



**REPUBLIC OF KENYA**

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

**REVISION CASE NO. 1 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**IQRA ABDULLAHI MOHAMED.....ACCUSED**

**RULING ON REVISION**

1. By a letter dated the 7<sup>th</sup> day of **October, 2015**, **Mulinga Mbaluka Advocate** urged the court to invoke the provisions of **Section 362** of the **Criminal Procedure Code**.
2. In the matter, **Iqra Abdullahi Mohamed** (Applicant) and **Another** were 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**. The particulars of the offence were that on the 28<sup>th</sup> day of **August, 2015** at **Mwingi Township** in **Mwingi Sub-County** within **Kitui County** being **Somali Nationals** were found aboard a motor-vehicle registration number **KBX 835H Volvo FH Lorry** from **Garissa** to **Nairobi** being unlawfully present in Kenya in contravention of the **Immigration Act** in that they had no valid pass or permit authorizing them to be in Kenya.
3. Both of them pleaded guilty to the charge, they were convicted and sentenced to serve **one (1) year imprisonment**.
4. The Applicant now seeks review/revision of the orders on the grounds that:
  - i. The plea was not unequivocal as:
    - a. The alleged interpreter was not qualified and his name, ethnicity, place of work and qualification to translate from Kiswahili/English/Kisomali was not indicated.
    - b. The court interpreter was of a different Somali dialect.
  - ii. The procedure on how the proceedings were conducted was erroneous.
  - iii. Sentencing the Applicant to **one (1) year imprisonment** was erroneous.
5. I have examined the court record in an endeavor to satisfy myself with the need to invoke powers conferred on me by **Section 362** as read with **Section 364** of the **Criminal Procedure Code**.
6. It is argued that the plea taken is unequivocal. Principles for consideration when taking plea were enunciated in the case of **Adan vs. Republic (1973) EA 445** where the court held:

***“(i) The charge and all essential ingredients of the offence should be explained to the accused in his language or in a language that he understands.***

*(ii) The accused's own words should be recorded and if they are an admission a plea of guilty should be recorded.*

*(iii) The prosecution should 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.*

*(iv) If the accused doesn't agree with the facts or raises any question of his guilt his reply must be recorded and the change of plea entered.*

*(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."*

7. The Applicant was a person of **Somali Origin** as stated by her counsel in his letter. The court record indicates – interpretation was in **Somali Language**. The interpreter was known as **Mohamed**. It is further indicated that the charge was read in **Somali** a language that the Applicant understood and she responded thereto.
8. Following the admission of the charge, the facts of the case were presented by the Prosecution and the Applicant on being given an opportunity to respond stated thus:

*"Facts are correct"*

9. The court entered a plea of guilty, found the Applicant guilty on his own plea and accordingly convicted her. The procedure adopted is what is outlined in **Section 207 of the Criminal Procedure Code**. The trial court can therefore not be faulted as the plea was taken in accordance with the law. It was unequivocal.
10. It has been alleged that there was failure of communication between the court and the Applicant because the dialect that was spoken was not indicated. The record reflects the language used – namely, **Somali**. The facts of the case were presented. The accused admitted what was stated and she was given an opportunity of mitigating. She sought leniency and even told the court her place of origin.

In the case of **Said Hassan Nuno vs. Republic (2010)eKLR** the court stated thus:

*"At each stage of the proceedings a court clerk was in attendance and we take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused or a witness to the case."*

11. The court clerk having discharged his duties appropriately the allegation fails.
12. The sentence passed is stated to be excessive. In the case of **Ogalo Son of Owoura vs. Republic (1954) 21 EA CA 270** the Court of Appeal stated thus:

*"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if 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 by in **James V Rex (1950) 18 EA CA 147**, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, he would also add a third criterion, namely, the sentence is manifestly excessive in view of the circumstances of the case, **R – Vs Shershewcity (1912) CCA 28 T.L.R. 364.**"*

13. The sentence provided for the offence the Applicant and her co-accused were charged with

attracts a fine not exceeding **five hundred thousand shillings** or to imprisonment for a term not exceeding **three years** or to **both** (see **Section 53(2) of the Kenya Citizenship and Immigration Act No. 2 of 2011**).

14. It has been stated that it was erroneous on the part of the magistrate to imprison the Applicant for **one (1) year** without an option of fine.
15. The sentence imposed was of course within the law. However the accused persons having been first offenders, an option of fine should have been considered.
16. In the premises, having satisfied myself of propriety of the sentence imposed against both offenders, I exercise the discretion bestowed upon me by **Section 364(1)(a)** of the **Criminal Procedure Code** by setting aside the sentence meted out in respect of both convicts and substitute it with a fine of **Kshs. 60,000/=** or **Six (6) months imprisonment** in default.
17. It is so ordered.

**Dated and Signed at Kitui this 30<sup>th</sup> day of November, 2015.**

**L. N. MUTENDE**

**JUDGE**