



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION APPLICATION NO. 25 OF 2014

KENT JAVIERE GALVAN APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original order in Criminal case of the Chief Magistrate's court at Nairobi before T. Murigi, Senior Principal Magistrate on 10th October, 2013)

RULING

The Applicant was charged with six offences. In count 1 he was charged jointly with another with the offence of obtaining money by false pretences contrary to Section 313 of the Penal code. In count 2 he was charged jointly with another with the offence of forgery contrary to Section 349 of the Penal Code. In count 3 he was charged with the offence of making a document without authority contrary to section 357 (a) of the Penal Code. In count 4 he was charged with the offence of being unlawfully present in Kenya contrary to Section 13 (2) (c) of the Immigration Act Cap 172 Laws of Kenya.

In count 5 he was charged with the offence of failing to report entry into Kenya contrary to Section 3 (1) of the Immigration Act aforesaid. Finally in count 6 he was charged with the offence of failing to register as an alien contrary to Regulation 4 (1) as read with Regulation 3 (iii) of The Aliens Restriction Act Cap 173 Laws of Kenya.

He denied the offences but after the trial he was convicted and sentenced to serve two years imprisonment in respect of count I. In count II he was sentenced to pay a fine of Kshs. 100,000/= in default to serve six months imprisonment. In count III he was sentenced to pay a fine of Kshs. 100,000/= in default to serve six months imprisonment. In Count 4 he was sentenced to pay a fine of Kshs. 50,000/= in default to serve six months imprisonment.

In count 5 he was sentenced to pay a fine of Kshs. 20,000/= in default to serve 3 months imprisonment. In count 6 he was sentenced to pay a fine of Kshs. 20,000/= in default to serve 3 months imprisonment. Sentences were ordered to run concurrently. The learned trial magistrate also made an order that the applicant be repatriated to his country of his origin upon completion of sentence.

The applicant then filed an application to review the sentence imposed upon him. He first appeared in person but subsequently engaged Mr. Nyaberi Advocate to act for him. In the amended Notice of Motion he has pleaded with the court to review the sentence imposed on 10th July, 2013 by factoring the 23 months that he remained in custody during the trial. To date he has served the sentences relating to count 2 up to 6 and has spent about 11 months in prison from the date of conviction.

In that regard, he asked for immediate release or any other relief the court may deem fit to grant. It is also said that he suffers from gall stones. The application is opposed by the Republic on the basis that he was properly convicted and sentenced and that the sentences imposed upon him were lawful. Proper principles were applied and there were no irregularities in the proceedings.

I have gone through the submissions filed by the learned counsel for the applicant and the respondent. The learned trial magistrate ordered that the sentences run concurrently. That is a departure from the established practice that where fines are imposed and default sentences of imprisonment ordered, the default sentences are supposed to run consecutively. This is informed by the fact that if such an order is not made then an accused person may escape punishment after paying a fine for one count only.

Be that as it may, there is no doubt that the offences upon which the applicant was convicted are serious. There is a misconception in the application that the applicant has already served sentences with respect to count 2 up to 6. Had the learned trial magistrate conceived the right principle that is not the case because, the applicant having been convicted on 10th July, 2013 the cumulative sentences of imprisonment add up to 18 months. That period is yet to be spent.

That notwithstanding, the applicant has entertained a legitimate expectation that this court is addressing the sentence relating to count 1 alone. It will be prejudicial to the applicant for this court to alter the sentences relating to the other counts.

A person convicted of an offence of obtaining by false pretences contrary to Section 313 of the Penal Code is liable to imprisonment for three years. The applicant was sentenced to two years imprisonment. The charge sheet shows that he was arrested on 12th August, 2011 and arraigned in count on 15th August, 2011. He was denied bail and remained in custody throughout the trial. As at the time of conviction he had spent 23 months in custody.

Section 333 (2) of the Criminal Procedure Code, the proviso thereof, mandates the trial court prior to sentencing an accused person to take account of the period spent in custody. There is no indication that the learned trial magistrate took that into account when sentencing the applicant herein. Had that been taken into account I believe the sentence would have been far much less. The applicant was treated as a first offender. From the date of conviction to date is a period of about 11 months. Added to the period he spent in custody during the trial, I believe that is sufficient punishment.

I am inclined therefore to review the sentence by setting aside the sentence of two years imprisonment and in place thereof replace it with the period already served by the applicant. That will ensure he is released from prison forthwith unless otherwise lawfully held. There is no challenge of the order to repatriate him to his country and therefore on release from prison he shall be handed over to the Immigration Department for that order to be executed.

Orders accordingly.

SIGNED DATED and DELIVERED in court this **19th Day** of June **2014**.

A.MBOGHOLI MSAGHA

JUDGE