



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION NO. 92 OF 2016

REPUBLIC.....APPLICANT

VERSUS

MOHAMMED ABHIR OMAR.....1ST RESPONDENT

ABDULLAHI ARABOW MOHAMED.....2ND RESPONDENT

ABDI KADIR DAHIR (MAALIM)3RD RESPONDENT

HUDIN HAMED MOHAMMED.....4TH RESPONDENT

YUSUF MOHAMMED SALAT.....5TH RESPONDENT

MOHAMMED ABDULAHI KHALIF.....6TH RESPONDENT

ZACHARIA ABDI MUHALIM NOOR.....7TH RESPONDENT

RULING ON REVISION

The request for revision herein is in a letter dated 7th November 2016 by Mrs. Jackline Abuga, the Senior Principal Prosecution Counsel at Machakos. The Applicant is seeking revision of the orders of sentencing by Hon. G.O. Shikwe, the Resident Magistrate at Kithimani Law Courts in Kithimani Principal Magistrate's Court Criminal Case No 1336 of 2016 that were given on 13th October 2016. The Respondents herein were the seven accused persons in the said criminal case, and were charged with the offence of being unlawfully present in Kenya contrary to section 4(2) of the Immigration Act Cap 172 of the Laws of Kenya.

The charge against the 1st Accused person was withdrawn under Section 87(a) of the Criminal Procedure Code, as he produced documents proving that he was a Kenyan citizen, while the rest of the Accused Persons pleaded guilty and convicted of the charge on 6th October 2016. On the date of sentencing on 13th October 2016, the 4th and 5th Accused persons mitigated and asked for forgiveness, and the trial court ordered their repatriation to their home country, which was to be facilitated by the Officer Commanding Station at Matuu Police Station. The 2nd, 3rd, 6th and 7th Accused Persons were sentenced to serve 12 months imprisonment .

The Applicant stated that this matter was brought to its attention on 4th November , 2016 by the relatives of the accused persons, and after perusing the charge sheets and proceedings, it was apparent that the section of the law under which the charges were brought is non-existent as Immigration Act Cap 172 if

the Laws of Kenya was repealed by Section 65 of the Kenyan Citizenship and Immigration Act No.12 of 2011. The Applicant therefore prays that this Court exercises its power of revision and declares that sentences null and void; orders the release of the 2nd, 3rd, 6th and 7th Accused Persons to the Officer Commanding Station at the Machakos Police station for onward repatriation to their Country of origin.

I have considered the Applicant's application. The applicable law in this application is section 362 of the Criminal Procedure Code which gives revisionary powers to this Court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

Section 364 of the Criminal Procedure Code provides for the powers of the High Court on revision as follows in this regard:

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

As the orders sought herein do not prejudice the accused persons, there was no requirement for the said accused persons to be given a hearing, With respect to the correctness, legality and propriety of the proceedings and sentence passed by the trial Court, it is indeed the position that the current law on the offences of unlawful entry into, and unlawful presence in Kenya is found in the Kenyan Citizenship and Immigration Act, Cap 172 of the Laws of Kenya , which came into effect on 30th August 2011, and which under section 65 repealed the Kenya Citizenship Act, the Immigration Act, and the Aliens Restriction Act.

It is also notable in this regard that the requirements of the law as regards the framing of charges is stated in section 134 of the Criminal Procedure Code as follows:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of

the offence charged.”

In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

The charge and particulars in the trial Court therefore did not disclose an offence as the law under which the offence was brought was repealed and non-existent at the time of taking plea. This defect was not a minor defect under Section 382 of the Criminal Procedure Code, but a fatal defect which is not curable. In addition even if the accused persons pleaded guilty to the charge as framed, as they did, they cannot be said to have pleaded guilty to any offence known in law. The learned trial magistrate therefore erred in convicting the accused persons on their pleas of guilty, and the sentence imposed upon the Accused persons was also not provided by law.

As regards the orders now sought by the Applicant from this Court, I note that section 43 of the Kenyan Citizenship and Immigration Act provides for the power to remove persons unlawfully present in Kenya as follows:

“(1) The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code (Cap. 63), shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

(2) A person against whom an order has been made under this section shall—

(a) be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or

(b) if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of.

(3) Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to the Constitution and related laws.

(4) Any order made or directions given under this section may at any time be varied or revoked by the Cabinet Secretary by a further order, in writing.

(5) In the case of a person who arrives in Kenya illegally, the powers of the Cabinet Secretary under this section may be exercised either by the Cabinet

(6) An order made or deemed to have been made under this section shall, for so long as it provides that the person to whom it relates shall remain out of Kenya, continue to have effect as an order for the removal from Kenya of that person whenever he is found in Kenya, and may be enforced accordingly; but nothing in this subsection shall prevent the prosecution for an offence under this Act or any other written law of any person who returns to Kenya in contravention of such an order.

(7) Where a person is brought before a court for being unlawfully present in Kenya, and the

court is informed that an application, to the Cabinet Secretary, for an order under this section has been made or is about to be made, the court may order that such person be detained for a period not exceeding fourteen days or admit the person to bail, pending a decision by the Cabinet Secretary.”

Pursuant to the foregoing provisions of the law, I accordingly quash the conviction and sentence meted on the 2nd, 3rd, 6th and 7th Accused Persons /Respondents and hereby order that the said 2nd, 3rd, 6th and 7th Accused Persons Persons/Respondents herein shall forthwith be released to the custody of the Officer Commanding Station at the Machakos Police Station, who shall arrange for their escort to the relevant Immigration Officer responsible for the return of the 2nd, 3rd, 6th and 7th Accused Persons /Respondents to their country of origin.

This ruling and orders to be furnished to, Hon. G.O. Shikwe, the Resident Magistrate at Kithimani Law Courts Courts; the Applicant herein, the 2nd, 3rd, 6th and 7th Accused Persons /Respondents; the Officer Commanding Machakos Police Station; and the relevant Prison authorities without delay.

DATED AT MACHAKOS THIS 23RD DAY OF NOVEMBER 2016.

P. NYAMWEYA

JUDGE