



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

Criminal Revision No. 15 Of 2016, 16 Of 2016 And 17 Of 2016 (CONSOLIDATED)

(From original conviction and sentence in Criminal Case No. 607 of 2016 of the Chief Magistrate's Court at Garissa – M. Wachira –CM).

1. H A A.....1ST APPLICANT

2. A M M.....2ND APPLICANT

3. G A M.....3RD APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

This ruling relates to Criminal Revision No. 15 of 2016 where the convict is H A A, Criminal Revision No. 16 of 2016 where the convict is A M M and Revision No. 17 of 2016 where the convict is G A M. In all three revision matters the convicts are represented by Miss Ng'ang'a. The state was represented by Mr. Okemwa from the DPP.

The revision proceedings were commenced through an informal letter by each of the convicts addressed to the Deputy Registrar of the High Court at Garissa stating that they were charged and pleaded guilty. That the sentence was extreme and excessive considering that they were minors. That the trial court did not consider the age of the convicts when considering the sentence. That the convicts were not taken to hospital for age assessment. That they were thus asking this court to review the sentences imposed.

The files were consolidated and heard together. M/s Ng'ang'a counsel for the convicts addressed the court combining all three files. Counsel submitted that under section 186(f) of the Children's Act, this court as a higher court has jurisdiction to review the orders of a trial court. Counsel argued the three convicts had been charged together with 9 others on 25th July 2016 of being unlawfully present in Kenya Contrary to the provision of the Kenya Citizenship and Immigration Act, and were each fined Kshs 500,000/- and in default to serve 2 years imprisonment with repatriation orders.

Counsel submitted that the court orders infringed on the rights of the three convicts who were not only minors but asylum seekers because under Section 18 of the Refugee Act, no person could be refused entry into Kenya or returned to a country where his life would be in danger. Counsel emphasized that though the Government of Kenya had recently ordered the closure of the refugee camps, the UNHCR a United Nations Organisation, still received asylum seekers as the border between Kenya and Somalia had not been closed. In addition it would be wrong to return un accompanied children to Somalia as such action violated their rights under Section 23(2) of the Refugee Act, which required the Commissioner for

Refugees to receive and attend to such persons. According to counsel the order for repatriation issued by the trial court denied the convicts herein their right to be asylum seekers. Counsel submitted further that though the Department of Refugee Affairs was closed by the Government of Kenya, there was now in existence a Refugee Affairs Secretariat through which the Government worked closely with the UNHCR on refugee matters so that refugees were taken to designated areas and placed under the UNHCR and the Government of Kenya for necessary action in accordance with the law.

Counsel emphasized that the convicts were children and their ages had been assessed, but instead of being put under appropriate institutions, they were fined by the trial court and in default were to be imprisoned and ordered to be repatriated. Counsel wondered how children would pay such huge fines. Counsel specifically stated that the convicts were imprisoned in default of paying fines in contravention of Section 190 of the Children's Act.

Counsel therefore urged this court to look into the whole matter involving the three minors and asylum seekers, set aside the sentence and place them in appropriate institutions and allow them to seek asylum in accordance with the Laws of Kenya.

Mr. Okewma the Prosecuting Counsel submitted that he had come to court to oppose the revision request but since it was now established that the three were minors, the fallback position was Articles 53 (2) of the Constitution which require that the interest of minor children to be considered paramount in all cases and situations. Counsel added however that the convicts contravened the Kenya Citizenship and Immigration Act and were found at the Hola junction with no evidence that they were asylum seekers. There was also no evidence as to who picked them.

With regard to the order for repatriation, counsel urged this court to go by the decision in Garissa High Court Criminal Appeal No. 68 of 2015 Shukri Muhudin and 11 Others -vs- Republic, which gave guidance on repatriation orders and the issue of payment of fines by children.

I have considered the matter, and the submissions on both sides. Indeed the convicts and others were charged in the Chief Magistrates Court at Garissa with 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. They pleaded guilty were convicted and each fined to pay Kshs 500,000/- and in default to serve 2 years imprisonment. They were also ordered to be repatriated to Somalia. They have now come to this court through the revision process.

I agree with M/s Ng'ang'a that under Section 186 (f) of the Children's Act No. 8 of 2001, this court can review the decision of a magistrate's court where children are concerned in criminal matters.

The major issue herein is that the convicts were minors. I have seen age assessment forms for the three supplied to this court from the Provincial General Hospital Garissa. They are headed dental age assessment. G A M is said to be 17 years on the 23rd of August 2016. A M M was said to be aged 16 years on the same date. H A A was also said to be aged 17 years on the same 23rd of August 2016.

Other than the indication in the forms that the assessment was a dental age assessment, the forms do not indicate what processes were carried out in determining the age of the convicts. The forms are stamped "Dental Officer" and not medical officer. The name and qualification of the person who made the assessment is not indicated in the forms.

In my view, the three age assessment forms do not establish that the convicts were medically or scientifically examined for their age. The forms look like they were just standard forms which were filled by an unknown person from the Hospital. I am therefore not able to find that the convicts, whose all ages are indicated in the forms to be almost 18 years, are minors. On that account the request for revision in all the three matters will not succeed though, the prosecuting counsel was of the view that age of the convicts had actually been scientifically established.

I will add that in future, it is preferable to get the person who is making such a technical report to attend

court and present the report himself or herself to demonstrate to the court that indeed this is a genuine report which can be relied upon by the court to revise a decision of a trial court, because the age of the convicts was not an issue before the trial court.

As for the sentences imposed, the fine of Kshs 500,000/= and in default 2 years imprisonment, might appear to be on the higher side. However, each case has to depend on its own merits. With the security situation prevailing, and also the fact that the Kenya Government had to take an unusual step and declare closure of the Refugee Camps in Kenya, offences like being unlawfully present in Kenya deserves to be treated with seriousness.

The same sentence was imposed on others who were convicted in the same trial where they pleaded guilty. A change of the punishment could be justified if it was proved that the three convicts herein were minors, because of the requirement of the Constitution of Kenya 2010 and the Children's Act. However since it was not shown that the three were children below the age of 18 years, this court cannot exercise its discretionary power in revision and treat them differently from the others who were convicted and similarly sentenced in the same criminal proceedings where all the accused persons pleaded guilty to the same offence.

I appreciate the good work the UNHCR and Refugee Consortium of Kenya have done and continue to do in conjunction with the Kenya Government. As stated by the Prosecuting Counsel, this court attempted to clarify what should happen in such cases in the case of ***Shukri Muhundin & 11 Others –vs- Republic – Garissa High Court Criminal Appeal No. 68 of 2015.***

I find no merits in the request for revision of sentences for the three convicts. I dismiss the request.

Dated and delivered at Garissa this 16th day of September 2016.

GEORGE DULU

JUDGE