by the court is what is stipulated by the provisions of **Section 207** of the **Criminal Procedure Code**. The trial Magistrate did not misdirect himself. In the premises the plea cannot be said to have not been unequivocal.

10. With regard to the sentence imposed, **Section 53(1)(j)** of the **Kenya Citizenship and Immigration Act No. 12 of 2011 (Act)** provides:

*"(1) A person who—*

*(j) unlawfully enters or is unlawfully present in Kenya in contravention of this Act;"*

**Section 53(2)** of the Act provides thus:

*“Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both;"*

11. In the instant case I have been asked to interfere with the sentence meted out by the trial court. In the case of **Owoura vs. Reginam (1954) EA CA 270** the Appellate court set out the principles to guide the court in such a situation where it stated thus:

*“The principles upon which an Appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by the trial judge unless, as was said in James vs. Republic (1950) EA CA 147;*

*“It is evident that the Judge acted upon some wrong principles or overlooked some material factor. To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.”*

12. Before passing sentence, the learned trial Magistrate took into consideration the National security threats posed by acts of the Applicant. The sentence imposed being within the law I would have no reason to interfere with.

13. In the result, the application lacks merit and is hereby dismissed.

14. It is so ordered.

**Dated, Signed and Delivered at Kitui this 18<sup>th</sup> day of August, 2016.**

**L. N. MUTENDE**

**JUDGE**