

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 324 OF 2016

EMMANUEL INOBEMHE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application before me is a Notice of Motion dated 26th October, 2016 brought **under Article 50(q) of the Constitution and Sections 207, 362, 364 and 365 of the Criminal Procedure Code**. The prayers sought are for revision of the sentence imposed upon the Applicant. He was charged with two counts under the **Kenya Citizenship and Immigration Act of 2011**. In count I, he was charged with contravention of an order issued to a foreign national by the Cabinet Secretary contrary to **Section 56(3)** and in Count II, for being unlawfully present in Kenya contrary to **Section 53(1)(j)** as read with **Section 53(2)**. He was convicted on his own plea of guilty. He was sentenced to serve three years imprisonment in each of the counts and sentences were to run concurrently. In addition, he was to be repatriated to his home country Nigeria upon serving the sentence. The sentence was imposed on 21st October, 2016.

Before this court, he has pleaded for reduction of the sentence stating that the same was manifestly harsh and excessive as he had pleaded guilty and saved the court's time. In addition, he pleaded remorsefulness stating that he has a family in Kenya and was its sole breadwinner. He has no objection to the repatriation order.

I have considered the application and the Applicant's plea for reduction of the sentence. In as much as he is not opposed to his immediate repatriation to Nigeria, this court must give regard to the background that culminated to the offences. The facts of the case were that the Applicant was arrested in Kayole on 28th September, 2016 and brought to court on 29th September, 2016. It was established that as at the date of the plea, 21st October, 2016 he was a prohibited immigrant. The declaration to this effect was made on 3rd June, 2013 by the Hon. The Attorney General, Mr. Githu Muigai on behalf of the Cabinet Secretary in charge of Immigration. Unknown to the State, the Applicant sneaked back to the country and was arrested on 13th September, 2013 and was charged with the offence of trafficking in narcotics. On 11th March, 2015, the Cabinet Secretary in charge of Interior and Coordination of National Government declared the presence of the Applicant in the country of national interest. He was required to be removed from the country with immediate effect. He failed to comply as a result of which he was arrested and charged with the current offences. The letter declaring him a prohibited immigrant was produced in court as exhibit. Also produced in court was the declaration by the Minister that the Applicant was of national interest.

The Applicant confirmed that the facts read out in court were true. In the circumstances, it is clear that he was a person who was not ready to abide by the laws of this country. He opted to defy the directive of the Government and in addition committed an offence while he was a prohibited immigrant. Although he pleads for leniency because he has married a Kenyan, I am of the view that is not sufficient reason that would mitigate a reduction of the sentence. It does not also give him the authority to live in the country whereas he is well aware that he is a prohibited immigrant. He has committed the offences with utter impunity.

With the above observations, I find this case not merited for revision *per se*. However, a look at the law shows that the learned trial magistrate imposed the maximum sentences which is not prudent unless there are reasons to warrant the same. I would therefore agree that the sentence imposed was harsh and excessive. But for the Applicant's refusal to abide by the law, he must serve a custodial sentence. This will send a signal to other like minded would be offenders. The application will then succeed with orders that, I set aside the three years imprisonment sentence imposed. I substitute it with an order that the Applicant will serve 18 months imprisonment in respect of each of the counts. The sentences will run concurrently. I take into account that the Applicant was in police custody for 23 days before he was charged. This period will be deducted from the jail term that he shall serve. Upon completion of service of the jail term, he shall immediately be repatriated to his home country, Nigeria.

DATED and DELIVERED this 21st day of November, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Kiongera h/b for Mr. Swaka for the Applicant

2. M/s Akuja for the State